

STATE OF INDIANA ) IN THE SHLEBY SUPERIOR COURT NO. 1  
 ) SS  
COUNTY OF SHELBY ) CASE NO.73D01-1601-PL-000003

KENNETH ALFORD, TERRY HASKET, )  
RICHARD DANIELS, RICHARD BUNTON, )  
ANTHONY OWENS, KEITH NYE, and )  
WARDELL STRONG, on behalf of themselves )  
and all others similarly situated, )  
Plaintiffs, )

-vs-

) Hon. Robert W. Freese, Special Judge  
)

JOHNSON COUNTY COMMISSIONERS, )  
in their official capacities, )  
THE HONORABLE MARK LOYD, )  
in his official and individual capacities, )  
THE HONORABLE KEVIN BARTON, )  
in his official and individual capacities, )  
THE HONORABLE LANCE HAMNER, )  
in his official and individual capacities, )  
THE HONORABLE CYNTHIA EMKES, )  
In her official and individual capacities, )  
JOHN P. WILSON, ESQ., )  
MICHAEL BOHN, ESQ. )  
ANDREW EGGERS, ESQ. )  
JOHN NORRIS, ESQ. )  
DANIEL VANDIVIER, ESQ. )  
J. ANDREW WOODS, and )  
MATTHEW SOLOMON, )  
Defendants. )

**ORDER AND ENTRY OF JUDGMENT ON JUDICIAL DEFENDANTS'  
MOTION TO DISMISS**

This case came before the Court on the Judicial Defendants' motion to dismiss and plaintiffs' response. The motion is fully briefed and the Court heard argument from all counsel.

Argument was heard in the court room of the Hendricks Superior Court No. 1 on January 20,

2017. Plaintiffs were present by counsel, Michael K. Sutherlin and Jonathan C. Little.

Defendants the Honorable K. Mark Loyd, the Honorable Kevin Barton, the Honorable Lance Hamner, and the Honorable Cynthia S. Emkes were present by counsel, David A. Arthur, Deputy Attorney General. The Defendants Johnson County Commissioners, John P. Wilson, Esq.,

Michael Bohn, Esq., Andrew Eggers, Esq., John Norris, Esq., Daniel Vandivier, Esq., J. Andrew Woods, Esq., and Matthew Solomon, Esq., were present by counsel, William W. Barrett and Daniel J. Layden.

Please refer to the **ORDER AND ENTRY OF JUDGMENT ON DEFENDANTS' MOTION TO DISMISS** entered contemporaneously for an historical chronology of this case.

The Court, being advised, the Court **GRANTS** the Judicial Defendants' motion for the reasons set forth below.

1. Under Indiana Rule of Trial Procedure 12(B)(6), a case may be dismissed if the complaint fails to state a claim for which relief can be granted. A court presented with a motion to dismiss should assess the sufficiency of the pleading to determine whether the allegations establish any set of circumstances under which a plaintiff would be entitled to relief. *See Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006).

2. In addition, a court should dismiss a case under Indiana Trial Rule 12(B)(1) if, after considering the complaint, the motion, and any affidavits or other evidence submitted, the court lacks authority to further adjudicate the action. *Common Council of City of Hammond v. Matonovich*, 691 N.E.2d 1326, 1328 (Ind. Ct. App. 1998). The court must take the well-pleaded facts in the complaint as true for purposes of determining whether it has subject matter jurisdiction over the action. *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, 648 N.E.2d 641, 643 (Ind. 1995).

3. Plaintiffs assert that they are indigent and have a criminal case pending in the Johnson County's courts. Complaint, p. 9. Plaintiffs (on behalf of themselves and other similarly situated) brought suit against the Johnson County Commissioners, seven public defenders in Johnson County, and four Johnson County judges, specifically Judge Mark Loyd, Judge Kevin Barton, Judge Lance Hamner, and Judge Cynthia Emkes (the "Judicial Defendants"). Plaintiffs assert

that the defendants operate a public defense system “that regularly and systematically deprives indigent persons of the right to assistance of counsel.” Complaint, p. 2.

