STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

GREG FLEMING,
WILLIAM SUSICK and
EDWARD F. COOK,

Plaintiffs,

vs. Case No. 2006-4256-AW

CARMELLA SABAUGH, Macomb County
Clerk, in her official capacity,

Defendant.

_______________________________________/

OPINION AND ORDER

Introduction

Plaintiffs Greg Fleming, William Susick and Edward F. Cook[1] filed this action to prevent defendant Carmella Sabaugh, in her official capacity as the Macomb County Clerk, from sending absent voter ("AV") ballot applications to certain Macomb County voters for the 2006 General Election. Plaintiffs assert that while a county clerk has a statutory duty to send AV ***ballots*** to city and township clerks in advance of elections, a county clerk has no authority to send AV ballot ***applications*** directly to voters. In their complaint, plaintiffs have asserted claims for declaratory judgment, injunctive relief, and mandamus.

The parties have now filed cross-motions for summary disposition under MCR 2.116(C)(10), which are ripe for determination as there are no material fact issues in dispute.

[1] Max Fellsman was dismissed as a party plaintiff on April 26, 2007.

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The reviewing court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light must favorable to the nonmoving party. *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000). The nonmoving party must proffer evidence establishing a material issue of disputed fact exists for trial to avoid summary disposition. *Id.*

Summary of Relevant Facts

During the 2006 election cycle, it was determined that in 11 of 24 communities in Macomb County, the city, township, or village clerk automatically sends voters over age 60 an AV ballot application for every election. (Stipulated Facts, ¶ 6.)[2] However, in the remaining 13 communities, unsolicited AV ballot applications are not automatically mailed to voters.

On September 21, 2006, the Macomb County Board of Commissioners ("Board") passed a Resolution directing defendant Sabaugh to mail AV ballot applications to voters over age 60 in the remaining 13 communities in Macomb County. The Resolution states in pertinent part as follows:

> Make the Macomb County absent ballot application process uniform and provide senior citizens an equal opportunity to vote an absent ballot regardless of where in the county they live, by directing the county clerk to mail an application for absent voter's ballot to Macomb County registered voters age 60 and over for the 2006 November Election, at a cost not to exceed $15,000; except, AV application forms would not be sent to senior citizen registered voters who are already on the permanent AV list or whose local clerk automatically does mail AV application forms to all voters age 60 and over. Funds are available in the Clerk/Register of Deeds' Special Projects Budget.

[2] There are 27 separate municipalities in Macomb County (12 cities, 12 townships and 3 villages). However, regular elections in each of the three villages are conducted by the appropriate township clerk. See e.g., MCL 168.642(6)(a).

Plaintiffs filed this action on October 2, 2006, along with a motion for a preliminary injunction seeking to prevent defendant from sending AV ballot applications for the 2006 General Election. On October 5, 2006, Circuit Judge John C. Foster denied plaintiffs' motion, and plaintiffs immediately filed an emergency application for leave to appeal.[3] On the same date, defendant mailed 49,234 AV ballot applications to Macomb County voters over sixty (60) years of age who were not otherwise slated to receive an application from their city, township, or village clerk. (Stip. Facts, ¶ 5.) Defendant claimed in a press release that as a result of the mailing, at least 7,700 additional votes were cast in Macomb County for the 2006 General Election. (Stip. Facts, ¶ 7.)

Although the Court of Appeals initially granted plaintiffs' motion for immediate consideration, the appeal was dismissed as moot in an unpublished opinion per curiam issued March 27, 2007 (Docket No. 273502).

Analysis

A. Mootness

In her brief, defendant argues that plaintiffs' complaint should be dismissed as moot because there is no longer an actual controversy to decide.

In *Morales v Parole Board,* 260 Mich App 29, 32; 676 NW2d 221 (2003), the court discussed the mootness doctrine, stating as follows:

> This Court's duty is to consider and decide actual cases and controversies. *Federated Publications, Inc v City of Lansing,* 467 Mich 98, 112; 649 NW2d 383 (2002). "To that end, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Id.* This Court will entertain cases that are technically moot if the issues involved are of public significance and are likely to recur in the future

[3] This case was administratively transferred to the undersigned on December 11, 2006 in order to equalize the docket.

> and yet evade judicial review. *In re Wayne Co Election Comm,* 150 Mich App 427, 432; 388 NW2d 707 (1986). Generally, a case is not moot if the issues sought to be litigated are capable of repetition, yet evade review. *Ferency v Secretary of State,* 139 Mich App 677, 681; 362 NW2d 743 (1984).

