STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR

Plaintiff, Court of Appeals No. 294087

v

MICHIGAN DEPARTMENT OF HUMAN SERVICES,

and ISHMAEL AHMED, in his official capacity as
Director of Michigan Department of Human Services,

Defendants
_____/

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_____/

PLAINTIFF'S BRIEF IN SUPPORT OF ANSWER TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO MCR 2.116(C)(8) AND (C)(4)

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Introduction

Plaintiff,[1] a home-based day care provider, filed this original action for mandamus seeking to prevent Defendants from diverting a portion of the subsidy checks being paid to her as part of a program Defendants administer to provide assistance to low-income families. Defendants have filed a motion to dismiss this mandamus action.

Defendants assert four procedural and jurisdictional defenses: (1) they did not receive sufficient notice of Plaintiff's claim, thereby requiring dismissal under MCR 2.116(C)(8); (2) Plaintiff's claim is not really a mandamus claim, but is "declaratory" or "injunctive," thereby denying this Court jurisdiction under MCR 7.203(C)(2) and requiring dismissal under MCR 2.116(C)(4); (3) this action necessarily requires other parties, including Child Care Providers Together Michigan (CCPTM), the purported collective bargaining agent, be named as a defendant, and any action that requires "a party other than a state officer" must be brought in Circuit Court, rather than this Court, under MCR 3.305(A)(2)), thereby requiring dismissal under MCR 2.116(C)(4); and (4) Plaintiff's claim is really an unfair labor practice claim that must be filed either at the Michigan Employment Relations Commission (MERC) or in Circuit Court, thereby requiring dismissal under MCR 2.116(C)(4). These arguments will be addressed in turn below.

[1] Originally, there were two plaintiffs, Sherry Loar and Dawn Ives. Ives had a change of legal circumstances requiring her dismissal, which the parties stipulated to, and it appears on this Court's docketing sheet that Ives has been removed as a party. Plaintiff did seek to add two new individuals as plaintiffs in order to prevent an unforeseen circumstance causing this case to become moot or hindered in some other manner. That amended complaint request is still pending.

Despite there being no factual matters at dispute, and notwithstanding that the court rules allow procedural and substantive motions to dismiss to be joined, Defendants did not seek to defend the merits of Plaintiff's claim. As will be discussed below, Defendants' fourth defense, a cursory treatment, touches upon the heart of the case – whether Plaintiff is a government employee of a government employer and therefore subject to collective bargaining under the undisputed facts. Plaintiff could argue that Defendants' fourth defense constitutes its sole defense of the merits, but recognize that this Court will likely be reluctant to enter mandamus relief in this important dispute basely solely on the meager treatment the issue received in Defendants' dismissal motion and brief. Given that the first three defenses will be shown to be unavailing, Plaintiff requests that this Court resolve Defendants' motion by entering an order dismissing the first three defenses, allowing Defendants and any proposed intervenors to address the merits by a date certain, and then scheduling this matter for a single oral argument on the Defendants' fourth defense, which when properly developed will essentially present the same legal question posed by a straightforward argument of the merits of the case.[2]

1. Notice of claim

MCR 2.111(B)(1) states a complaint must contain:

> A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary

[2] In essence, this Court should reject the first three defenses presented here, but will likely want to wait on the fourth defense until Defendants and any potential intervenors have had the opportunity to address the merits, which are inextricably intertwined with the fourth defense. Thus, one dismissal defense and Plaintiff's merits claim would remain to be argued.

> reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.

Further, MCR 2.111(B)(2) indicates that a complaint must have a "demand for judgment for the relief that the pleader seeks." *Id*. The Michigan Supreme Court has indicated that Michigan Court Rules have created a "generally applicable notice pleading environment." *Roberts v Mecosta Co Hospital*, 470 Mich 679, 700 n 17 (2004).

The Michigan Supreme Court has indicated that MCR 2.111(B) is meant to prevent two extremes: (1) "the straightjacket of ancient forms of action"; and (2) "ambiguous and uninformative pleading." *Dacon v Transue*, 441 Mich 315, 329 (1992). The court explained:

> Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice. Extreme formalism and extreme ambiguity interfere equivalently with the ability of the judicial system to resolve a dispute on the merits. The former leads to dismissal of potentially meritorious claims while the latter undermines a defendant's opportunity to present a defense. Neither is acceptable.

