STATE OF MICHIGAN
IN THE 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 Appeals No. 334480

Court of Claims No. 16-000122-MM

DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION

INTRODUCTION

Plaintiffs-Appellants, Committee to Ban Fracking in Michigan (CBFM) and Luanne Kozma, seek reconsideration of this Court's unanimous opinion upholding the dismissal of their complaint on the grounds that there is no actual controversy. Appellants challenge the constitutionality of a statutory process that prohibits counting initiative petition signatures that are more than 180 days old. But, to date, Appellants have only collected approximately 207,000 signatures – approximately 50,000 short of the bare minimum number required to have the question placed on the ballot. (Opinion and Order, pg 1-2.) So, whether Appellants may obtain an arguably sufficient number of signatures in the future is wholly speculative and hypothetical. As a result, the unanimous decision correctly

concluded that the Appellants' claims were not ripe, and that the case lacked an actual controversy. In its motion for reconsideration, Appellants claim that the Court's decision was based upon palpable error in misapprehending the nature of the claim, but they rely upon arguments that they already raised before this Court—as well as to the Court of Claims. (See e.g. Opinion and Order, pg 2-4; Appellants' Brf on appeal at pp 7, 9-10, and 17.) Because Appellants fail to identify any palpable error and merely raise the same arguments that have already been considered by this Court, their motion for reconsideration should be denied.

STANDARD OF REVIEW

A motion for reconsideration filed in the appellate court is subject to the restrictions contained in MCR 2.119(F)(3). MCR 7.215(I)(1). "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court . . . will not be granted." MCR 2.119(F)(3). The moving party "must demonstrate a 'palpable error' by which the court and the parties have been misled." *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605 (1989), citing MCR 2.119(F)(3).

ARGUMENT

I. Appellants have not demonstrated any palpable error in this Court's decision affirming the Court of Claims' dismissal of the complaint, and instead merely restate arguments that they have already presented.

Appellants' motion raises arguments that they already presented to this Court. Appellants claim that the Court misunderstood the nature of their claims,

but the Court expressly discussed their theory that the Legislature lacked authority to implement procedural requirements on initiative petitions. (Appellants' Brf at pp 7, 9-10, and 17.) This argument was thus presented and rejected by this Court. Appellants have failed to demonstrate that the panel made a palpable error by which the Court and the parties have been misled as they are required to do. Therefore, the request for reconsideration should be denied.

Moreover, Appellants' argument was simply wrong and cannot form the basis for any "palpable error." Appellants' motion once again focuses on *Wolverine Golf Club v Secretary of State*, 384 Mich 461 (1971) and argues that no limits can be placed upon initiative petitions. This, they claim, would lead to the conclusion that they had presented an actual controversy, and that their case was ripe. However, not only was this argument rejected by this Court's unanimous opinion, Appellants' reliance upon *Wolverine* is misplaced.

In *Wolverine,* the Michigan Supreme Court struck down a requirement that initiative petitions must be filed at least 10 days before the start of the legislative session. There, the Supreme Court held that Const 1963, art 2, § 9 was self-executing, and that the Legislature lacked the power to impose additional restrictions on the exercise of the right of initiative. *Wolverine*, 384 Mich at 466. But the Supreme Court also stated that art 2, § 9's provision that, "the legislature shall implement the provisions of this section" was "a directive to the legislature to formulate *the process* by which initiative petitioned legislation shall reach the legislature or the electorate." *Id.* (emphasis added).

The issue in *Wolverine* was the legislative imposition of an additional restriction on when the power of initiative could be exercised that was not contained in the Constitution itself. The Supreme Court interpreted article 2, § 9's implementation clause as, "a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Id.* After noting that article 2, § 9 was self-executing, the Court quoted, with approval, this Court's earlier decision where it stated, "[t]he only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any *undue burdens* placed thereon." *Id.* (quoting *Wolverine Golf Club v Sec'y of State*, 24 Mich App 711, 725 (1970) (emphasis added) (internal quotations omitted)).