See also City of Novi v Robert Adell Children's Funded Trust, 473 Mich 242, 256; 701 NW2d 144 (2005) (party must satisfy heavy burden to demonstrate mootness).

In the instant matter, the AV ballot applications were mailed October 5, 2006 for the general election held November 7, 2006. Given the Board's justification for mailing the applications, it appears likely that the Board will direct defendant to send a similar mailing in future election cycles. In the event that defendant again mails AV ballot applications to certain voters, plaintiffs would again be forced to contest the legitimacy of defendant's actions after the fact. Significantly, neither the Board nor defendant is under any obligation to provide advance notice of any future AV ballot application mailing in order to allow plaintiffs the opportunity to obtain judicial review in advance of such mailing.

Therefore, as this issue is of public importance and capable of repetition while evading judicial review, plaintiffs' challenges will be addressed. *Compare Morales, supra* at 32-33, and *Socialist Workers Party v Secretary of State,* 412 Mich 571, 582 n 11; 317 NW2d 1 (1982).[4]

[4] The Court of Appeals dismissed plaintiffs' appeal as moot, stating that "although publicly significant, the challenged action – the county clerk conducting an unsolicited mailing of absent voter ballot applications – is not likely to recur and yet evade judicial review." However, the context makes it clear that the Court of Appeal's holding relates solely to the interlocutory appeal of the trial court's order denying plaintiff's motion for a preliminary injunction – not to the remainder of plaintiffs' claims that, as the Court of Appeals observed, remain "pending in the trial court." *Id.*

B. The County Clerk's Authority to Mail AV Ballot Applications

Plaintiffs argue that defendant's mailing of AV ballot applications was contrary to law because the Michigan Election Law, MCL 168.1 *et seq.*, does not authorize or permit the mailing of absent voter ballot applications by a county clerk in his or her official capacity.[5]

Under Michigan law, "[t]he extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority." *Sittler v Board of Control*, 333 Mich 681, 687; 53 NW2d 681 (1952) (citation omitted). As a result, "[p]ublic officers have and can exercise only such powers as are conferred on them by law." *Id.* (citation omitted).

Under the Michigan Constitution, the county clerk's "duties and powers shall be provided by law." Michigan Const 1963, art 7, § 4. *See also Howard v Bouwman*, 251 Mich App 136, 144; 650 NW2d 114 (2002) ("The county clerk is an independently elected county official whose duties are prescribed by the Michigan Constitution, statues, and court rules").

MCL 168.759 governs the process by which a person may obtain an AV ballot. It provides, in relevant part, as follows:

> (1) At any time during the 75 days before a primary or special primary, but not later than 2 p.m. of the Saturday immediately before the primary or special primary, an elector who qualifies to vote as an absent voter, as defined in section 758, may apply for an absent voter ballot. The elector shall apply in person or by mail with the clerk of the township, city, or village in which the elector is registered. * * *

---

[5] Plaintiffs base their argument, in large measure, on the rationale set forth by Chief Judge Mary Beth Kelly in *Taylor v Currie* (Wayne County Circuit Court No. 2005-524513-AW). Although there is no requirement that a circuit court judge follow the decision of another, *see People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988), this Court agrees that Judge Kelly's opinion is "thorough and well-reasoned." S*ee, e.g., Taylor v Currie*, 386 F Supp 2d 929, 931 (ED Mich, 2005). However, although it provides a useful analytical framework, *Taylor* is factually distinguishable because the issue in *Taylor* was the authority of a ***city*** clerk – as opposed to a ***county*** clerk – to mail AV ballot applications.

> (3) An application for an absent voter ballot under this section may be made in any of the following ways:
>
> (a) By a written request signed by the voter stating the statutory grounds for making the application.
>
> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city, township, or village.
>
> (c) On a federal postcard application.
>
> * * *
>
> (5) The clerk of the city, township, or village shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request.

This section, by its terms, does not authorize a county clerk (as opposed to a township, village or city clerk) to play any role in the handling or distribution of AV ballot applications.[6]

A separate section of the Michigan Election Law requires a county clerk to deliver AV ***ballots*** for each precinct to township and city clerks a certain number of days in advance of an election. *See* MCL 168.714(1). This latter section also does not authorize a county clerk to distribute AV ballot ***applications*** directly to voters.