Id. at 329 (citations and footnote omitted).

To the extent that Defendants allege that every element of a cause of action must be explicitly contained in the complaint, a similar contention was rejected by this Court in *Smith v Stolberg*, 231 Mich App 256 (1998), where this Court refused to throw out a complaint that did not contain a title heading naming the cause of action. *Id*. at 260-61. Further, Plaintiff's complaint was explicitly titled "Complaint For Writ of Mandamus." The jurisdictional section referred to a statute and a court rule related to mandamus

against state officials. Count I was titled "Mandamus." The relief sentence asked for the issuance of a writ of mandamus. At the same time Plaintiff's filed her complaint, she filed a 47-page brief discussing the facts related to the mandamus action (16 pages) and the legal merits of it. Taken together or apart, the brief and complaint more than meet the notice pleading requirements of MCR 2.111(B)(2). Defendants could not have been confused regarding the nature of Plaintiff's claim.

> The elements of a mandamus claim are:
>
> (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.

Citizens Protecting Michigan's Constitution v Secretary of State, 280 Mich App 273, 284 (2008). This Court explained that: "Within the meaning of the rule of mandamus, a 'clear, legal right' is one 'clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.'" *University Medical Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143 (1985).

Defendants characterize Plaintiff's claim as "the Union was improperly formed because it did not have the state legislature's approval." Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1. Defendants are mistaken. Plaintiff contends that Defendants cannot remove "union dues" from child care subsidy payments because Defendants did not have the authority to give the Michigan Home Based Child

Care Council (MHBCCC) the power to collectively bargain as the "employer" of home-based day care providers under the interlocal agreement.

MHBCCC, as a governmental entity, is free under PERA to engage in collective bargaining with its employees, but home-based day care providers are not employees of MHBCCC or any other state or local governmental employer. Further, unions and collective bargaining can be bifurcated. *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979). Under the First Amendment, public employees can unionize, but "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or . . . to recognize the association and bargain with it." *Id*. at 465. State law is necessary to make public-sector bargaining with public-employee unions mandatory. Thus, it is possible that a union can be properly formed and that state law does not allow for public-sector bargaining.

Putting it in terms of the mandamus elements, Plaintiff, like every Michigan resident, has a clear legal right to the common-law presumption against public-sector collective bargaining unless and until that presumption is changed by the Legislature. In 1965, through the creation of the Public Employee Relations Act, that common-law presumption was suspended for residents who meet the PERA definition of public employees. At no point, however, did PERA or any amendment of it expand the class of people who could be subjected to mandatory collective bargaining to include home-based day care providers, who are in reality independent contractors who serve private-sector clients and run private businesses out of their own homes. Defendants have a clear legal

duty not to usurp legislative prerogatives, but this is precisely what they have done: They have attempted to expand the class of citizens subject to public-sector collective bargaining by placing into a mere interlocal agreement a provision purporting to allow home-based day care providers to be characterized as public employees subject to collective bargaining.

The relief sought here, cessation of the diversion of "union dues," is part of a ministerial act by Defendants: issuing low-income child care subsidy checks to the home-based day care providers.

The fourth mandamus element is related to Defendants' second defense, which is discussed immediately below.

2. Nature of claim

Defendants seek to classify the relief requested as declaratory or injunctive. Defendants define "declaratory" as where "a party seeks a declaration of legal rights," Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 9. In support of their definition, Defendants, somewhat circularly, cite only MCR 2.605, the court rule setting forth that declaratory actions are possible. The citation for Defendants' definition of "injunctive," described as a claim in which "a party asks a court to stop another party's activity," Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 9, is no more illuminating. Defendants just cite to a case in which a party asked for injunctive relief. See *Woodlands v Michigan Citizens Lobby*, 423 Mich 188, 199 (1985).

