STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR, MICHELLE BERRY,
and PAULETTE SILVERSON

Plaintiffs, 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

_____/

**PLAINTIFFS' MOTION FOR RECONSIDERATION**

Patrick J. Wright (P54052)
MACKINAC CENTER LEGAL FOUNDATION
Attorney for Plaintiffs
140 West Main Street
Midland, MI 48640
(989) 631-0900

## Facts and Procedure

Plaintiffs Sherry Loar, Michelle Berry, and Paulette Silverson[1] are three home-based day care providers who tend children of parents who qualify for state day care subsidies. Plaintiffs filed a complaint for mandamus seeking to stop Defendant Department of Human Services (DHS) and its director, Defendant Ishmael Ahmed, from diverting "dues" to a union, Child Care Providers Together Michigan (CCPTM), since the DHS does not have the constitutional authority to reclassify home-based day care providers, who are business owners and independent contractors, as government employees.

In 2005 and 2006, there appears to have been a union-driven, multistate movement to organize day care providers. In Michigan, that effort began with an attempt to organize the providers directly against the DHS. That effort fizzled. Soon thereafter, a novel method was deployed.

The legal impediments that led to the development of this novelty were discussed in an illuminating article by the National Women's Law Center. As the article noted, "home-based providers do not easily fit into a legal status that permits them to unionize" since they "are either independent contractors — self-employed business owners — or, in the case of a small number of . . . providers who are providing care in a child's home, [are] otherwise not in an employer-employee relationship." Deborah Chalfie, et al, Getting Organized: Unionizing Home-based Child Care Providers 6-7 (2007). Given the lack of a traditional employer-employee relationship, organized labor developed a new model, which "used the provider's relationship with the state — receipt of payment from

[1] This suit was originally filed by Loar and Dawn Ives. Ives has since been dismissed without prejudice. Berry and Silverson were added as plaintiffs as part of an amended complaint.

the state under a program administered by the state — as the nexus to find or fashion an 'employer of record' with whom to bargain." *Id*. at 7.

In Michigan, an "employer of record" — the Michigan Home Based Child Care Council (MHBCCC) — was created through an interlocal agreement[2] between the Department of Human Services and Mott Community College. That document professed to give the MHBCCC the "right to bargain collectively and enter into agreements with labor organizations." It also stated, "[MHBCCC] shall fulfill its responsibilities as a public employer subject to 1947 PA 336, MCL 423.201 to 423.217 [Public Employment Relations Act]." Complaint, Exhibit 8 at § 6.10.

In a striking concession, Defendants flatly admit that the DHS did not have the power to grant collective bargaining authority: "[Plaintiffs claim] that DHS gave the [MHBCCC] the 'power to collectively bargain.' . . . DHS did not — indeed *could not* — grant MHBCCC the power to collectively bargain."[3] Defendants' Reply to [Plaintiffs'] Brief in Support of Answer to Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at 1 (emphasis in original). At no point in this litigation have Defendants squared their statement that the DHS could not grant the MHBCCC collective bargaining power with the fact that in the interlocal agreement, the DHS attempts to do just that.

---

[2] Plaintiffs argued the Michigan Constitution requires the involvement of at least two local governments in an interlocal agreement; here, there was only one (and the state). Hence, Plaintiffs contend the document does not constitute a valid interlocal agreement.

[3] To be clear, the following was Plaintiffs' exact language in their answer to Defendants' motion to dismiss: "[Plaintiffs contend] 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." In other words, the DHS "gave" a power that it never had.

Defendants did not make this admission until late in the legal process. Their initial response to the complaint was a motion to dismiss on grounds that Plaintiffs' six-page, forty-six-paragraph complaint and forty-seven-page brief in support did not provide enough detail to allow Defendants to comprehend the nature of the complaint. Further, Defendants claimed that this Court lacked jurisdiction to hear this matter, as the MHBCCC, CCPTM and other "necessary parties" were not named as defendants. Perhaps aware that they would have to admit that the DHS overstepped its bounds in granting the MHBCCC collective bargaining power, Defendants did not make any defense on the substantive merits of Plaintiffs' claims. It was not until their reply brief that Defendants admitted that they lacked the power to grant collective bargaining power to the MHBCCC.