A final section of the Michigan Election Law relating to AV ballot applications makes it a misdemeanor for someone other than an authorized election official to both distribute absent voter ballot applications to voters and receive signed applications from voters for delivery to the appropriate city or township clerk. *See* MCL 168.931(1)(b)(iv). MCL 168.931(1)(b) provides, in pertinent part, as follows:

> A person shall not, either before, on, or after an election, for the person's own benefit or on behalf of any other person, receive, agree, or contract for valuable consideration for 1 or more of the following:
>
> * * *

[6] Recently proposed changes to MCL 168.759(5) would specifically permit – but not require – city, township or village clerks to forward unsolicited AV ballot applications to voters 60 years of age or older. See Mich Senate Bill 160 (February 6, 2007) and Mich House Bill 4553 (March 29, 2007). However, neither of the proposed amendments would authorize a ***county*** clerk to mail AV ballot applications to voters.

> (iv) Both distributing absent voter ballot applications to voters and receiving signed applications from voters for delivery to the appropriate clerk or assistant of the clerk. ***This subdivision does not apply to an authorized election official.*** [Emphasis added.]

This section makes it a criminal offense for individuals or groups – other than "authorized election officials" – to both distribute AV ballot applications and receive the signed applications from voters. However, there is no prohibition against individuals or groups that only distribute AV ballot applications, and this practice routinely occurs. (Stip. Facts, ¶ 8.) This section similarly does not authorize a county clerk to distribute AV ballot applications directly to voters, but it does not prohibit the practice, either.[7]

As the foregoing makes clear, the Court has not located any statutory authority – and none has been provided by the parties – specifically authorizing a county clerk to distribute AV ballot ***applications***. Instead, it appears that such authority as exists under the Michigan Election Law for the processing of AV ballot applications resides with city, township and village clerks. As a result, the Court concludes that a county clerk is without the statutory authority to mail AV ballot applications.

However, this conclusion does not end the inquiry. The Court will next examine whether any other authority existed to justify defendant's actions. In *Taylor*, Judge Kelly made specific reference to charter provisions or ordinances as a possible source of such authority:

> In this case, the defendant has not cited any statute, ***any charter provision, or any ordinance*** which would provide the city clerk any inherent power, any general power, specifically any power, to make the mass unsolicited mailing of absentee voter ballot applications.

[7] A county clerk would likely be deemed an "authorized election official" under the Michigan Election Law – see, e.g., MCL 168.23, 168.24e and 168.29 – and thus, exempt from the prohibition set forth in MCL 168.931(1)(b)(iv).

Hearing Transcript, September 1, 2005, p 9 (emphasis added). The court agrees that the county clerk's authority may be derived from another source, such as a Board reselection. See, e.g., MCL 46.4 (county clerk also serves as the clerk of the board of commissioners, and must perform the duties required by Board resolutions). In this case, it is undisputed that the Board authorized defendant to distribute the AV ballot applications when it passed the September 21, 2006 Resolution. (Stip. Facts, ¶ 5).

A county board of commissioners has "legislative, administrative and such other powers and duties as provided by law." Const 1963, art 7, § 8; see also *Brownstown Twp v Wayne County,* 68 Mich App 244, 247; 242 NW2d 538 (1976). The Board exercises it legislative powers by adopting "resolutions and ordinances relating to its concerns." Const 1963, art 7, § 2. See also MCL 46.11(j) (a county board of commissioners may "[b]y majority vote...pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county...").

Plaintiffs have not challenged the validity of the Board's September 21, 2006 Resolution.[8] Absent such a challenge, or any showing that the action was arbitrary or capricious, the Court will not intrude into the Board's exercise of its local legislative power. See *Wayne County Sheriff, supra.* Thus, in accordance with the parties' stipulation, the Court holds that defendant was properly authorized to distribute the AV ballot applications by the Board's September 21, 2006 Resolution.

---

[8] Even if plaintiffs had challenged the resolution, such a challenge would be difficult to sustain because, under the separation of powers doctrine, "legislative power must be insulated from judicial interference." *Wayne County Sheriff v Wayne County Board of Commissioners*, 148 Mich App 702, 704 (1986) (citations omitted). As a result, "the judiciary will not interfere with discretionary actions of a legislative body such as [a board of commissioners]" unless the action "is so capricious or arbitrary as to evidence a total failure to exercise discretion..." *Id.* at 704-05 (citations and internal quotations omitted).

C. Plaintiffs' Constitutional Arguments

The Court will next examine the constitutionality of the Board's resolution as carried out by defendant during the 2006 General Election.

1. Purity of Elections

Plaintiffs first argue that the mailing of AV Ballot applications to voters over age 60 violated the "purity of elections" clause in the Michigan Constitution because other voters eligible to vote by AV ballot were not sent an application.[9] Plaintiffs' argument is unavailing for the following reasons.