It is difficult to think of any non-monetary relief that would not fit within either of Defendants' abstract definitions. Indeed, Defendants' argument would seem to virtually preclude the use of mandamus. It is perhaps telling that Defendants do not provide any examples.

Note, however, that Defendants' definition would contradict this Court's definition of mandamus in *Duncan v Michigan*, 284 Mich App 246 (2009), which is discussed immediately below. Defendants' definition implies a mandamus action is never proper when a state officer is "stopped" from doing a particular act.

In *Duncan*, this Court was presented with a constitutional challenge to the manner in which the State provided defense for the indigent in three Michigan counties. In that case, a class of present and future indigent criminal defendants filed suit against the Governor. This Court defined mandamus as "mandatory injunctive relief." *Id*. at 273, 275. Thus, *Duncan* indicates that mandamus more accurately equates to mandatory injunctive relief.[3]

Further, under Defendants' definitions, this Court's most recent use of mandamus in *Citizens Protecting Michigan's Constitution* was improper. In that case, a ballot question committee sought to prevent –"stop," in Defendants' words here – the Secretary

[3] *Duncan* involved a challenge to the manner in which the State financed indigent criminal defense. This Court's discussion of mandamus centered on whether it was proper for the courts to enter mandamus against the Governor, as opposed to any other state officer. This Court held that under 42 USC § 1983, mandamus against the Governor could be entered in appropriate circumstances. *Duncan*, 272-74. In fact, this Court even held that it was possible for the courts to order the other branches to fund the courts' "essential judicial functions." *Id*. at 282-84.

of State from placing on the 2008 ballot a proposed constitutional amendment created through a petition drive.

This Court set out the elements of a mandamus action, but also noted that "under MCR 7.216(A)(7), this Court can, in our discretion and on terms we deem just, 'enter any judgment or order and grant further or different relief as the case may require.'" *Citizens Protecting Michigan's Constitution*, 280 Mich App at 284. Defining a clear legal duty, this Court noted that where all "of the information necessary to resolve [a] controversy . . . is presently available," mandamus may be appropriate. *Id*. at 287. This Court reviewed to the 1963 Constitution and held that there were separate mechanisms for amending, as opposed to revising, that document. *Id*. at 277. Because the proposed amendment was more properly characterized as a revision, this Court held that there was a "clear legal duty" not to place the item on the ballot. *Id*. Specifically, the courts had a clear legal duty to make a "threshold determination" of whether a ballot proposal was proper, and in turn, the Secretary of State and Board of Canvassers had a clear legal duty to act in compliance with the court's determination. *Id*. at 291. The Secretary's and Board's actions in compliance with the court's ruling would be ministerial. *Id*.

This Court entered a writ of mandamus preventing the amendment from appearing on the ballot. Thus, the courts can issue a mandamus when there has been a foundational failure to act in compliance with the 1963 Constitution.[4]

[4] In denying leave to appeal, the Michigan Supreme Court agreed that the issuance of mandamus was proper, but some members of the Court differed on the basis of the constitutional violation. *Citizens Protecting Michigan's Constitution v Secretary of State*, 482 Mich 960 (2008).

While it is Plaintiff's' argument that she is not an employee of the State or the MHBCCC and therefore cannot be a public-sector employee, mandamus has been issued in employment cases. In *Locke v Macomb County*, 387 Mich 634 (1972), a deputy sheriff was suspended while awaiting the outcome of a criminal trial concerning his alleged filing of a false police report. When he was acquitted, the deputy sought reinstatement, which the county refused to grant. The Michigan Supreme Court held it proper to issue a writ of mandamus requiring that the deputy be rehired. Similarly, in *Van Antwerp v Detroit*, 47 Mich App 707 (1973), this Court held that a retiree who had a "matured right" to a pension could enforce that right via a writ of mandamus when a city sought to lessen the pension payments the retiree was to receive.