4. As to the specific claims, Plaintiffs allege that the Judicial Defendants and Johnson County Commissioners violated Plaintiffs’ rights secured by the Sixth and Fourteenth Amendments of the United States Constitution; that the Judicial Defendants and Johnson County Commissioners violated Plaintiffs’ rights secured by Article 1, Section 13(a) of the Indiana Constitution; and that the Judicial Defendants and public defenders violated Plaintiffs’ rights as third-party beneficiaries of the contracts between the Judicial Defendants and public defenders. Plaintiffs request injunctive and declaratory relief. Plaintiffs’ counsel at the argument previously conducted in Shelby County suggested Plaintiffs are not seeking damages, but in their complaint Plaintiffs ask for “an award of damages to the Plaintiffs and those similarly situated so as to reasonably compensate them for the damages that they have suffered as a result of the breach of contract by the Defendants.” Complaint, p. 25.

5. Indiana Code 33-40 *et seq.* provides three forms of defense for the indigent in Indiana. One option is for the State Public Defender to provide representation in post-conviction proceedings for incarcerated indigent people, and to serve as trial counsel upon the request of a trial court judge when warranted. Ind. Code § 33-40-1. Second, a county, through its county executive, may establish a County Public Defender Board (Ind. Code § 33-40-7-3(a)), which would then prepare a plan for criminal defense of the indigent in that county, and that plan may include a county Public Defender’s Office. Ind. Code § 33-40-7-5. Third, a “judge of any court having criminal jurisdiction” may “contract with any attorney or group of attorneys admitted to practice law in Indiana to provide legal counsel for all or some of the poor persons coming before the court charged with the commission of a crime and not having sufficient means to

employ an attorney to defend themselves.” Ind. Code § 33-40-8-1. Plaintiffs challenge this third option.

6. First, Plaintiffs’ claims for injunctive and declaratory relief are not ripe. In *Platt v. State*, 664 N.E.2d 357, 362-63 (Ind. Ct. App. 1996), the Court of Appeals found that the plaintiffs’ claims for equitable relief in that case (claims similar to those brought by Plaintiffs in this case) were barred because they were not ripe. Plaintiffs request equitable relief, but to obtain such relief, Plaintiffs must show that there is no adequate remedy at law. *Id.* at 362-63. They have remedies available to them, or they had remedies available to them in their criminal cases; thus, the claims for equitable relief must be dismissed under *Platt v. State*. The cases cited by the plaintiffs, including those cited in their “Plaintiffs’ Pre-Hearing Brief” from other states and other federal jurisdictions, do not overrule the Indiana Court of Appeals as to the law that this Court must follow. This Court is bound to follow decisions of higher Indiana courts. *See Patton v. State*, 507 N.E.2d 624, 626 (Ind. Ct. App. 1987) (Indiana Court of Appeals bound to follow decisions of the Indiana Supreme Court).

7. Second, with respect to any contract claim against the Judicial Defendants, Plaintiffs have failed to state a claim for which relief may be granted because Plaintiffs do not allege that any of the Judicial Defendants breached the contract. Rather, all the alleged breaches relate to the conduct of the Defendant Public Defenders. As the Judicial Defendants are not alleged to have breached the contract, the Judicial Defendants cannot be liable for any breach of contract.

8. Third, Plaintiffs have not stated a claim with respect to the constitutionality of the public defender system in Indiana. Ind. Code § 33-40-8-1. Plaintiffs necessarily claim that there is no set of circumstances under which the statute can be constitutionally applied. *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999). That means that Plaintiffs bear the burden to show that the statute is unconstitutional. *Id.*

9. Indiana law permits a “judge of any court having criminal jurisdiction” to “contract with any attorney or group of attorneys admitted to practice law in Indiana to provide legal counsel for all or some of the poor persons coming before the court charged with the commission of a crime and not having sufficient means to employ an attorney to defend themselves.” Ind. Code § 33-40-8-1. If the county executive (here the County Commissioners) do not establish a public defender board, a judge must appoint counsel and contract with attorneys to provide counsel for the indigent appearing before the particular court. Courts for over a century and a half have appointed counsel to represent the poor in criminal cases. *See, e.g., Blythe v. State*, 4 Ind. 525, 525 (1853). There is no authority to strike down such a system based on the nature of the system itself.