On December 30, 2009, this Court entered an order, which stated in pertinent part: "The complaint for mandamus is DENIED." It is this order that Plaintiffs seek to have reconsidered. Per MCR 7.215(I), a copy of the order is attached.

**Standard of Review**

Motions for reconsideration are subject to MCR 2.119(F)(3), which generally prohibits presentation of the same issues ruled on by the court. A "palpable error" that needs to be corrected must be shown.

**Analysis**

In *Anderson v Hayes*, 483 Mich 873 (2009), Justice Markman chastised a trial court for making a valuation determination in a single sentence without discussing the rationale for the decision. He indicated that in order for appellate courts to do their job, the reviewing court must have some inkling of the lower court's reasoning:

> [T]he judicial process is largely a process of analysis, not of results. Both the parties and reviewing judges in the appellate process are entitled to something more on the part of the trial court than a conclusory statement.
>
> . . . Although a trial court is, of course, not obligated to comment on every matter in evidence, it is obligated, I believe, to explain at least minimally its decisions on the principal issues before it. Here, the trial court's single sentence of non-explanation did not satisfy this obligation. For these reasons, I would remand this case to the trial court for it to explain the rationale for its decision.

*Id*. (Markman, J., dissenting from denial of leave to appeal; emphasis added).

In *Citizens Protecting Michigan's Constitution v Secretary of State* 482 Mich 960 (2008), Justice Kelly — now Chief Justice Kelly — indicated that the courts have a duty to Michigan's citizens to provide guidance on important constitutional questions. A decision that offers no guidance on "essential questions" is in fact neglecting the courts' "duty to the citizens of Michigan to serve as the final arbiter of the law." (Kelly, J., dissenting from denial of leave to appeal).

Const 1963, art 6, sec 6, addresses the need for a court of the first instance to provide an opinion, even though this guidance is binding only on the Michigan Supreme Court. It states:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

The predecessor to that provision, Const 1908, art 7, sec 7, stated:

> Decisions of the supreme court, including all cases of mandamus, quo warranto and certiorari, shall be in writing, with a concise statement of the facts and reasons for the decisions; and shall be signed by the justices concurring therein. Any justice dissenting from a decision shall give the reasons for such dissent in writing under his signature. All such opinions shall be filed in the office of the clerk of the supreme court.

*Id*. (emphasis added). The Address to the People explained the changes from the 1908 Constitution to the 1963 Constitution:

> This is a revision of Sec. 7, Article VII, of the present constitution. The reference to "prerogative writs" replaces the list of historic writs contained in the present document. The proposed section continues the requirement of written opinions with a statement of facts and reasons for each decision. The final sentence requires a statement of reasons for all dissents whether in whole or in part.
>
> The eliminated language of the present constitution requiring signature on opinions and their filing is regarded as excess verbiage. The practice is well established and it appears unnecessary to encumber the constitution with this requirement.

2 Official Record, Constitutional Convention 1961, pp. 3355, 3385. Hence, the term "prerogative writs" was meant to include all "historical writs" listed in the 1908 constitutional provision — including the writ of mandamus.

Much of the debate of Const 1963, art 6, sec 6, centered on requiring the Michigan Supreme Court to explain its reasons for denying leave to appeal. Some delegates thought each litigant deserved at least a cursory explanation of the Michigan Supreme Court's denial, and others thought it would decrease the utility of the newly created Court of Appeals, which was intended in part to handle some of the less important cases and issues needing review. The group advocating a written explanation on all writs, decisions, and applications for leave to appeal prevailed.

