

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

FILED IN OFFICE
2015 APR 29 PM 1:46

M. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

LINDA PIERCE, Clerk of Superior,)
State, and Juvenile Courts of)
Muscogee County, and the)
Columbus Board of Equalization,)

Plaintiff,)

v.)

Civil Action Number:
SU14CV3472

COLUMBUS, GEORGIA, TERESA P.)
TOMLINSON, Individually and as Mayor,)
JERRY "POPS" BARNES, Individually)
and as District 1 Councilor,)
GLENN DAVIS, Individually and as)
District 2 Councilor, BRUCE HUFF,)
Individually and as District 3 Councilor,)
EVELYN TURNER PUGH, Individually)
and as District 4 Councilor, MIKE BAKER,)
Individually and as District 5 Councilor,)
GARY ALLEN, Individually and as)
District 6 Councilor, EVELYN "MIMI")
WOODSON, Individually and as District 7)
Councilor, JUDY THOMAS, Individually)
and as District 9 Councilor, BERRY "SKIP")
HENDERSON, Individually and as District)
10 Councilor, ISAIAH HUGLEY,)
Individually and as City Manager,)
PAMELA HODGE, Individually and as)
Director, REATHER HOLLOWELL, as)
Human Resource Director, CLIFTON C.)
FAY, Individually and as City Attorney,)

Defendants.)

NOTICE OF APPEAL

Defendants filed a Notice of Appeal on April 28, 2015 as to the two orders entered by the Court on April 22, 2015. Through no fault of Defendants, it appears that those two orders were not filed with the Clerk of Court until April 29, 2015. In an abundance of caution, Defendants hereby file this Notice of Appeal to the Supreme Court of Georgia from the Order entered in this action on April 22, 2015 on Plaintiff's Motion for Authority to Retain Independent Counsel and for Payment of Attorney's Fees and Litigation Expenses and from the Order entered on April 22, 2015, granting in part and denying in part Defendants' Motions to Dismiss, both of which were filed by the Clerk of Court on April 29, 2015. File-stamped copies of these two orders are attached hereto, respectively, as Exhibits "1" and "2".

Pursuant to Art. VI, § 6, ¶ III of the Constitution of the State of Georgia, jurisdiction is proper in the Supreme Court of Georgia rather than the Georgia Court of Appeals because the substantive issues on appeal involve the legality or propriety of equitable relief and/or extraordinary mandamus remedies sought in the Superior Court and ordered by the Superior Court. The Supreme Court of Georgia has jurisdiction over any other issues on appeal pursuant to O.C.G.A. § 5-6-34(d), and because the Superior Court rejected defenses of sovereign immunity, official immunity, and/or legislative immunity asserted by the Defendants.

Please omit nothing from the record on appeal.

Respectfully submitted, this 29th day of April, 2015.

PAGE, SCRANTOM, SPROUSE,
TUCKER & FORD, P.C.

By: 

James C. Clark, Jr.

Ga. Bar No.: 127145

Alan G. Snipes

Ga. Bar No.: 665781

Thomas F. Gristina

Ga. Bar No.: 452454

1111 Bay Avenue, Third Floor
Post Office Box 1199
Columbus, Georgia 31901
706-324-0251

CERTIFICATE OF SERVICE

I do hereby certify that I am counsel for Defendants and that a true and exact copy of the foregoing document has been served upon counsel of record in the within matter by email, as follows:

William S. Stone
Boone & Stone
P.O. Drawer 70
Blakely, Georgia 39823

David Wm. Boone
Simone R. Siex
Ryals D. Stone
James W. Stone
3050 Peachtree Road, NW
Two Buckhead Plaza, Suite 360
Atlanta, Georgia 30305

This 29th day of April, 2015.

