State of Michigan
Court of Appeals

Committee to Ban Fracking in Michigan
and LuAnne Kozma,
Plaintiffs-Appellants

v

Christopher Thomas, Director of Elections;
Ruth Johnson, Secretary of State; and
Board of State Canvassers,
Defendants-Appellees
_____/

Court of Claims Case # 16-000122-MM
CA Case # 334480
CA Decision 3/14/17

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Motion and Brief for Reconsideration

I. Proceedings

Plaintiffs-appellants brought this action on June 1, 2016, seeking a declaratory judgment as to the constitutionality – under the enabling language of the Michigan

constitution for statutory initiatives[1] – of MCL 168.472a's regulation of the timeframe within which voter signatures may be counted.

On August 8, 2016, the court of claims granted summary disposition under MCR 2.116(C)(8), upon finding no actual controversy to have surfaced in advance of plaintiffs filing their petition and defendants' refusal (which the challenged statute requires) to count 180-day-old signatures. The suit was held unripe.

On March 14, 2017, this court entered an unpublished decision affirming the lower court.

II. Standard of review

The grant or denial of a timely motion for reconsideration is a matter of discretion.[2] Generally, the moving party must demonstrate a palpable error by which the court has been misled and that correction of the error would warrant a different disposition of the decision entered.

III. Argument

A. The court based its ripeness evaluation on a critical misunderstanding as to the nature of the underlying controversy.

In accordance with the declaratory judgment rule,[3] the court observed that the

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1 Const 1963, art 2, § 9.

2 *Kokx v Bylenga*, 241 Mich App 655, 658; 617 NW2d 368 (2000) (citing MCR 2.119(F)(3)).

3 MCR 2.605.

ripeness of plaintiffs' declaratory judgment action hinges on whether their constitutional challenge presents an actual controversy.[4] However, at the root of its reviewability determination, the court applied this standard to a substantially different question than that presented by the complaint.

In finding that no actual controversy has surfaced over the constitutionality of MCL 168.472a, the court grounded its reasoning on the assumption that plaintiffs seek a declaratory ruling on whether the difficulty of satisfying the statute's signature time window rises to the level of an "*undue burden* on their ability to obtain the required number of signatures."[5] In other words, the court found that no controversy over the *weight* of burden imposed by 472a could be mature before such a burden has come to fruition.[6]

But in contrast to the court's understanding, the complaint does not charge that MCL 168.472a renders the statutory initiative process unduly burdensome. As masters of their complaint, plaintiffs seek no evaluation of the weight of that burden. Indeed if they did, the court's ripeness ruling would be reasonably founded.

Rather, regardless how due or undue the burden may be, the complaint charges that the legislature overstepped its constitutional powers by grafting *any* procedural requirement onto the process for invoking a statutory initiative.[7] Relying on the holding

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4 Opinion, at 3-4.
5 *Id*. at 2, 3 (emphasis added).
6 *Id*. at 4.
7 Complaint ¶ 1.

of *Wolverine Golf Club* as to the "self-executing" nature of the constitutional enabling language,[8] plaintiffs charge that MCL 168.472a unconstitutionally infringes on the statutory initiative process.[9]

In addition to controlling the underlying legal question, *Wolverine Golf Club* illustrates *concretely* that plaintiffs' complaint presented a live controversy when it was filed. In reviewing the plaintiffs' challenge to MCL 168.472 (which required statutory initiative petitions to be filed not less than ten days prior to the start of a session of the legislature), *Wolverine Golf Club* observed that the plaintiffs brought their action *prior to* having submitted any petition. Why did the plaintiffs there sue before filing? Because acting "to tender any petitions would have been fruitless in light of the defendant's *stated intention* to reject them" for noncompliance with the challenged statutory requirement.[10] Accordingly, in consideration of the plaintiffs' choice to fashion their complaint as a mandamus action, the court observed that, "[u]nder this circumstance" of commencing their challenge prior to submitting a petition, "it might be argued that a suit for a declaratory judgment would have been a more appropriate form of action than a suit for mandamus."[11]

Plaintiffs here have done exactly what *Wolverine Golf Club* recommended: a suit

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8 Const 1963, art 2, § 9; *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971); see complaint, ¶¶ 25, 38.

9 384 Mich at 466.

10 *Id*. at 464 (emphasis added).

11 *Id*.

for declaratory relief prior to filing signatures.