Regarding payments generally, in *Zelenka v Wayne Corporate Counsel*, 143 Mich App 567 (1985), this Court held that it could properly issue a writ of mandamus against a County Board of Commissioners in order to enforce the payment of an amount agreed to in a settlement. In *Belding v Ionia County Treasurer*, 360 Mich 336 (1960), the Michigan Supreme Court held mandamus against a county treasurer was proper to obtain a correct apportionment of penal fines being distributed to various localities. The court held that payment of the proper amount was a ministerial function. *Id*. at 342. *In Kosa v State Treasurer*, 408 Mich 356 (1980), the Michigan Supreme Court held that a writ of

mandamus issued in a case involving an "unconstitutional diversion of monies" was proper. *Id*. at 383.[5]

Here, Plaintiff seeks payment of amounts she earned by providing day care services to low-income parents. Having completed that service and thus being entitled to payment from the parents, Plaintiff finds that the state, which has agreed to subsidize the parents' child care payments, is now paying Plaintiff only a portion of the cost, citing a "collective bargaining arrangement" that is entirely without legal merit. Plaintiff seeks a writ of mandamus to prevent the unconstitutional diversion of the subsidy payments legally due to Plaintiff.

3. "Necessity" of Third Party

Defendants claim that this Court does not have jurisdiction to hear an original action under MCR 7.203(C)(2) and MCR 3.305(A)(1) once "necessary parties" who are not state officers are added. Defendants suggest "there must be a determination of legal obligations and legal rights of [MHBCCC], [CCPTM, its members] and MERC relative to union representation and the terms of the collective bargaining agreement." Defendants claim MERC's certification of CCPTM and the "collective bargaining agreement" between CCPTM and MHBCCC are both challenged and that providing Plaintiffs' relief "may violate the legal rights of the home-based child care providers who voted in favor of union representation."

[5] The court suspended the writ not because mandamus was an improper remedy for an unconstitutional diversion of monies, but rather because the passage of legislation had ended the diversion. *Kosa*, 408 Mich at 383.

MCR 3.305(A) states:

> (A) Jurisdiction.
>
> (1) An action for mandamus against a state officer may be brought in the Court of Appeals or the circuit court.
>
> (2) All other actions for mandamus must be brought in the circuit court unless a statute or rule requires or allows the action to be brought in another court.

In essence, Defendants argue that this Court is stripped of jurisdiction to hear an original action any time there is a defendant who is not a "state officer."[6] Even accepting that the parties Defendants claim are "necessary" are actually so, Defendants fail to recognize that MCR 3.305 has a more plausible reading – that it is only where defendants involve no "state officers" that mandamus must be brought in the circuit court.

Defendants contend that MHBCCC, CCPTM, and MERC are necessary parties under MCR 2.205 and that this fact deprives this Court of original jurisdiction. This arguments directly contradicts this Court's ruling in *Citizens Protecting Michigan's Constitution*. In that case, a ballot question committee "Reform Michigan Government Now" (RMGN) was formed, and it circulated a proposed constitutional amendment. *Citizens Protecting Michigan's Constitution*, 280 Mich at 275. A second ballot question committee "Citizens Protecting Michigan's Constitution" filed suit solely against the Secretary of State and Board of Canvassers, both "state officers," to prevent the proposed amendment from being placed on the ballot. *Id*. at 275, 278. RMGN was not named in the complaint, and it sought to intervene. This Court allowed permissive intervention and

[6] It is unclear why Defendants include MERC in this argument as it is clearly a state entity and its inclusion as a party would not deprive this Court of original jurisdiction even under Defendants' theory.

aligned RMGN as a defendant. *Id*. at 279. The Attorney General was granted permission to file a brief as amicus curiae due to his "independent obligation as a state officer to protect and defend the constitution." *Id*.

Under Defendants' theory, as soon as RMGN was added as a defendant, this Court should have dismissed that action for lack of jurisdiction. Subject matter jurisdiction cannot be enlarged by the courts or by consent of the parties. *In re Hatcher*, 443 Mich 426, 433 (1993). Jurisdictional defects may be raised at any time, even on appeal. *Polkon Charter Twp v Pellegrom*, 265 Mich App 88, 97 (2005). Courts are required to question their own jurisdiction sua sponte. *Straus v Governor*, 459 Mich 526, 532 (1999). Yet at no point during the pendency of *Citizens Protecting Michigan's Constitution* was the jurisdiction of this Court questioned by either its own panel or any member of the Michigan Supreme Court in denying leave to appeal.