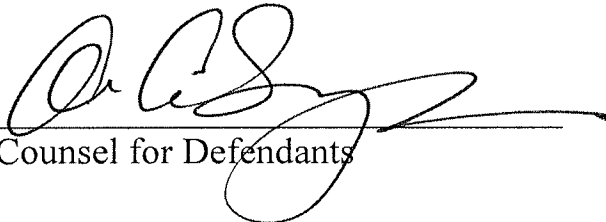

Counsel for Defendants

EXHIBIT "1"

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

FILED IN OFFICE

2015 APR 29 PM 12:35

LINDA PIERCE, Clerk of Superior, State, *
and Juvenile Courts of Muscogee County, *
Georgia and the Columbus Board of *
Equalization, *

H. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

Plaintiff, *

v. *

CIVIL ACTION NO. SU14 CV 3472

COLUMBUS, GEORGIA, TERESA P. *
TOMLINSON, individually and as Mayor, *
JERRY "POPS" BARNES, individually and *
as District 1 Councilor, GLENN DAVIS, *
individually and as District 2 Councilor, *
BRUCE HUFF individually and as District 3 *
Councilor, EVELYN TURNER PUGH, *
individually and as District 4 Councilor, *
MIKE BAKER, individually and as District *
5 Councilor, GARY ALLEN, individually *
and as District 6 Councilor, EVELYN *
"MIMI" WOODSON, individually and as *
District 7 Councilor, JUDY THOMAS, *
individually and as District 9 Councilor, *
BERRY "SKIP" HENDERSON, *
individually and as District 10 Councilor, *
ISAAH HUGLEY, individually and as City *
Manager, PAMELA HODGE, individually *
and as Director, and REATHER *
HOLLOWELL, Individually and as Human *
Resource Director, CLIFTON C. FAY, *
Individually and as City Attorney, *

Defendants. *

**ORDER ON PLAINTIFF'S MOTION FOR AUTHORITY TO RETAIN INDEPENDENT
COUNSEL AND FOR PAYMENT OF ATTORNEY'S FEES AND LITIGATION
EXPENSES**

Before the court is the Plaintiff's motion pursuant to O.C.G.A. § 45-9-21(e) for authority to retain the BOONE & STONE law firm as her independent counsel in this matter, and to require the Defendant CCG to pay all associated attorney's fees and litigation expenses. Upon

consideration of the motion, all submissions and arguments of counsel, the pleadings, admissions, and all other materials and evidence on file, it is considered and ordered as follows:

1. Plaintiff Linda Pierce (the Clerk) is the duly elected, qualified, and acting Clerk of the Superior Court of Muscogee County, Georgia, the State Court of Muscogee County, Georgia, and the Juvenile Court of Muscogee County, Georgia. She serves also as Clerk of the Columbus Board of Equalization.

2. This action involves financial disputes between the Clerk and the Defendants concerning the Clerk's budgets for FY 2014 and 2015 adopted by the City Council. It also involves questions concerning the independence of the Clerk's office from control or management by the Defendants.

3. O.C.G.A. § 45-9-21(e) provides:

(e)(1) As used in this subsection, the term "county officer" means the sheriff, the judge of the probate court, the clerk of the superior court, and the tax commissioner or tax collector and tax receiver of a county.

(2) In any civil case in which the county attorney has a conflict of interest which would ethically prevent the county attorney from representing both the county, the governing authority of the county, or another county officer or employee and the county officer, upon a determination by the chief judge of the superior court of the circuit in which the county is located that an ethical conflict exists, the county officer shall be authorized to employ individual legal counsel to represent such county officer in such matter. The governing authority of the county shall pay the reasonable fees of such individual counsel and all applicable court costs, deposition costs, witness fees and compensation, and all other like reasonable costs, expenses, and fees; provided, however, that such attorneys' fees shall be no more than the rate paid to the county attorney for similar representation or in accordance with a schedule of rates for outside counsel adopted by the governing authority, if any. Such fees and costs shall be authorized by the chief judge of the superior court of the circuit in which the county is located. This subsection shall not apply unless the governing authority of the county has first denied a written request by a county officer for counsel.

4. The Clerk is an elected, constitutional officer, she is a "county officer" as that term is described in O.C.G.A. § 45-9-21(e)(1).

5. The City Attorney is named as a Defendant in this action.

6. Under the City Charter, § 4-312(1) the City Attorney, or his designated and approved outside counsel, normally represents the Clerk in legal matters, including litigation.

7. The Defendants admit and the court finds that a conflict of interest exists. As such, the Clerk cannot legally or ethically be represented in this action by the City Attorney, or its retained outside counsel.