This court's March 14 opinion observes that:

> the essential requirement of the term "actual controversy" under the declaratory judgment rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.[12]

But amid the controversy centering on the legislature's very authority to govern the procedural process with which plaintiffs must comply, it follows plainly that such a point of sharpening is reached once plaintiffs have entered the scope of the statute's regulation.

Failure to recognize that is the "palpable error" which this motion seeks to correct.

Indeed, in 1986 the supreme court construed the old iteration of MCL 168.472a[13] to constitute a regulation on the *pre-filing* process of petition signature collection.[14] Plaintiffs expect defendants will try erroneously[15] to rely on this ruling when a court reaches the merits here. But in upholding the statute as applied (unlike here) to constitutional initiative petitions, *Consumers Power* based its holding directly on the constitution's enabling language for that type of initiative, which provided:

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12 Opinion, at 4 (brackets omitted) (quoting *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 n 20; 792 NW2d 686 (2010)).

13 Prior to its amendment last year, MCL 168.472a permitted rebuttal of the "stale and void" presumption for signatures older than 180 days. See complaint ¶ 1.

14 Constitution article 12 section 2; *Consumers Power Co v Attorney General*, 426 Mich 1, 6; 392 NW2d 513 (1986); see *id*. at 9.

15 The constitution contains no similarly authorizing language for statutory initiative petitions under article 2 section 9 – consistent with its distinct purpose as "a reservation of legislative authority which serves as a limitation on the powers of the Legislature." *Woodland v Citizens Lobby*, 423 Mich 188, 215; 378 NW2d 337 (1985).

authoriz[ing] the Legislature to prescribe by law for the *manner of signing and circulating petitions* to propose constitutional amendments.[16]

Whether plaintiffs' immediate manner of circulating and signing their statutory initiative petition must conform to the prescription of MCL 168.472a is the essence of the controversy here.

B. The decision cannot be reconciled with *UAW v Central Michigan University Board of Trustees*.

At oral argument on March 7, 2017, plaintiffs' counsel offered a detailed comparative summary of the background and holding of this court's published decision in *UAW v Central Michigan University Board of Trustees*.[17] Though the court declared from the bench that the panel will review that case before reaching a decision here, the court's decision provides no reference to *UAW v CMU*.

Plaintiffs fully respect the court's prerogative to determine what authority it finds most suitable to address. But we submit that there appears to be no way that *UAW* and the decision here can be read together consistently. In addition to the far more concretely developed injury seen here, this court's construction that plaintiffs' challenge can only reach the level of an actual controversy upon sustaining the injury of the challenged statute's direct enforcement reflects a fundamental conflict with the declaratory judgment rule's purpose of enabling litigants "to obtain adjudication of

16 Emphasis added.
17 295 Mich App 486; 815 NW2d 132 (2012).

rights *before an actual injury occurs*, to settle a matter *before it ripens into a violation of the law.*"[18]

IV. Conclusion

Wherefore, plaintiffs respectfully request that the court grant this motion and remand the case for further proceedings in the court of claims.

Respectfully submitted,

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Dated: April 4, 2017

18 *Id*. at 496 (emphasis in original).

Proof of Service

I hereby certify that on April 4, 2017, I electronically filed the foregoing motion and following appendix with the Clerk of the Court, using the Truefiling system, which will provide electronic service to all counsel of record for appellees.

/s/ *Matthew Erard*
Matthew Erard

APPENDIX

PER CURIAM OPINION ENTERED MARCH 14, 2017

STATE OF MICHIGAN

COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN and LUANNE KOZMA, Plaintiffs-Appellants, v DIRECTOR OF ELECTIONS, SECRETARY OF STATE, and BOARD OF STATE CANVASSERS, Defendants-Appellees.	UNPUBLISHED March 14, 2017 No. 334480 Court of Claims LC No. 16-000122-MM

Before: CAVANAGH, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendants' motion for summary disposition and dismissing plaintiffs' complaint for injunctive and declaratory relief challenging the constitutionality of MCL 168.472a, which requires signatures on initiative petitions be made within 180 days of their filing. We affirm.

Plaintiff Committee to Ban Fracking in Michigan (CBFM) is engaged in a statutory initiative campaign that seeks to include a ballot option to ban horizontal hydraulic fracturing, which is commonly known as "fracking."[1] Plaintiff Luanne Kozma "directs the campaign." Plaintiffs sought to have the issue on the 2016 ballot and, on April 14, 2015, the Board of State Canvassers approved the form of CBFM's initiative petition. On May 22, 2015, plaintiffs began circulating their petitions and collecting signatures. By November 18, 2015, the 180th day, plaintiffs had collected over 150,000 signatures—but that was less than the required number of 252,523.[2] By June 1, 2016, the deadline for filing initiative petitions for the November 2016

[1] Article 2, § 9 of the Michigan Constitution provides: "The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . ."