10. Next, a complaint should be dismissed under Indiana Trial Rule 12(B)(6) if it does not state a “redressable” claim. *Marcuccilli v. Ken Corp.*, 766 N.E.2d 444, 448 (Ind. Ct. App. 2002) (citing *Am. Dry Cleaning & Laundry v. State*, 725 N.E.2d 96, 98 (Ind. Ct. App. 2000)). Plaintiffs must show some “nexus between the defendant’s action and the ‘redressability’ requirement which looks at the nexus between the harm and the relief available.” *Jones v. Sullivan*, 703 N.E.2d 1102, 1106-07 (Ind. Ct. App. 1998). Plaintiffs have not alleged a proper link between the Judicial Defendants’ acts and any harm alleged in the complaint, relying only on the caseloads of select public defenders in Johnson County. There is no authority for using bare caseload numbers as a basis for a constitutional violation.

11. Also, with respect to redressability, the Judicial Defendants do not have the authority to set up the Public Defender Board that Plaintiffs want to impose on Johnson County. Only a County Board of Commissioners may establish a County Public Defender Board. Ind. Code § 33-40-7-3(a). Further, any reimbursement for expenses to a member of the public defender

board would come from the county, not from the courts or their Judges. Ind. Code § 33-40-7-4. The relief Plaintiffs seek must come from the County, if at all.

12. Finally, the Judicial Defendants are entitled to immunity as to all claims for damages. The United States Code explicitly bars any lawsuit brought under 42 U.S.C. § 1983 for damages or for injunctive relief. Second, Indiana law, specifically Indiana common law and the Indiana Tort Claims Act, provides immunity for the Judicial Defendants against claims for damage.

13. While Plaintiffs argue that the appointment of counsel is not a judicial function, the Judicial Defendants were acting as judges in providing criminal defense to the indigent, and they were acting under the express authority of Indiana Code § 33-40-8-1. Section 1983 provides that “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief is unavailable.” *And see Gocke v. Comer*, No. 1:07-CV-008-SEBJMS, 2007 WL 670961, at \*1 (S.D. Ind. Feb. 28, 2007). Accordingly, Plaintiffs’ claim for injunctive relief and any claim for damages are dismissed. As to damages, the Judges are absolutely immune for their judicial decisions. *Mireles v. Waco*, 502 U.S. 9 (1991); *Stump v. Sparkman*, 435 U.S. 349 (1978).

14. In addition, the Judicial Defendants are entitled to absolute judicial immunity as against damage claims brought under state law because “judges are entitled to absolute judicial immunity from suits for money damages for all actions taken in the judge’s judicial capacity, unless those actions are taken in the complete absence of any jurisdiction,” providing judges with the necessary judicial independence in the decision-making process. *Newman v. Deiter*, 702 N.E.2d 1093, 1097 (Ind. Ct. App. 1998) (internal citations omitted).

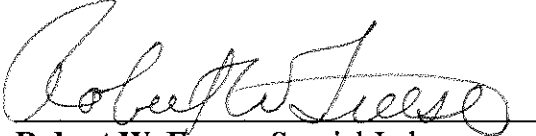
15. In summary, any claim brought under 42 U.S.C. § 1983 for injunctive relief is barred by statute. Any claim for equitable relief is barred because it is not ripe. Also, Plaintiffs do not state

a claim for which relief can be granted because Plaintiffs were not harmed by the Judicial Defendants and the Judicial Defendants cannot provide the relief Plaintiffs seek. Finally, any claim for damages is barred by judicial immunity.

Accordingly, for the reasons stated above, the Judicial Defendants' Motion to Dismiss is **GRANTED**, and Plaintiffs' complaint against the Judicial Defendants is hereby **DISMISSED**, with prejudice.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to T.R. 12(B), the Plaintiffs shall have ten (10) days after service of notice of this order to amend once as a matter of right pursuant to T.R. 15(A). In the event the Plaintiffs fail to amend the Complaint with respect to claims and counts dismissed hereunder, the judgment entered herein shall be considered a final and appealable judgment under T.R. 54(B) as there is otherwise no just reason to delay entry of final judgment.

Dated: January 30, 2017

  
**Robert W. Freese**, Special Judge  
Shelby Superior Court 1

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