8. The Defendants acknowledge further that the Clerk has a legal right to employ independent counsel to represent her in this case and have her attorney's fees and litigation expenses paid by the City pursuant to O.C.G.A. § 45-9-21(e), at the same rate the Defendants attorneys are being paid.

9. While the Defendants acknowledge that the Clerk's legal fees and expenses in this action are to be paid by CCG, the parties disagree as to the mechanics of said payment.

10. The Defendants contend the City is entitled to charge the Clerk's attorney's fees and litigation expenses in this case against her budget. The clerk asserts that the City should pay said expenses from other funds. In this instance, the court agrees with the clerk.

11. The detailed billings of the Clerk's independent counsel are subject to attorney-client privilege, and for that reason it would be inappropriate for CCG to review them. O.C.G.A. § 45-9-21(e) provides adequate safeguards to ensure the Clerk's fees and expenses are reasonable and necessary. First, the rate charged by the Clerk's attorneys for their attorney's fees must be the same as the rates the City's attorneys charge CCG for their attorney's fees which are approved by the City Council. Second, O.C.G.A. § 45-9-21(e) requires the court to approve the attorney's fees and litigation expenses claimed by the Clerk's attorneys, and order their payment.

12. The Defendants do not assert that the Council has adopted a budget amendment appropriating to the Clerk's budget any funds for payment of her attorney's fees or litigation expenses, or charging any attorney's fees or litigation expenses to the Clerk's budget. Rather, the Defendants assert that if the City must pay the Clerk's attorney's fees and litigation expenses, they are entitled to charge those payments against the Clerk's budget, with no need to increase the Clerk's budget by the amount of such payments.

13. The Clerk is an officer of the Court and the duties she performs are a compelling need essential to the administration of justice.

14. At least in this instance, in this budget year, charging the Clerk's attorney's fees and litigation expenses to her budget would undermine the intent and purpose of O.C.G.A. § 45-9-21(e).

15. The Clerk suggests that the General Assembly did not intend for this remedial statute to result in creating the problem it was enacted to eliminate. This court, however, learned long ago to resist the temptation to discern the intent of the General Assembly by simple application of logic.

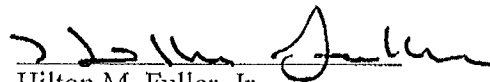
16. CCG is not authorized to charge the amount of the Clerk's attorney's fees and litigation expenses for representation in this case against the Clerk's FY15 budget; instead it shall pay such fees and expenses as approved by the court from CCG's general funds as a cost of government operations.

17. The Clerk's attorneys are ordered to submit their bills for fees and expenses monthly to the Court for *in camera* review, along with an affidavit establishing that the fees and expenses charged are reasonable and necessary.

18. Within 10 days of entry of this order the Defendants and their counsel shall submit to the Court proof of the rates for attorney's fee charged by the Defendants' attorneys to represent them in this matter, and serve such proof on the Clerk's counsel. Along with that submission, the Defendants shall submit to the Court for *in camera* inspection all bills previously sent to the City for the Defendants' attorney's services in this case along with evidence of payment of such bills by the City. Also within 10 days of this order, the Clerk and her counsel shall submit to the court for *in camera* inspection copies of all currently rendered and due bills and expenses (hard copies only).

19. The court will issue appropriate orders approving the amounts CCG is ordered to pay to the Clerk's counsel, BOONE & STONE.

SO ORDERED, this 22nd day of April, 2015.



Hilton M. Fuller, Jr.
Senior Superior Court Judge,
presiding by designation.
And acting Chief Judge for purposes of
O.C.G.A §45-9-21(e)

EXHIBIT "2"

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY IN OFFICE
STATE OF GEORGIA

2015 APR 29 PM 12:34

LINDA PIERCE, Clerk of Superior,)
State, and Juvenile Courts of)
Muscogee County, and the)
Columbus Board of Equalization,)

L. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

Plaintiff,)

v.)