[2] As set forth in Article 2, § 9 of the Michigan Constitution, the required number of registered voter signatures is "not less than eight percent for [an] initiative . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected[.]"

ballot, plaintiffs had over 207,000 signatures—but, again, that was less than the required number.[3] Plaintiff is apparently continuing to collect signatures with the same petition sheets in an effort to have the fracking issue on the November 2018 ballot. Accordingly, on June 1, 2016, plaintiffs filed this action challenging the 180-day rule set forth in MCL 168.472a, which provides:

> The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

Plaintiffs alleged that MCL 168.472a violates Article 2, § 9 of the Michigan Constitution because it restricts the utilization of the initiative petition by placing an undue burden on their ability to obtain the required number of signatures. Thus, plaintiffs requested the court to declare MCL 168.472a unconstitutional and enjoin defendants from its enforcement.

Defendants responded to plaintiffs' complaint with a motion for summary disposition under MCR 2.116(C)(4), (5), and (8). Defendants argued that plaintiffs did not collect the required number of signatures and did not file their petition with the Secretary of State; thus, no actual controversy existed from which declaratory or injunctive relief could be provided. Moreover, plaintiffs lacked standing and the issue—whether MCL 168.472a was constitutional—was not ripe. Simply stated, the challenged statute had not been applied to plaintiffs, accordingly, plaintiffs' claim was premised on hypothetical facts. In effect, then, plaintiffs were seeking an advisory opinion, which the Court of Claims was not empowered to render. Therefore, defendants requested the dismissal of plaintiffs' complaint.

Plaintiffs responded to defendants' motion for summary disposition, arguing that they met the requirements for declaratory relief under MCR 2.605. Plaintiffs asserted that an actual controversy existed because this action was necessary to guide their future conduct and they could demonstrate a substantial interest distinct from the interest of the public, i.e., "the huge logistical effort of assembling, training, and motivating a volunteer team of hundreds of circulators—which will be detrimentally affected in a manner different from the citizenry at large." Moreover, this matter was ripe for adjudication because, considering the number of signatures already collected, they were likely to obtain the rest before the cut-off date. Accordingly, plaintiffs requested the court to deny defendants' motion for summary disposition.

Subsequently, the Court of Claims issued an opinion and order granting defendants' motion for summary disposition. The court noted that it only had authority to enter a declaratory judgment under MCR 2.605 if an actual controversy existed, which plaintiffs failed to establish in this case. That is, plaintiffs did not submit their initiative petition to the Secretary of State and had not even collected the requisite number of signatures. The court recognized that plaintiffs intended to obtain enough signatures for a ballot initiative, but found "their ability to do so is, at most, speculative." The court determined that "[a] declaratory judgment is not necessary to

[3] Pursuant to MCL 168.471, petitions in support of a ballot initiative must be filed at least 160 before the election.

guide plaintiffs' future conduct when, at this point, an application of MCL 168.472a to their efforts would be purely hypothetical." And, for the same reasons, the court concluded, plaintiffs' challenge to the constitutionality of MCL 168.472a was not ripe for judicial consideration. Plaintiffs' claim was contingent on them collecting enough petition signatures and, thus, plainly rests upon a future event that may or may not occur. The ripeness doctrine prevents the adjudication of hypothetical or contingent claims before injury has occurred. Accordingly, plaintiffs' complaint was dismissed. This appeal followed.

Plaintiffs argue that their constitutional challenge to MCL 168.472a presents an actual controversy that is ripe for judicial consideration because a ruling will have a significant effect on their signature collection efforts and it is likely that they will be able to collect the necessary signatures for their ballot initiative. We disagree.

This Court reviews de novo a ruling on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Although the Court of Claims did not indicate under which subrule it was granting defendants' motion for summary disposition, we review this matter as granted under MCR 2.116(C)(8).[4] A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone, determining whether it states a claim upon which relief could be granted. *Id*. We also review de novo the lower court's determination whether an actual controversy exists that is ripe for adjudication. *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013); *Kircher v City of Ypsilanti*, 269 Mich App 224, 226-227; 712 NW2d 738 (2005).