Regardless of their views on the issuance of written Supreme Court opinions, the delegates assumed that the Court of Appeals would issue written opinions on all such matters. Delegate Danhof, the chair of the Committee on the Judicial Branch at the Constitutional Convention, noted that the new Michigan court system would mirror the federal system, and that at the Court of Appeals, a party "will get a written decision." 1 Official Record, Constitutional Convention 1961 p. 1295. In arguing that an explanation

for a denial of an application for leave to appeal was not necessary, he stated: "Now, if the court says your leave is denied, it very adequately means that the court of appeals becomes your court of last resort, and the decision therein written . . . will passively become the law of the state of Michigan." *Id*. Delegate Iverson, who was arguing against a written explanation for the denial of leave to appeal, stated: "Has anyone any doubt in this room that on any appeal as a matter of right to the court of appeals, that there would not be a written opinion?" *Id*. at 1299.[4]

During these debates about providing reasons for denying leave to appeal, writs of mandamus were discussed at length. *Id*. at 1301. Delegate Mahinske indicated that it was proper to include writs of mandamus among the writs requiring a statement of the facts and reasons for the decision because at the time, the Michigan Supreme Court had original jurisdiction over such matters. *Id*. at 1303. The obvious implication is that courts of the first instance are supposed to supply the facts and reasons for their result.

The constitutional provisions that created the Court of Appeals were debated at the convention after the deliberation over what would become Const 1963, art 6, sec 6. The issuance of opinions at the Court of Appeals appears to have generated no discussion because the delegates presumed the court would always issue such opinions whenever there was either an original action or an appeal by right.

Since its creation, this Court has developed a practice of dismissing many original actions for writ of mandamus in one-sentence denials. This custom may have arisen because mandamus requests often occur immediately prior to elections and could affect the composition of the ballot. In many cases, this Court may have felt it expedient to

[4] One delegate seemed to assume that while the Court of Appeals would issue written decisions, the delegates were not "anticipating intermediate court's opinions being printed." 1 Official Record, Constitutional Convention 1961 p. 1296.

decide the controversies quickly in order to provide the Michigan Supreme Court time to act if it chose. But such concerns do not arise in this case. This Court had — and still has — sufficient time to explain its rationale.

By not providing reasons for its decision, this Court fails to fulfill the principal purpose it was created for — to lessen the work of the Michigan Supreme Court. By making the Michigan Supreme Court review this case blind, this Court is making that body start from scratch, with no notion of the issues this Court found dispositive. This means the Michigan Supreme Court is not free simply to provide a focused analysis of the key issues in the case; instead, it must review the entire case to determine the key issues before making its determination. If, as is likely, the Michigan Supreme Court were to remand this case and order this Court to issue an opinion, the Michigan Supreme Court would necessarily have to engage in a second round of staff time and Justice review when whoever loses this important public policy dispute files leave to appeal.

This Court previously dismissed a complaint for mandamus filed directly with it by a memorandum order, and the Supreme Court ordered that the case be remanded for an opinion. *Michigan United Conservation Clubs v Secretary of State*, 463 Mich 1009 (2001).[5] The complaint in that case was filed with this Court on March 23, 2001, and concerned the plaintiffs' request that the Secretary of State reject a referendum on recent legislation that transformed Michigan into a "shall issue" state regarding concealed weapons permits. Plaintiffs claimed that an appropriation passed in that legislation prevented that act from being subject to a referendum under Const 1963, art 2, sec 9.

On April 9, 2001, seventeen days after the case was filed, this Court entered an order that while short, provided a hint of this Court's reasoning:

[5] The Court of Appeals' panel in that case included a member of the instant panel.

> Pursuant to MCR 7.206(D)(3) the complaint for mandamus is DISMISSED on the ground that the matter is not ripe for this Court's consideration. The Board of State Canvassers has not completed its canvass of the referendum petitions. MCL 168.479.

An order of the Michigan Supreme Court on April 30, 2001, indicated that this Court erred about the case's ripeness. Tellingly, instead of deciding the merits in the first instance itself, the Michigan Supreme Court remanded the action to this Court "for plenary consideration of the complaint for mandamus." On May 16, 2001, sixteen days after the Michigan Supreme Court's remand order, this Court issued a seven-page opinion on the merits.[6]

MCR 7.302(B)(2) and (3) set forth grounds on which the Michigan Supreme Court can grant leave to appeal, and they help explain why the Michigan Supreme Court would have been interested in the *Michigan United Conservation Clubs* case:

> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence[.]