In *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71,* ___ Mich ___; ___ NW2d ___ (2007), our Supreme Court discussed the competing interests that come into play when the state regulates elections pursuant to its constitutional mandate, stating as follows:

> The "right to vote" is not expressly enumerated in either our state or the federal constitution. Rather, it has been held that the right to vote is an implicit "'fundamental political right'" that is "'preservative of all rights.'" As the United States Supreme Court noted, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." However, "[t]his 'equal right to vote' is not absolute...."

Id., Slip Op at 11-12 (citations omitted). The Court next observed that "[b]alanced against a citizen's 'right to vote' are the constitutional commands given by the people of Michigan to the Legislature in Const 1963, art 2, § 4."[10] Finally, the Court observed that "the purpose of a law

---

[9] Others eligible to vote by AV ballot include persons who cannot attend the polls on the day of an election for any of the following reasons: (1) physical disability; (2) religion; (3) service as an election precinct inspector in another precinct; (4) expected absence from place of residence; or (5) confinement to jail awaiting arraignment or trial. See MCL 168.758(1).

[10] Const 1963, art 2, § 4 provides in relevant part as follows:

enacted pursuant to these constitutional directives 'is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. *It is for the purpose of preventing fraudulent voting.*'" *Id.,* Slip Op at 13 (emphasis added).

In the instant case, there is no allegation that by sending AV ballot applications to otherwise qualified voters, defendant encouraged or permitted fraudulent voting. As noted above, the practice of mailing such applications is not illegal, and is in fact commonplace. Indeed, to the extent the legislature has regulated such activity, it has only prohibited the same person from ***both*** sending applications ***and*** receiving them for delivery to the appropriate township or city clerk. See MCL 168.931(1)(b)(iv). Presumably, the legislature's concern was that if a third party could both send and receive applications, it would be too easy for a candidate or group to process AV ballot requests only for voters identified as favorable (and to omit requests by voters thought to be unfavorable); or perhaps even to fraudulently vote the AV ballots themselves once they are obtained. Those concerns are not present where, as here, the AV ballot applications must be returned by the voters directly to the appropriate township or city clerk for processing.

In *McDonald v Grand Traverse County Election Comm,* 255 Mich App 674, 682-683, 695; 662 NW2d 804 (2003), the court discussed this issue in the context of a challenge to straight-ticket voting, stating:

The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting.

> The phrase "purity of elections" does not have a single precise meaning. However, "it unmistakably requires...fairness and evenhandedness in the election laws of this state."
>
> * * *
>
> In *Jacobs v Headlee,* [135 Mich App 167, 177; 352 NW2d 721 (1984),] this Court held that the Michigan campaign financing and practices act did not violate the "purity of elections" clause because it was "based on legitimate governmental objectives" and did not provide "any *unfair advantage* to major party candidates." Similarly, the straight-ticket ballot option in this case does not create an unfair advantage to candidates affiliated with a political party. The benefit of the straight-ticket ballot option is that it makes it easier and faster for some voters to vote. Although the straight-ticket ballot option benefits candidates affiliated with a political party by making it easier for voters to vote for those candidates, such a benefit does not afford an *unfair advantage* to the candidates affiliated with a political party. The advantage here is only minimal; the straight-ticket ballot option does not prevent or prohibit any voter from voting for the candidate of the voter's choice.

Id. (citations omitted; emphasis in original).

In this case, it is important to note AV ballot applications were sent to all qualified Macomb County voters over age 60. The mailing of AV ballot applications to registered voters over age 60 undeniably made it more convenient for those voters to obtain AV ballots. However, other voters eligible to vote by AV ballot in Macomb County and elsewhere were not prevented or discouraged from obtaining an AV ballot. Hence, any benefit to voters over age 60 in this county was minimal and did not afford those voters an *unfair advantage* over any other eligible AV ballot voters. Nor has there been any allegation or showing that the mailing created an unfair advantage to any particular candidate or political party. Therefore, plaintiffs have not established that the mailing of AV ballot applications to voters over age 60 violated the purity of elections clause.

2. Equal Protection

In *Advisory Opinion Regarding Constitutionality of 2005 PA 71, supra,* our Supreme Court discussed the standard for reviewing an Equal Protection Clause challenge:

> [T]he United States Supreme Court has rejected the notion that every election law must be evaluated under strict scrutiny analysis. The Court recognized that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest...would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Rather, the Court has held that a "flexible standard" is applicable:
>
>> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>>
>> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Id., Slip Op at 17-18 (citations omitted). See also *McDonald, supra* at 688-692.

