UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Rosemarie E. Aquilina,
Plaintiff,

v.

Gene Wriggelsworth, Charles Buckland,
Defendants.

Docket No. 1:16-cv-1168

Hon. Robert J. Jonker
District Court Judge

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DEFENDANTS, GENE WRIGGELSWORTH AND CHARLES BUCKLAND'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Oral Argument Requested

NOW COME Defendants, GENE WRIGGELSWORTH and CHARLES BUCKLAND, by and through their attorneys, ABBOTT NICHOLSON, P.C., and pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 56(c), hereby move this Court for entry of summary judgment in their favor and against Plaintiff, Rosemarie E. Aquilina.

Pursuant to W.D.Mich. Local Rule 7.1(d), concurrence in the motion has been requested of opposing counsel, but concurrence has not been granted; therefore, it is necessary to file this motion.

In support of this motion, Defendants submit and rely upon the attached brief.

WHEREFORE, Defendants, GENE WRIGGELSWORTH and CHARLES BUCKLAND, pray that this Honorable Court dismiss Plaintiff's Complaint and/or grant summary judgment in their favor and against Plaintiff, Rosemarie E. Aquilina, and award Defendants their costs and attorneys' fees so wrongfully incurred in having to defend this action.

Respectfully submitted,

Dated: August 30, 2017

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DEFENDANTS, GENE WRIGGELSWORTH AND CHARLES BUCKLAND'S BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

Plaintiff, Rosemarie E. Aquilina ("Aquilina" or "Plaintiff"), filed her two (2) Count Complaint against Gene Wriggelsworth ("Wriggelsworth") and Charles Buckland ("Buckland") on September 23, 2016. Aquilina alleges in Count I that the Defendants retaliated against her for releasing a court security video recording ("video") to the media.[1] This, she says, violated the U.S. Constitution's First Amendment and gives rise to a cause of action under 42 U.S.C. §1983.

Count II alleges a state law claim for False Light Invasion of Privacy. Here, Plaintiff says that by investigating the release of the court security video, submitting a warrant request for obstruction of justice by the Plaintiff, and publishing "false information about the Plaintiff to the media," the Defendants have portrayed the Plaintiff in a false light. Plaintiff also says in Count II that because the Defendants were motivated by their alleged embarrassment due to the events depicted in the court security video, they "improperly" caused the Plaintiff to recuse herself as a presiding judge in a case in which Wriggelsworth is a defendant.

After taking Plaintiff's deposition, it became obvious that Aquilina's claims are so lacking in merit, that the Defendants are entitled to have their instant motion granted. Plaintiff's deposition testimony revealed that not only is there no legal basis to support her claims, but neither is there any factual basis. She admitted that many of the facts she alleged in her Complaint simply are not true.

For example, at her deposition, Plaintiff admitted that she never publicly disclosed that she released the security video to the media. Indeed, rather than speaking out as a citizen on a matter of public concern, she testified that she used her judicial office (and its access to restricted court security video) to release the video to the media and also took steps to conceal her identity

[1] ¶44 of the Complaint alleges that engaging in discussions about court security is a matter of public concern, but does not allege Plaintiff engaged in those discussions or that Defendants retaliated against her because of her actions in this regard.

as the source of this disclosure. She testified that she never had any discussion with Wrigglesworth about providing more court security much less that he refused to provide it -- contrary to the allegations at ¶25 of her Complaint. What is worse, and contrary to her Verified Complaint, the Plaintiff testified that she is not aware of any other judges having a conversation with Wriggelsworth regarding court security.

Plaintiff further admitted that despite the allegations at ¶64 of her Complaint, at the time she signed and filed her Complaint, she had not recused herself from the case in which she averred Defendants "improperly" caused her recusal. Even more shocking, perhaps, is that the Plaintiff admitted that she recused herself on her motion because she was obligated to do so as a result of the filing of the instant lawsuit. In other words, she admitted doing that after signing and filing her Complaint. She admitted that in addition to her not knowing Wriggelsworth's motives in seeking her recusal, she had no idea of even when the investigation of the video release was completed (which occurred before the lawsuit in which she recused herself was filed).

When she testified about her "damages," Plaintiff described her "anxiety" about what others may think of her. She says the fact that Buckland asked questions about the release of the video, along with a media report that she had been investigated for possible criminal wrongdoing, caused her to become "distracted" from her judicial duties. Yet, as we shall see, time and time again, Plaintiff has denied suffering any problems as a result of the investigation and the media report about it.