Civil Action Number:
SU-14-CV-3472

COLUMBUS, GEORGIA, TERESA P.)
TOMLINSON, Individually and as Mayor,)
JERRY "POPS" BARNES, Individually)
and as District 1 Councilor,)
GLENN DAVIS, Individually and as)
District 2 Councilor, BRUCE HUFF,)
Individually and as District 3 Councilor,)
EVELYN TURNER PUGH, Individually)
and as District 4 Councilor, MIKE BAKER,)
Individually and as District 5 Councilor,)
GARY ALLEN, Individually and as)
District 6 Councilor, EVELYN "MIMI")
WOODSON, Individually and as District 7)
Councilor, JUDY THOMAS, Individually)
and as District 9 Councilor, BERRY "SKIP")
HENDERSON, Individually and as District)
10 Councilor, ISAIAH HUGLEY,)
Individually and as City Manager,)
PAMELA HODGE, Individually and as)
Director, REATHER HOLLOWELL, as)
Human Resource Director, CLIFTON C.)
FAY, Individually and as City Attorney,)

Order on Defendants'
Motion to Dismiss

Defendants.)

Order on Defendant's Motion to Dismiss

Linda Pierce, Clerk of the Superior, State, and Juvenile Courts of Muscogee County, Georgia, and the Clerk of the Columbus Board of Equalization (the "Clerk") filed the instant action on November 13, 2014. Defendants have filed motions to dismiss. On December 8, 2014, defendants filed a separate motion to dismiss all claims against them in their individual capacities.

For purposes of the present order, the court considers the allegations as pled in the Clerk's original complaint, as amended and supplanted by the Clerk's first amended complaint, which is the operative complaint at this time.

On January 15, 2015, the court heard defendants' motions including extensive argument from the parties. On January 26, 2015 the Clerk dismissed certain claims asserted in the complaint as amended. After a review of all materials on file and consideration of argument, the court finds and **ORDERS** as follows:

Georgia law provides:

"A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a

motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." *Austin v. Clark* 294 Ga.773 (2014), quoting *Anderson v. Flake* 267 Ga. 498, 501(2), 480 S.E.2d 10 (1997).

On February 24, 2014, Georgia laws on sovereign immunity were substantially modified. The Supreme Court held that sovereign immunity "bars suits against the State or its officers and employees in their official capacities, unless and until sovereign immunity has been waived by the General Assembly." *Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 593, 755 S.E.2d 184, 186 (2014). After such change it is clear that as to injunctive relief, only constitutional changes or legislative waiver can abrogate sovereign immunity. Overturned are previous laws permitting "judicially created exceptions" to the sovereign immunity doctrine. These changes are meaningful in the consideration of the instant motions.

As to injunctive theories of recovery, sovereign immunity bars claims against CCG and individual defendants in official capacities. Therefore, the defendants' motion to dismiss is sustained and granted insofar as it applies to injunctive claims against CCG and the individual defendants in official capacities.

As to claims against the defendants in individual capacities, this court cannot now determine with certainty that the clerk would not be entitled to relief under

any state of probable facts. Nor can the court now conclude that the Clerk could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Georgia's Supreme Court, but not this court (of course), has the power to overrule previous Supreme Court decisions and, as noted above, has recently done so concerning one aspect of sovereign immunity.

But, in *Sustainable Coast*, the Court did not then have before it claims for declaratory relief, alleged constitutional deficiencies, attorney's fees, or mandamus as these claims are presented in this case. But, from the court's opinion on the issues it did have before it, one could infer that without legislative or constitutional waivers, judicial exceptions to other constitutional or statutory immunities might well be inappropriate as well.

A wise trial Judge, perhaps, might stop here. But, I continue. If the court were given the power to craft judicial exceptions to immunities' issues in the instant case, I can imagine some which might assist in relatively quicker and less costly resolution of those issues.

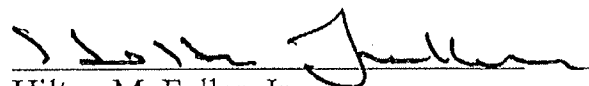
With the present state of the record, whether legislative or other immunities might protect the individual defendants in individual capacities cannot now be determined. Therefore, the defendants' motions to dismiss as they apply to other

claims against CCG and the individual defendants in individual capacities are DENIED.

The motions to dismiss as they apply to declaratory judgments and mandamus claims are DENIED.

Attorney's fees and expense claims are the subjects of a separate order.

SO ORDERED, this 22nd day of April, 2015.



Hilton M. Fuller, Jr.
Senior Superior Court Judge, presiding by
designation.