Here, 2016 PA 142 contains no restriction on when Appellants may file their initiative petition, such as what was at issue in *Wolverine.* MCL 168.272a. 2016 PA 142 also does not limit the subject matter of an initiative, or restrict the ability of circulators to engage the electorate in any meaningful way.

This is a far cry from proscribing *any* procedural requirements, as Appellants now urge. (Mot. for Recons., p 3-4.) Rather, MCL 168.472a addresses the validity of petition signatures; a subject that easily fits within the description of "the process by which initiative petitioned legislation shall reach the legislature or the electorate." *Id.* So, the statute is within the scope of the Legislature's constitutional authority under article 2, § 9 to "implement the provisions of this section."

Moreover, the 180-day expiration period for signature validity has been previously upheld by the Michigan Supreme Court in *Consumers Power Co v Attorney General*, 426 Mich 1 (1986). In that case, the Supreme Court overturned an Attorney General Opinion declaring unconstitutional MCL 168.472a's "rebuttable presumption" that petition signatures more than 180 days old were stale and void. *Consumers Power*, 426 Mich at 7-9. That Attorney General Opinion reached the exact conclusion Appellants urge here—that the 180-day period was an unconstitutional limitation on art 2, § 9.

However, the Michigan Supreme Court rejected that conclusion. The Supreme Court observed that the statute did not set a 180-day time limit for obtaining signatures—only that signatures on a petition more than 180 days old were presumed invalid. *Consumers Power*, 426 Mich at 7-8. The Supreme Court's reasoning was that the 180-day period furthered the constitutional requirement that only registered electors may engage in the processes under art 2, § 9. *Consumers Power*, 426 Mich at 7-8.

Appellants attempt to distinguish *Consumers Power* as addressing constitutional amendments under art 12, § 2 instead of initiative proposals under art. 2, §9. However, art 2, § 9 includes a similar requirement that only registered electors may sign petitions:

> *To invoke the initiative* or referendum, petitions signed by a number of *registered electors*, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

Const. 1963, art 2, §9 (emphasis added). The Supreme Court has thus recognized that a similar 180-day signature expiration period is a lawful fulfillment of a constitutional directive that only registered electors may participate in the process. The same conclusion should apply in this case to a similar constitutional requirement that only registered electors may initiate legislation.

Similarly, Appellants contend that this Court failed to consider *UAW v Central Mich Univ Trs*, 295 Mich App 486 (2012). However, this argument also fails to show palpable error, or how the court was misled. Indeed, this case was cited in the briefs by both Appellants and by Defendants-Appellees. (Appellants' Brief, pg 15-16; Appellees' Brief, pg 5). By any reasonable measure, the case was considered. The only argument that appears to be presented suggesting palpable error is that "the court's decision provides no reference to *UAW v CMU*." (Appellants' Br, pg 6.) However, as Appellants further indicate, the court is not required to cite every authority mentioned, and the failure to reference one case does not automatically suggest palpable error.

Additionally, Appellants' reliance upon *UAW* is misguided. *UAW* relied upon the standing requirements established in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), as well as the requirements under MCR 2.605. These are the same requirements that the Court's unanimous opinion relied upon to find that the Appellants here had not established an actual controversy.

Appellants have not demonstrated any palpable error in this Court's opinion. Instead, their motion raises only arguments that have already been presented and

rejected by this Court. Accordingly, the request for reconsideration should be denied.

REQUEST FOR RELIEF

For the reasons discussed above, Appellants' request for reconsideration should be denied as they have failed to demonstrate that in issuing its unanimous opinion, this Court made a palpable error by which the Court and the parties have been misled. Accordingly, the motion for reconsideration should be denied.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Laura Moody (P51994)
Chief Legal Counsel

s/Denise C. Barton
Denise C. Barton (P41535)
Erik A. Grill (P64713)
Joseph Ho (P77390)
Adam Fracassi (P79546)
Assistant Attorneys General
Attorneys for Defendants-Appellees
P.O. Box 30736
Lansing, Michigan 48909
517.373.6434

Dated: April 18, 2017