We also shall see that notwithstanding Plaintiff's false accusations, neither Wriggelsworth nor Buckland were aware when the criminal investigation was initiated that the Plaintiff had released

the video to the media. Nor had either Defendant reported the investigation to the media. Even if they had, which they did not, Plaintiff has no cause of action associated with such a disclosure.

Plaintiff admitted in her answers to interrogatories and deposition testimony that she had not sought any treatment for her humiliation, embarrassment, anxiety, etc. as alleged damages, indeed the only damages, listed in her Complaint. Plaintiff testified that all of these reactions concerned what she thought other may be thinking about her.

Accordingly, for all of these reasons, Defendants' motion should be granted.

STATEMENT OF FACTS

A. THE PARTIES.

1. Defendant Gene Wriggelsworth.

Gene Wriggelsworth is the former Sheriff of Ingham County, Michigan and served in that capacity from January 1, 1989 through December 31, 2016. **Ex. 1, ¶2, Affidavit of Gene Wriggelsworth.** Sheriffs are county officials established by the Michigan Constitution, art 7, §6. All of the events at issue in this lawsuit occurred while Wriggelsworth served as Sheriff.

2. Defendant Charles Buckland.

Charles Buckland is an Ingham County Detective employed at the Ingham County Sheriff's Office. He has served in that capacity for over nine (9) years and has been a law enforcement officer for twenty-five (25) years. BTR 4.[2] All of the events at issue in this lawsuit occurred while Buckland was working as an Ingham County Detective.

[2] The deposition transcript of Charles Buckland will be referred to as "BTR" followed by the appropriate page number. Relevant portions of the transcript are highlighted and attached as **Ex. 2**.

3. Plaintiff Rosemarie Aquilina.

Rosemarie Aquilina is an Ingham County, Michigan Circuit Court Judge. She has served in that capacity for approximately ten (10) years. ATR 5.[3] As a circuit court judge, Aquilina employs a judicial assistant, Allison Hayes ("Hayes"). ATR 20. She also has a court reporter that she supervises, Jean Ann Hamlin ("Hamlin") p. 40-41. Aquilina has the power to fire both Hayes and Hamlin. ATR 21; 42. Aquilina and her staff, as well as the other circuit court judges and their staff, have password protected access to the security video recorded in each courtroom and stored on the IT system[4], Complaint ¶11-12; HTR 11-16. Other than court personnel and law enforcement officers assigned to security at the Courthouse, no one else has access to the IT system containing courtroom security video.

B. THE PLAINTIFF'S RELEASE OF THE COURT SECURITY VIDEO TO THE MEDIA.

On August 2, 2016, an inmate named Harding was in the Ingham Circuit Courtroom of Judge James Jamo. Harding had a "shank" concealed on his person and attempted to stab an assistant prosecutor with the weapon. The incident was recorded on the court security video system. Complaint ¶2-7. No one other than court staff, deputies assigned to courtroom security, and IT personnel had access to the security video which captured the attack. Complaint ¶12.

A news reporter from the Lansing State Journal, Matt Mencarini ("Mencarini"), called the Plaintiff on her cellphone following the attack. ATR 29. He asked the Plaintiff if she would allow him to view the security video of the incident. Complaint ¶15; ATR 28. Plaintiff agreed

[3] The deposition transcript of Rosemarie Aquilina will be referred to as "ATR" followed by the appropriate page number. Relevant portions of the transcript are highlighted and attached as **Ex. 3**.
[4] The deposition transcript of Melissa Hoover will be referred to as "HTR" followed by the appropriate page number. Relevant portions of the transcript are highlighted and attached as **Ex. 4**.

to show him the video and even told him to "go ahead" if she were on the bench when he showed up at her chambers. ATR 28-29.

Following her conversation with Mencarini, Plaintiff instructed Hayes to show him the video if she were on the bench when he showed up. ATR 26.

When Mencarini arrived in Aquilina's chambers, he was shown the video on a computer monitor per Aquilina's instructions. Aquilina was not on the bench and watched the video played for Mencarini "a couple of times." ATR 30. Mencarini then asked Aquilina for permission to film the video with his phone/camera off of the computer monitor. Plaintiff gave him permission. ATR 33.

Plaintiff believed she told Mencarini that her contact with him was "off the record," consistent with her usual practice. ATR 36-37. Aquilina also told Hayes not to talk about Mencarini viewing and/or recording the video. ATR 27. She testified that what she does in "her office" is confidential and that as far as she was concerned, she would not be identified as the source of Mencarini's copy of the video. ATR 27, 37. What is more, before Mencarini published the video on the internet, he telephoned Plaintiff to advise her of his intent to do so and she "did not object." ATR 35-36.

Harding was charged criminally for his attack. The Ingham Sheriff's Office conducted the criminal investigation. BTR 17. Eventually Harding entered a plea for the attack. WTR 6.