The *Michigan United Conservation Clubs* case dealt with an important public policy matter that had generated significant publicity and involved a novel constitutional question. Similarly, *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273 (2008), an original action for mandamus, generated a twenty-page opinion from this Court less than one month after that complaint was filed. That case, too, generated significant publicity and concerned a novel constitutional question.

---

[6] The Michigan Supreme Court reversed this opinion on June 29, 2001. *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359 (2001).

The instant case has received tremendous publicity.[7] Further, the suit is against a state agency. The instant case directly involves the propriety of a state executive agency diverting $3.7 million from a state and federal program meant to help low-income parents obtain child care while they work. In addition, this case raises the fundamental constitutional question of whether an executive agency — and by extension, the governor — has unconstitutionally usurped legislative power through an abuse of the interlocal agreement process. Clearly, this case meets the criteria of MCR 7.302(B)(2) and (3).

Nevertheless, this Court entered a one-sentence order dismissing the complaint 105 days after the complaint was filed. Given judicial precedent and the Michigan Constitution, the Plaintiffs and the Michigan Supreme Court are entitled to "something more . . . than a conclusory statement," to use the words of Justice Markman.

This Court's failure to explain its rationale is exacerbated by the Defendants' failure to address the merits of the case. The dismissal order not only deprives the Michigan Supreme Court and the Plaintiffs of this Court's rationale; it deprives the Michigan Supreme Court of an understanding of the Defendants' arguments on the merits.

For example, mandamus has four elements:

> (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.

---

[7] The case has been featured in *The Wall Street Journal*, *The Weekly Standard*, and *The Washington Times*. Locally, it has been featured in *The Detroit News*, *Detroit Free Press*, *Lansing State Journal*, *Flint Journal*, *Livingston Daily*, *Petoskey News-Review*, and other papers around the state. The undersigned has been interviewed on News/Talk 760 WJR Radio in Detroit several times about it and has also been interviewed by Channels 2, 7 and 56 in Detroit; Channels 12 and 25 in Flint; Channel 5 in Saginaw; and Channels 6 and 10 in Lansing. Plaintiffs recognize that "significant public interest" is a somewhat abstract concept, but media coverage seems like a reasonable means of measuring such interest.

*Citizens Protecting Michigan's Constitution*, 280 Mich App at 284. Defendants' admission cedes the first and second elements. The third element is also satisfied: The issuance of a check is plainly a ministerial act, and the Michigan Supreme Court ruled in *Kosa v State Treasurer*, 408 Mich 356 (1980), that it was proper to issue a writ of mandamus related to "unconstitutional diversion of monies." *Id*. at 383. Finally, no other remedy exists that would prevent the illegal diversion. If this Court disagrees with any of the above statements, it is incumbent on it to explain why.[8] Failure to do so constitutes "palpable error" that needs to be corrected.

**Relief Requested**

For the reasons set forth above, Plaintiffs request that this Court order Defendants, and any potential intervenors or amici, to address the merits of this action. Plaintiffs also request that this Court set a schedule for oral argument and then issue a written opinion explaining the facts and legal rationale behind its decision.

Respectfully Submitted,

_____
Patrick J. Wright (P54052)
Attorney for Plaintiffs

Dated: January 20, 2010

[8] It would further be appropriate for this Court to explain how the instant case differs from *Michigan United Conservation Clubs* and *Citizens Protecting Michigan's Constitution*, both of which are analogous to the instant case, and both of which eventually generated opinions from this Court.

There is also a question of whether this Court's dismissal is on the merits or jurisdictional. That matters for determining the res judicata effect of the order. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 381-82 (1999). In the instant case, this Court mooted Defendants' motion to dismiss, which included a jurisdictional defense, but perhaps this Court relied on a separate jurisdictional argument. The order provides no clarity on this matter.