Secretary of State v Department of Treasury, 113 Mich App 153 (1982) vacated on other grounds 414 Mich 874 (1982), provides further support for the conclusion that the addition of non-state officers does not destroy original jurisdiction in this Court. In that case, the Secretary of State filed an original mandamus action at this Court against the Department of Treasury, and a number of entities relating to county roads – none of which were "state officers" – were allowed to intervene. Similarly, in *People ex rel Oakland County Prosecuting Attorney v State Bureau of Pardons and Paroles*, 78 Mich App 111 (1973), when a county prosecutor filed an original action in this Court seeking to nullify a grant of parole, the parolee was allowed to intervene as a defendant. It is

difficult to think of a party more necessary to an action than an individual who might be returned to prison if the requested relief was granted, yet the parolee's inclusion in the case did not deprive this Court of jurisdiction.

Assuming that Defendants' cursory argument is correct that other parties need to be added to this action, MCR 2.207 indicates that those parties may be added. The rule states in pertinent part:

> Misjoinder of parties is not a ground for dismissal of an action. Parties may be added or dropped by order of the court on motion of a party or on the court's own initiative at any stage of the action and on terms that are just.

MCR 2.207. As noted above, Plaintiffs seek to have this Court enter an order allowing Defendants and any proper intervenors to respond to the merits by a date certain. It is fairly likely that should this Court enter such an order, the entities that Defendants mention would seek leave to intervene. Alternatively, this Court could choose to order any entity it deemed necessary into the case.

Further, none of the parties mentioned is necessary to provide Plaintiff's requested relief. Defendants contend that the MERC certification is being challenged, but what Plaintiff's claim actually question is the inclusion in the interlocal agreement of the provision purporting to allow MHBCCC to engage in public-sector collective bargaining with an entity that claims to represent home-based day care providers. Plaintiff is not contending that the election was run improperly, but rather that the election never should have taken place without legislation bringing Plaintiff within

PERA. Defendants also claim that the "collective bargaining agreement . . . requires DHS to deduct the union dues from the subsidy checks." Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 10. But Defendants are not a party to the purported collective bargaining agreement; only MHBCCC and CCPTM are. Since Plaintiff cannot be made subject to collect bargaining absent a proper act of the Legislature, the only relevant parties are Defendants, who pay the subsidy, but who are illegally diverting a portion of it and Plaintiff, who seeks the full amount of the subsidy.

This Court has jurisdiction of this original action and will retain that jurisdiction even if a defendant who is not a state officer intervenes or is joined.

4. Exhaustion

Defendants contend that to the extent that this is an unfair labor practice charge, it should have been brought at MERC. What Defendants did not do is address either of the cases cited in Plaintiff's brief accompanying the complaint and showing MERC has no subject matter jurisdiction over private employees. *Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 637 (2003) ("PERA is directed at *public* rather than *private* employees and it indicates no intent to regulate the labor relations of public employers generally."); *Prisoners' Labor Union v Dep't of Corrections*, 61 Mich App 328, 330 (1975) ("It is undisputed MERC has jurisdiction over the inmates' claims if, and only if, those inmates are 'public employees' within in the meaning given that term in [the Public Employment Relations Act]."). Defendants make no attempt to show that Plaintiff is a public employee covered by PERA and therefore subject to MERC.

Conclusion

As noted above, Plaintiff recognizes that this Court will likely hold that the public-employee issue has not been waived, despite Defendants' failure to engage it. It is the central question in this lawsuit, and this Court will probably wish to have before it Defendants' arguments on the merits before entering Plaintiff's requested relief. Thus, under MCR 7.206(D)(3), Plaintiff requests that this Court resolve Defendants' motion by entering an order dismissing the first three defenses, allowing Defendants and any proposed intervenors to address the merits by a date certain, and then setting this matter for a single oral argument on the Defendants' fourth defense, which when properly developed will essentially present the same legal question posed by a straightforward argument of the merits of the case.

Respectfully submitted,

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Dated: October 28, 2009