C. THE INVESTIGATION OF THE RELEASE OF THE COURT SECURITY VIDEO.

After Plaintiff provided the video to Mencarini, Mencarini telephoned then Sheriff Wriggelsworth and inquired as to whether the Sheriff's Office was going to release (publicly) the court security video. Wriggelsworth responded in the negative because the video was evidence

of a criminal assault. WTR 8.[5] At this time, neither Wriggelsworth, nor anyone else in the Sherriff's Office to his knowledge, had a copy of the video. WTR 8-9. Mencarini then told the Sheriff "that's okay, I already have it." Wriggelsworth asked Mencarini how he had obtained it but Mencarini would not say. WTR 9.

Subsequently, Wriggelsworth contacted Ingham Sheriff's Office Detective Sergeant Greg Harris ("Harris") and instructed Harris (verbally) to investigate how the security video was released. WTR 12. No one from the Circuit Court asked Wriggelsworth to investigate the release. Prior to Wriggelsworth's initiation of the investigation, he was unaware of who had released the security video. **Ex. 1, ¶3**. Thereafter, Wriggelsworth had no involvement, whatsoever, with the investigation. **Ex. 6, ¶3, Affidavit of Charles Buckland.**

Harris met with Buckland and assigned Buckland to conduct the investigation. BTR 6. The assignment was made verbally in a routine manner. BTR 7. Harris identified the security video for Buckland and the two discussed the possible crime that would be involved in the release of the video. BTR 8,10. At no time did Buckland have any contact with Wriggelsworth about what crime to investigate or the investigation of the Plaintiff as a suspect. BTR 10; WTR 13.

Harris and Buckland contacted Ingham County Chief Assistant Prosecuting Attorney Lisa McCormick (McCormick") to discuss what crime could have occurred in connection with the release of the security video. BTR 11. This discussion was routine in nature and obstruction of justice was introduced as being more consistent with the facts known to Harris and Buckland. Based on their discussion, McCormick had no concern about the direction of the investigation

[5] The deposition transcript of Gene Wriggelsworth will be referred to as "WTR" followed by the appropriate page number. Relevant portions of the transcript are highlighted and attached as **Ex. 5**.

because, in her view, a crime associated with the release of the security video could very well have been committed. **Ex. 7, ¶¶5,6, Affidavit of Lisa McCormick**.

Buckland obtained from the Ingham County Information Technology Department ("IT") a list of court employees who had accessed the security video on their computers. Buckland learned from the IT that on the day the video appeared on the internet, it had been accessed by Hayes' computer. **Ex. 6, ¶¶4, 5**. Buckland also received a hearsay statement that Judge Aquilina was seen in her court chambers with Mencarini, **Ex. 6, ¶6**.

Thereafter, Buckland telephoned Hayes. Hayes initially advised him that the Plaintiff instructed her to refer any questions to Aquilina's attorney. **Ex. 6, ¶7**. Buckland then attempted to contact the Plaintiff, but she referred Buckland to her attorney, Nick Bostic. **Ex. 6, ¶7**.

Next, Buckland interviewed Melissa Hoover, Judge Clinton Canady's court clerk. On August 3, 2016, she observed Mencarini, in Plaintiff's presence, watching Hayes' computer monitor with his phone/camera extended toward it. HTR 23, 25, 27. Hoover reported this to Judge Canady and Judge Jamo's judicial assistant, Janell Liles. HTR 28. Hoover reported these facts to Buckland. **Ex. 6, ¶8**.

Buckland next interviewed Judge Canady and Plaintiff's law clerk, Stefan Foucrier. Following these interviews, he interviewed Hayes. Hayes confirmed that Plaintiff had allowed Mencarini to view and record the security video. **Ex. 6, ¶9**.

Buckland then interviewed the Chief Judge of the Circuit Court, Janelle Lawless ("Lawless"). **Ex. 6, ¶10**. Lawless considered the release of the video to be entirely improper and in violation of the Court's policies. LTR 54[6]; **Ex. 9**.

[6] The deposition transcript of Janelle Lawless will be referred to as "LTR" followed by the appropriate page number. Relevant portions of the transcript are highlighted and attached as **Ex. 8**.

Buckland next interviewed Jean Ann Hamlin. Hamlin confirmed that Plaintiff showed Mencarini the security video and allowed him to record it. **Ex. 6, ¶11**.