As an initial matter, the Court must address whether the alleged discrimination in this case is the type of discrimination prescribed by the United States and Michigan Constitutions. In *McDonald*, the court observed that "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Id.* at 689 (citation omitted). Thus, a plaintiff alleging an Equal Protection violation has the "burden...to demonstrate in the first instance a discrimination against them of some substance." *Id.*

The Court concludes that the discrimination that plaintiffs allege is not the sort of invidious, intentional or purposeful discrimination that is proscribed by the Equal Protection Clause of the U.S. Constitution and the equal protection provision in the Michigan Constitution. See US Const, Am XIV; Const 1963, art 1, § 2. The nature of the alleged discrimination is that

voters who do not automatically receive AV ballot applications must spend more time and make a greater effort to cast their vote, while voters who receive such applications can more easily obtain an AV ballot. However, plaintiffs do not claim that they were prevented from voting by AV ballot. Moreover, there is no suggestion that the Board, in passing the resolution, intentionally or purposely discriminated against voters who do not receive such applications. As a result, the Court holds that this is not the type of discrimination proscribed by the Equal Protection Clause. See *McDonald, supra.*

Even if this was the type of discrimination prohibited by state or federal law, the mailing of AV ballot applications to voters over age 60 in this county imposes, at most, only a "reasonable, nondiscriminatory restriction" on the rights of other voters, and is thus subject to the less stringent rational basis level of review. As noted, the mailing of AV ballot applications to voters over age 60 in this county created only a minimal advantage to the voters receiving such applications over voters who do not automatically receive them. The Board justified its resolution as necessary to "make the Macomb County absent ballot application uniform and provide senior citizens an equal opportunity to vote an absent ballot regardless of where in the county they live." These are important regulatory interests sufficient to justify the minimal disadvantage to other voters. See *McDonald, supra* at 686 (holding that efforts to make the voting process easier and more expedient so that people will be more likely to vote were important regulatory interests).

Finally, although it may be optimal to send AV ballot applications uniformly to all Macomb County voters eligible to receive them, the Board is not required under the Equal

Protection Clause to remedy every deficiency at once, but may undertake reforms one step at a time. *Advisory Opinion Regarding Constitutionality of 2005 PA 71, supra* (citations omitted).[11]

Because the Board's action in directing defendant to mail AV ballot applications to all voters age 60 in Macomb County advanced important regulatory interests, the Board's resolution did not violate the Equal Protection Clause.

3. Dilution of Votes

Plaintiffs final argument is that defendant's mailing diluted the votes of every Michigan voter who did not automatically receive an AV ballot application. Noting defendant's claim that 7,700 additional votes were cast by AV ballots in the November 7, 2006 election, plaintiffs claim that their votes were diluted by the additional votes cast.

Plaintiffs' reliance on *Bush-Cheney, Inc v Baker,* 34 SW3d 410 (Mo App, 2000) in this regard is misplaced. The *Bush-Cheney* Court stated:

> [The] commendable zeal to protect voting rights must be tempered by the corresponding duty to protect the integrity of the voting process. Courts should not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.

Id. at 413.

In this case, the Board directed defendant to mail AV ballot applications to registered voters over age 60. The Board's actions made it slightly easier for lawful voters to exercise their elective franchise. As these voters were lawfully entitled to cast a ballot, plaintiffs' right to vote was not diluted. See *Bush-Cheney, supra.*

---

[11] In selecting voters over the age of 60, the Board chose the most readily identifiable category of voters eligible to vote by AV ballot – voters in the other categories may not as readily be identified in advance of the election. See MCL 168.758(1).

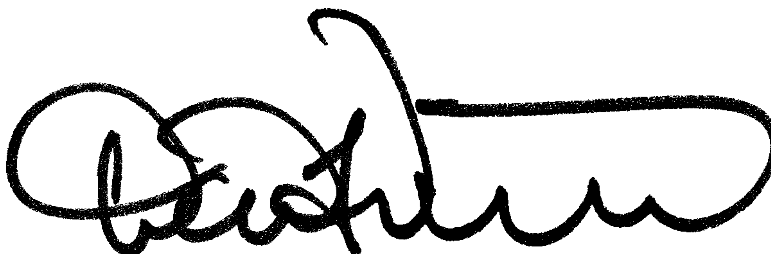
Conclusion

For the reasons set forth above, plaintiffs Greg Fleming, William Susick and Edward F. Cook's motion for summary disposition is **DENIED** and Defendant Carmella Sabaugh's motion for summary disposition is **GRANTED** under MCR 2.116(C)(10).

Accordingly, plaintiffs' complaint is **DISMISSED**, with prejudice. MCR 2.116(I)(1).

This *Opinion and Order* resolves the last pending claim and closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.



DATED:

David F. Viviano
Circuit Judge

cc: Eric E. Doster
Jill K. Smith