Plaintiffs' complaint sought a declaratory judgment that MCL 168.472a violates Article 2, § 9 of the Michigan Constitution because it restricts the utilization of the initiative petition by placing an undue burden on their ability to obtain the required number of signatures. Thus, consistent with the purpose of a declaratory judgment action, plaintiffs sought a judicial determination on a question of law. See *Health Central v Comm'r of Ins*, 152 Mich App 336, 347; 393 NW2d 625 (1986). And in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), our Supreme Court held that "a litigant has standing whenever there is a legal cause of action;" thus, if plaintiffs meet the requirements of MCR 2.605, they have standing to seek a declaratory judgment. *Id*. at 372.

MCR 2.605 governs declaratory judgments and provides, in pertinent part: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1). In this case, the Court of Claims

[4] This case was not dismissed under MCR 2.116(C)(4) because it was undisputed that the Court of Claims had the right to exercise judicial power over a case of this kind, i.e., had subject-matter jurisdiction. See *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938) (citation omitted). Further, this case was not dismissed under MCR 2.116(C)(5) because there was no allegation that plaintiffs lacked the "legal capacity" to sue, which is not the same concept as "standing," i.e., whether the litigant is the proper party to bring the action. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010).

held that it could not render a declaratory judgment because an actual controversy ripe for adjudication did not exist, which is a necessary precondition for declaratory relief. See *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 127; 715 NW2d 398 (2006). We agree.

The "actual controversy" requirement prevents a court from deciding hypothetical issues. *Shavers v Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978). In *Allstate Ins Co v Hayes*, 442 Mich 56; 499 NW2d 743 (1993), our Supreme Court explained:

> Properly understood, however, the actual controversy requirement is simply a summary of justiciability as the necessary condition for judicial relief. Thus, if a court would not otherwise have subject matter jurisdiction over the issue before it or, if the issue is not justiciable because it does not involve a genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it. [*Id*. at 66 (internal citations omitted).]

Similarly, in *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20, the Court clarified that the "essential requirement of the term 'actual controversy' under the [declaratory judgment] rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." (internal quotation marks and citations omitted). Stated differently, "before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, i.e., a plaintiff must allege and prove an actual *justiciable* controversy." *Shavers*, 402 Mich at 589. But, "[g]enerally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000).

This case does not "involve a genuine, live controversy between interested persons asserting adverse claims," *Allstate Inc Co*, 442 Mich at 66, and the injury that plaintiffs seek to prevent is merely hypothetical, *Citizens for Common Sense*, 243 Mich App at 55. Plaintiffs, in effect, are claiming that they are unable to meet the 180-day rule set forth in MCL 168.472a with regard to their ballot initiative; thus, they filed this action seeking the declaration that the 180-day rule is unconstitutional. But this is not a "genuine, live controversy." This is not a case in which plaintiffs have collected the number of required petition signatures, albeit during a time-frame outside the 180-day rule, filed those petitions at least 160 days before the election, had those petitions rejected by defendants as insufficient, and then had their ballot proposal denied. In fact, defendants had made no adverse claim and had taken no adverse action that impacted plaintiffs' legal rights in any way before plaintiffs filed this action. That is, no controversy between the parties existed. Rather, plaintiffs are projecting that, in the future, if they ever collect the precise number of petition signatures required for their ballot initiative, they will be rejected by defendants because they do not meet the requirements of the 180-day rule. Thus, plaintiffs' claim sets forth a possible—not actual—controversy that may arise in the future which rests upon contingent, uncertain events that may not occur at all and the injury plaintiffs seek to prevent is merely conjectural or hypothetical.

Further, plaintiffs' reliance on the case of *Huntington Woods v Detroit*, 279 Mich App 603; 761 NW2d 127 (2008), is misplaced. In that case, the golf course property that the defendant was in the process of selling was located in the plaintiffs' city and residential subdivision, and was subject to certain deed restrictions that impacted the plaintiffs' own property rights. *Id*. at 606-610. Thus, the parties had clear antagonistic legal interests with regard to the real property at issue which existed *before* the lawsuit was filed, i.e., "adverse claims." In this case, the parties did not have antagonistic legal interests before this lawsuit was filed; defendants had taken no action that impacted plaintiffs' legal rights.

In summary, because no actual controversy ripe for declaratory relief exists, the Court of Claims lacked jurisdiction to issue a declaratory judgment and properly dismissed plaintiffs' complaint.

Affirmed. Defendants are entitled to tax costs as the prevailing parties. See MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Deborah A. Servitto