Buckland then prepared a written report of his investigation. **Ex. 10**. This report, along with a warrant request, was submitted by Buckland to the Ingham County Prosecutor's Office on August 30, 2016. **Ex. 10**. The following day, August 31, 2016, Ingham County Prosecutor Gretchen Whitmer filed a Petition for Appointment of Special Prosecutor with the Michigan Attorney General's Office. **Ex. 11**.[7]

At no time did Buckland advise the media that he was investigating the Plaintiff. **Ex. 6, ¶12**. At no time did Wriggelsworth advise the media that there was an investigation of the Plaintiff. **Ex. 1, ¶4**. Neither Wriggelsworth nor Buckland are aware of how the investigation of the Plaintiff was made public. WTR 20; **Ex. 6, ¶13**.

D. THE MEKO MOORE LAWSUIT.

One week after Buckland sent his report and warrant request to the Ingham County Prosecutor's Office, on September 6, 2016, a former employee who had worked at the Sheriff's Office, Meko Moore, filed a lawsuit against the County and Sheriff. Complaint ¶6. The Plaintiff was assigned to this case. Complaint ¶2a. Ingham County Corporation Counsel, Ms. Bonnie Toskey, represented the defendants and contacted the Plaintiff's office by phone in September 12, 2016 seeking direction from the Court concerning a possible motion to disqualify due to an investigation of events that may have occurred in the Plaintiff's courtroom. A copy of the transcription of Ms. Toskey's voicemail message was made part of a subsequent circuit court hearing before the Plaintiff and is attached as **Ex. 13**.

[7] The matter was referred to Clinton County Prosecutor, Charles Sherman, who ultimately decided not to issue criminal charges. **Ex. 12**.

No motion for the Plaintiff's recusal or disqualification ever was filed in the Moore case. Instead, on September 29, 2016 which is six (6) days after Plaintiff signed and filed her Verified Complaint, Plaintiff signed an order of disqualification "on her own motion." **Ex. 14**. She wrote on the order that the grounds for her disqualification is "pending litigation of a party related to this case." At her deposition, Plaintiff identified her instant lawsuit as the "pending litigation" referenced in her order. ATR 63. She also testified that once she filed the instant lawsuit, she had an obligation to recuse herself from the Moore lawsuit. And notwithstanding the allegations contained in her Complaint about why the Sheriff sought her recusal (which he did not), she has no idea what the Sheriff's motives were in seeking her recusal. ATR 61.

E. THE PLAINTIFF'S CLAIMS AND HER DEPOSITION TESTIMONY.

Count I (¶45) of Plaintiff's Complaint alleges that Plaintiff's assignment of the Moore case was a "motivating factor" in the decision of Wriggelsworth to "continue" the investigation of the video release. Again, Plaintiff admitted she has no idea of what Wriggelsworth's "motives" were. We also have seen that the investigation had been concluded and a warrant request had been submitted for an entire week before Moore even filed her lawsuit! What is more, Plaintiff testified she doesn't know anything about the criminal investigation of the video release. ATR 88.

She claims that she was retaliated against for "speaking" on a matter public concern by releasing the security video. However, she did not speak about anything nor submit any written statements about her thoughts, opinions or anything else. We also have seen that despite her vague allegations regarding discussions about more court security and the Sheriff's refusal to provide additional security, she never even spoke to the Sheriff about it nor is she aware of another judge who did.

Count II (¶65) alleges that the Defendants told the media about the criminal investigation and, as a result, Plaintiff "has suffered humiliation, embarrassment, anxiety, stress and anger all of which distracted her from her judicial duties. However, that is not what the Plaintiff said at her deposition nor is it what she said on the bench on the very day she signed her Verified Complaint.

Plaintiff testified that before she signed her Complaint on September 23, 2016, she stated from the bench that the criminal investigation of her is part of being in public office and that "it's not going to impact my life." ATR 79, DX 6, p. 5, **Ex. 15**. She testified that as recently as April, 2017, during her independent medical examination, she told the examining psychologist that she has not had any problems performing her job since the events at issue in her Complaint. ATR 104.[8]

In ¶48 of her Complaint, Plaintiff says (among other things) that the mere fact that there was an investigation of the release of the security video to the media, somehow, violated her rights under the First Amendment. During the course of the investigation, Plaintiff's attorney sent an astounding letter to Buckland essentially telling him that the Plaintiff committed no crime, and that the investigation of the video release was the result of an "internal squabble" into which the Sheriff's Office had been "lured" in order to "intimidate and harass" the Plaintiff. **Ex. 16**. In other words, Plaintiff alleged that Buckland and presumably Wriggelsworth were the "cat's paws" of other judges most notably, Chief Judge Janelle Lawless.

Plaintiff further testified that the mere fact Buckland had investigated the security video release caused her anguish because of what she believes others thought about her as a result of the investigation:

[8] We also have attached as **Ex. 17**, Plaintiff's Response to Defendants' Answers to Interrogatories which states she has not sought any treatment for any injuries arising from the video release investigation.

71

Q. Judge, I'd like to go back to your complaint, if I

72

may.
A. Which page?
Q. It's paragraph 65, please.
A. Yes.
Q. In that paragraph, and I'll read it into the record: Plaintiff has been damaged, in that she has suffered humiliation, embarrassment, anxiety, stress, and anger, all of which have distracted her from her judicial duties.

And then it goes on from there, too, but I just want to stop there and ask you how Defendant Buckland caused this distraction.

A. Well, let's start by repeatedly calling and coming into the building, interviewing people, letting it known that I'm the target. That's humiliating, embarrassing. It's stressful. It demeans me. People think I'm a criminal.
Q. Right, but my question was only about the distraction for right now.
A. That's distracting. I second-guess what people are -- people are looking at me and talking to me, and I'm thinking, "Okay, what are they really thinking of me." There are sort of two voices in my head thinking, what am I saying, what are they thinking about me, who is this.

73

I have to pass by Judge Canady's office all the time. Now, Missy just left, but I passed by her office. She was always in the lunchroom, she's, you know, the whole staff, this is -- it's a question of second-guessing everybody that he talked to who's thinking -- I think, what are they thinking of me, since the detective interviewed them, from Judge Lawless's staff on up, because I know he interviewed everybody, and I know that they know that I was the target.

Q. If I'm hearing you correctly, the distraction to which that paragraph refers is your concern about what Detective Buckland said to witnesses he was interviewing during his investigation, correct?
A. That's part of it, but that soils my reputation, my credibility.
Q. Perhaps.

A. There are -- it's not just perhaps.
Q. Judge, all I'm trying to ask you is, right now I'm focusing on the distraction.
A. Okay. That also goes out into the community. There's a little -- it's like a ripple. Each of these people have friends, have family. The courthouse is a network of gossip. Each person that Detective Buckland talked to goes out and smokes and talks, and

74

they go out into their family and into the community. And I think I had an exceptional reputation. It's now soiled. He was part of that soiling. I can't get past that. And I'm trying, but it's, you know, it nags at me. (Emphasis added).

When the Plaintiff was asked to identify her "First Amendment" activities as referenced in ¶44 of her Complaint, she said those included releasing the video and speaking to the reporter in the course of her releasing the video. ATR 93. However, the Plaintiff then admitted her "speaking to the media" only involved her allowing the media into her chambers and recording the security video there. ATR 93-94. In essence, Plaintiff claims that her First Amendment right that was violated was not her right to speak out on a matter of public concern, but, instead, a right to surreptitiously release a courthouse security video that only courthouse staff and security officers could access. In other words, Plaintiff says her conduct, not her speech, was the cause for the "unlawful" investigation of the video release and public statements regarding the investigation.

Aside from the complete lack of legal support for her claims, Plaintiff's deposition testimony forcefully confirms that Defendants' motion should be granted.

ARGUMENT

A. STANDARDS FOR MOTION TO DISMISS AND FOR SUMMARY JUDGMENT.

1. Fed. R. Civ. P. 12(b)(6).

Defendant moves to dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6),

for failure to state a claim upon which relief can be granted. In deciding a Rule 12(b)(6) motion, a court must view the Complaint in the light most favorable to the plaintiff, treat all well-pleaded allegations as true, and dismiss the plaintiff's claims if it is without doubt that the plaintiff can prove no set of facts in support of the claims that would entitle him or her to relief. *Conley v Gibson*, 355 U.S. 41, 45-46; 78 S.Ct. 99; 2 L.Ed.2d 80 (1957); *Gregory v Shelby County, Tenn.*, 220 F.3d 433, 445-46 (6th Cir. 2000).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *Glassner v R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 346 (6th Cir. 2000). However, a court need not accept as true legal conclusions or unwarranted factual inferences. *Gregory, supra*, at 446, citing *Mixon v State of Ohio*, 193 F.3d 389, 400 (6th Cir. 1999).

2. Fed. R. Civ. P. 56(c).

Fed. R. Civ. P. 56(c) provides that summary judgment should be entered where "the pleadings, depositions answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The presence of factual disputes will preclude granting of summary judgment only if the disputes are genuine and concern material facts. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248; 106 S.Ct. 2505; 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Although a court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita Electric Industrial Co. v Zenith Radio Corp., 475 U.S. 574, 586; 106 S.Ct. 1348; 89 L.Ed.2d 538 (1986); *Celotex Corp. v Catrett*, 477 U.S. 317, 323-24; 106 S.Ct. 2548; 91 L.Ed.2d 265 (1986).

Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex, supra*, at 322-23. A court must look to the substantive law to identify which facts are material. *Anderson, supra*, at 248.

B. THE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON, OR DISMISSAL OF, PLAINTIFF'S FIRST AMENDMENT CLAIM UNDER 42 U.S.C. §1983.

1. Elements Of A First Amendment Retaliation Claim.

In order to establish that a §1983 defendant unlawfully retaliated against a plaintiff for exercising his First Amendment rights, he must show:

(1) that the plaintiff was engaged in a constitutionally protected activity;

(2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and

(3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Bloch v Ribar, 156 F.3d 673, 678 (6th Cir. 1998). Here, the Plaintiff cannot establish any of the above-elements. Indeed, her deposition testimony confirmed that she has no factual support for her claims, much less any legal support.

2. Plaintiff Did Not Engage In Activity Protected By The First Amendment.

We initially note that the free-speech protections in the First Amendment generally do

not apply to mere conduct. *Blau v Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). The U.S. Supreme Court has rejected the claim that any conduct can be considered "speech" whenever the person engaging in the conduct intends to express an idea through the conduct. *Texas v Johnson*, 491 U.S. 367, 376 (1988). Instead, the conduct must be "sufficiently imbued with elements of communication" to come within the protection of the First Amendment. *Spence v Washington*, 418 U.S. 405, 409 (1974).

We were unable to find any legal authority that recognizes the release of a courthouse security video as "conduct sufficiently imbued with elements of communication" to fall within the protection of the First Amendment. Yet, Plaintiff has claimed in this lawsuit that not only did she have a constitutional right to release the video but that this right was so clearly established that no reasonable person would have considered it otherwise.

Plaintiff's position could not be further from the law. Not only was Plaintiff's release of the security video not constitutionally protected, it was a potential crime in the trained eyes of a law enforcement officer and a prosecutor. And of course, speech or conduct is not protected by the First Amendment when it is a vehicle for the crime itself. *US v. Varani*, 433 F.2d 758, 762 (6th Cir. 1970).

One cannot tell what the Plaintiff was trying to communicate, if anything, in releasing the video to the media. The fact that she hardly spoke about her release of the video footage until she was discovered, coupled with her efforts to keep her release secret make it impossible to even guess what "message" her release was intended to convey, if any. Maybe she simply wanted to help a particular reporter get a "scoop."

Regardless, her release of the video is not conduct entitled to First Amendment protection and, consequently, her §1983 claim should be dismissed.

3. Plaintiff Did Not Engage In Protected Activity As A Private Citizen.

The United States Supreme Court held in *Garcetti v Ceballos*, 547 U.S. 410 (2006) that when a public official makes statements as part of their official duties, they are not speaking as citizens and, therefore, the First Amendment does not protect such statements. Relying on *Garcetti, supra*, the Sixth Circuit Court of Appeals held in *Weisbarth v Geauga Park District*, 499 F.3d 538 (6th Cir. 2007) that the statements made by a public employee during an interview by the employer's consultant were not made as a private citizen, even though providing such statements were not listed as a duty in her job description. Therefore, the statements were not entitled to First Amendment protection.

Here, the Plaintiff's conduct (releasing the security video) was not conduct of a private citizen. Indeed, it could not have been. Only the Plaintiff (and other judges) had chambers where the court security could be viewed and recorded by an individual who had the necessary consent to do so. The Plaintiff had access to the security video only because she was/is a circuit court judge. She released the video in her capacity as a judge. She could not have done that as a private citizen.

The Plaintiff's release of the security video did not occur in her capacity as a private citizen. Therefore, for this reason also, her release of the security video is not conduct provided by the First Amendment. *Garcetti, supra*; *Weisbarth, supra*.

4. Plaintiff Has Not Suffered Any Adverse Action.

The Sixth Circuit Court of Appeals addressed retaliation claims similar to Plaintiff's in *Mattox v City of Forest Park*, 183 F.3d 515 (6th Cir. 1999). There, several city firefighters raised concerns about the operation of the fire department with Brenda Mattox, a member of the city council. The mayor was directed to conduct an investigation. Thereafter both an administrative

investigation by the fire department and a criminal investigation by the city police department were conducted.

Following the completion of the investigation, the city released to the public a lengthy report, along with a police department provided video overview, of the report. Both contained negative information about Mattox, who subsequently lost her bid for re-election to the city council. Mattox then filed a First Amendment retaliation claim under §1983, alleging, as here, that the publication of the report and police video affected the character and reputation of Plaintiffs [a firefighter also was a plaintiff], holding them up to ridicule, contempt, shame and disgrace.

The Sixth Circuit considered initially whether the defendants were entitled to qualified immunity which requires a determination of whether the law allegedly violated was clearly established at the time of the events at issue, citing *Siegert v Gilley*, 500 U.S. 226 (1991); *Blair v Meade*, 76 F.3d 97, 100 (6th Cir. 1996). For reasons applicable here, the Court held that Mattox failed to allege a constitutional violation and granted the defendants summary judgment.

The Court began its analysis by noting that a constitutional tort - like any tort - requires injury and "allowing constitutional redress for every minor harassment may serve to trivialize the First Amendment" as noted in *Thaddeus-X v Blatter*, 175 F.3d 378 (6th Cir. 1999)(en banc). Mattox at 521. The Court particularly emphasized the public office Mattox held in ruling that her alleged injuries were insufficient to use to the level of a constitutional violation:

> As an elected public official, Mattox voluntarily placed herself open to criticism of her actions and views on political matters. A deliberate attempt to discredit Mattox, especially if initiated in retaliation for her actions in investigating the fire department, is perhaps an inappropriate and unfortunate occurrence, but on the facts of this case, it is not the type of "adverse action" against which the First Amendment protects. It is not equivalent to being fired by a government employer for expressing protected views. We do not think it would deter a public official of ordinary firmness from exercising his or her right to speak under the First Amendment. Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views. Mattox has not pleaded

sufficient injury to make out a claim for First Amendment retaliation.

Mattox at 522.

Perkins v Township of Clayton, 411 Fed.Appx. 810 (6th Cir. 2011) attached hereto as **Ex. 18**, also provides guidance. There, the plaintiff, an elected township treasurer, complained to the township board and the township supervisor that the township's clerk and her son were receiving discounted cellphone service and township contracts to provide cleaning services, respectively. The plaintiff also disclosed those supposed improprieties to a newspaper reporter and showed him township invoices on her computer.

The relationship between the township supervisor and the plaintiff deteriorated. The supervisor believed that in reviewing plaintiff's complaints, the plaintiff had failed to perform certain legal duties she was legally required to perform. The supervisor then filed a mandamus action against the plaintiff which resulted in a ruling adverse to the plaintiff. The township also conducted a censure hearing of the plaintiff and passed a resolution to seek contempt proceedings against her.

Thereafter, plaintiff filed her §1983 suit against the township and the township supervisor, alleging a claim for First Amendment retaliation for having spoken to the press. The district court held that as the township and its supervisor had not taken adverse action against the plaintiff that rose to the level of a constitutional violation. It granted the defendants summary judgment as a result.

The plaintiff then appealed to the Sixth Circuit. Relying on *Mattox, supra,* the Court rejected the plaintiff's claims and upheld summary judgment:

> Although Perkins alleges that she suffered more serious harms than the plaintiff in *Mattox*, that is not enough to establish that the Township's actions rise to the level of an adverse action. Some of Perkins' alleged harms as a result of these actions are trivial at best, but it does appear that the Township's actions seriously injured

> Perkins. However, as part of this contextual inquiry we have noted that "public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views."*816 *Mattox*, 183 F.3d at 522; *see Thaddeus-X*, 175 F.3d at 398. As a public official Perkins must tolerate more significant actions taken in response to her exercise of First Amendment rights than an average citizen would before the actions are considered adverse. The Township's actions here, even though they harmed Perkins, were not adverse.

No less is required here. We have seen that the Defendants did not publish any information, much less negative information, about the Plaintiff to the media. However, even if they had said to the media that a criminal investigation was conducted against the Plaintiff, an elected public official, for her release of the security video to the media, that still falls short of a constitutional violation. *Mattox*, *supra*; *Perkins*, *supra*. We also have seen that Plaintiff, herself, acknowledged that the investigation was just part of being in public office and caused her no problems.

For these reasons, also, Defendants are entitled to dismissal/summary judgment on Plaintiff's §1983 claim.

C. THE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON, OR DISMISSAL OF, PLAINTIFF'S STATE LAW INVASION OF PRIVACY CLAIM.

In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position. *Duran v Detroit News, Inc.*, 200 Mich App 622, 632; 504 NW2d 715 (1993); *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986). The individual accused of having invaded the plaintiff's privacy "must have had knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Id.*

Plaintiff's false light claim is based upon a non-fact, namely, that Defendants reported to the media that Plaintiff was the object of a criminal investigation concerning the release of the video. It also is based on her claim (at ¶59) that the Defendants published "false information" (that Plaintiff was suspected of committing a criminal offense) to three governmental entities.

Under Michigan's Governmental Tort Liability Act, MCL 691.1401 *et seq.*, these claims are absolutely barred. Even if this immunity does not apply, we have seen there was nothing false published about the Plaintiff being investigated for criminally releasing the security video. This is true even if the Defendants did release such information to the public in general,[9] which they did not.

In Michigan, a governmental agency is immune from tort liability if it is engaged in the exercise or discharge of a governmental function. MCLA § 691.1407(1). An officer or an employee of a governmental agency that is engaged in the exercise or discharge of a governmental function is also immune from tort liability if: (a) the officer or employee is acting or reasonably believes he or she is acting within the scope of his or her authority; (b) the governmental agency is engaged in the exercise or discharge of a governmental function; (c) The officer's or employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. MCLA § 691.1407(2).

Under MCL 691.1407, Buckland and Wriggelsworth are entitled to governmental immunity on Plaintiff's state law tort claims because there is no question of fact that Buckland was performing his duties as a law enforcement officer, investigating a possible crime and making a warrant request were within his scope of authority as a law enforcement for officer or that he reasonably believed that his investigation and warrant request were within the scope of

[9] Releasing such information to the "three governmental entities," by definition, does not meet a requirement for a false light invasion of privacy claim.

his authority and that he was carrying out a governmental function for the County and the Sheriff's Office. There also in no question of fact that Wriggelsworth also is entitled to immunity under the GTLA. Ordering an investigation of potential criminal activity is a governmental function. It is what Sheriffs do (among other things). Therefore, Buckland and the County are immune from tort liability under MCL 691.1407 and Plaintiff's state law claims must be dismissed as a matter of law.

D. GIVEN THE BLATANTLY FALSE STATEMENTS IN PLAINTIFF'S VERIFIED COMPLAINT, THE COURT SHOULD CONSIDER IMPOSING RULE 11 SANCTIONS.

As discussed above, the Plaintiff's deposition testimony makes it very clear that Plaintiff signed her Verified Complaint in this matter knowing that certain allegations contained in the Verified Complaint were false. In particular, the Plaintiff testified that she had not yet recused herself in the Meko Moore litigation when she alleged that she had been improperly compelled to do so by the Defendants in her Verified Complaint. Furthermore, she testified that she, in fact, recused herself on her own motion due to her filing of the instant litigation against former Sheriff Wriggelsworth. Plaintiff also testified that, contrary to the allegations in her Verified Complaint, she never discussed with then Sheriff Wriggelsworth any requests for additional court security, much less that he refused any such requests.

Fed. R. Civ. P. 11(b)(3) mandates that by presenting a pleading to the court, the attorney is certifying that to the best of his knowledge, information, and belief, the factual contentions have evidentiary support. We now know that verified allegations in the Plaintiff's Complaint were false when made, in contravention of Fed. R. Civ. P. 11(b)(3). As the Court is well aware, the Plaintiff is a Circuit Court Judge. As a consequence of her judicial office, Plaintiff certainly should be aware of, and vigilant to uphold, the requirements of Rule 11. Fed. R. Civ. P. 11(c)(3)

permits the Court, on its own initiative to order an attorney or party to show cause why Rule 11(b) has not been violated. Defendants submit that the Court should invoke this provision of Rule 11 for Plaintiff's filing of frivolous claims based on demonstrably false factual allegations.[10]

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendants, GENE WRIGGELSWORTH and CHARLES BUCKLAND, pray that this Honorable Court grant their Motion for Summary Judgment and/or Dismissal against Plaintiff and award them their attorneys' fees and costs wrongfully incurred in having to defend this action pursuant to Fed. R. Civ. P. 11.

Respectfully submitted,

Dated: August 30, 2017

ABBOTT NICHOLSON, P.C.

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4811-3756-1678, v. 1

[10] Defendants have had grave concerns regarding the frivolity of the allegations in Plaintiff's Complaint since it was filed and served. Defendants sent the attached letter to Plaintiff's counsel on January 5, 2017 offering to stipulate to the dismissal of the lawsuit before the parties incurred the burden and expense of litigation. **Ex. 19.** This offer was ignored.

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2017, I electronically filed the foregoing *Defendants, Gene Wriggelsworth and Charles Buckland's Motion to Dismiss and/or for Summary Judgment and Defendants, Gene Wriggelsworth and Charles Buckland's Brief in Support of Motion to Dismiss and/or for Summary Judgment* with the Clerk of the Court using the electronic filing system which will send notification of such filing to all counsel of record.

Respectfully submitted,

Dated: August 30, 2017

ABBOTT NICHOLSON, P.C.

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