STATE OF MICHIGAN
COURT OF CLAIMS

Committee to Ban Fracking in Michigan and LuAnne Kozma,

Plaintiffs,

v

No. 18-000-274-MM
Hon. Michael J. Kelly
Filed 12-27-18

Secretary of State Ruth Johnson, Director of Elections Sally Williams, in their official capacities, and Board of State Canvassers,

Defendants.
_____/

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PLAINTIFFS' BRIEF AS TO *RES JUDICATA*

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I. Introduction

The Court has ordered the parties to brief the issue of whether the doctrine of *res judicata* bars the present action.

Plaintiff Committee to Ban Fracking in Michigan's (CBFM) filed statutory initiative signatures on November 5, 2018. The number was 7% over the minimum required as of that date to make the 2020 ballot. They were well vetted, with duplicate and invalid signatures removed.[1] The Secretary of State refused to accept them.

The next day, November 6, CBFM filed an emergency complaint in the Court of Appeals requesting an "immediate writ of mandamus requiring [the Secretary of State] to accept the filing of Plaintiff's petition on today's date,"[2] along with a corresponding emergency motion for same-day immediate consideration. Neither Plaintiff Kozma nor Defendant Board of State Canvassers were parties to that action.

Due to both to the gubernatorial election cycle restriction of MCL 168.473b and the effect of the gubernatorial election vote on the signature threshold for subsequent petition filings, it was imperative for CBFM's petition's date of filing to be no later than that of the November gubernatorial election. Consequently, CBFM narrowly sought such an extraordinary remedy only as an emergency intervention to prevent future controversy over the date of its petition filing. And it

1 Complaint ¶¶ 1, 3; Kozma affidavit, ¶ 16.

2 Emergency complaint for mandamus, 'request for relief,' *CBFM v Secretary of State*, No. 346280 (November 5, 2018) at 8 (emphasis added).

sought no relief beyond that which could be immediately granted on the date of filing.

Because the Court of Appeals did not act on CBFM's complaint and motion on November 6, CBFM's complaint for mandamus became moot on November 7. On November 8, CBFM moved to file an amended complaint, declaring expressly that "the relief originally sought is now moot," and seeking to instead pursue declaratory relief over the status of its November 5 petition filing in lieu of that initially requested.[3]

On November 15, 2018, the Court of Appeals entered a summary order denying both CBFM's motion to amend the mandamus complaint and the then-moot complaint itself.[4] The order did not indicate the basis for the denials nor oblige the Secretary of State's request to rule the matter dismissed with prejudice.[5]

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3 Motion to amend and supplement the complaint, *CBFM v Secretary of State*, *op cit* (November 8, 2018) at 2.

4 *CBFM v Secretary of State*, unpublished order of the Court of Appeals, *op cit*, entered November 15, 2018.

5 *Id*; see Defendants' answer to plaintiff's emergency complaint for mandamus, *CBFM v Secretary of State*, No. 346280 (November 14, 2018) at 5 (requesting the Court to "deny the relief requested and dismiss the complaint with prejudice.").

II. The prior action was not decided on the merits.

In order for the doctrine of res *judicata* to bar a subsequent claim, the prior action must have been decided on the merits.[6] Here, because the prior action was already moot at the time of the Court's order and no basis was provided by the Court for the judgment rendered, the prior action cannot be presumed to have constituted a decision on the merits.

A. Mootness of the Complaint

At the time of the Court of Appeals order on November 15, 2018, the relief requested in CBFM's complaint was not only impossible for the Court to grant, but had been expressly declared to be moot by the petitioner.

Consequently, any finding of such an order to constitute an adjudication on the merits would require this Court to assume that the Court of Appeals acted beyond its jurisdictional limitations. See *City of Novi v Robert Adell Children's Funded Trust*[7] (noting that "a court hearing a case in which mootness has become apparent would lack the power to hear the suit.")

Moreover, in denying CBFM's motion to amend its complaint concurrently with CBFM's original request for mandamus relief, the Court made plainly evident that it had chosen not to exercise review of any claim still subject to justiciable resolution.

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6 *Garrett v Washington*, 314 Mich App 436, 441 (2016).
7 473 Mich 242, 255 n 12 (2005).

B. No Indicated Merits Determination

Although Michigan's appellate courts have not in recent years addressed the effect of summary denials of mandamus on subsequent claims, longstanding Michigan caselaw centering on that question is fully consistent with the "generally adopted [] rule that a denial of a writ of mandamus by a supervisory court, without opinion, is not entitled to preclusive effect."[8] As outlined by our state's Supreme Court:

> It does not follow, because the mandamus was denied, that the court passed upon the merits of plaintiff's application. That mandamus may have been denied because no case was made that appealed to the discretionary power of the court, because relator had a manifest legal remedy of which he could not be deprived, or because mandamus was not the proper remedy. If the mandamus was denied for either of these reasons, no authority need be cited to the proposition that that decision was not *res judicata*. Though the members of this court might ascertain by consulting their own recollections the precise ground upon which that decision proceeded, it is obvious to the slightest reflection that such a course cannot be adopted. We are bound to proceed, in determining this case, on legal grounds.[9]

Even if CBFM's mandamus complaint had not become moot ahead of the Court of Appeals' order, there would still be no indication that the Court's denial of mandamus was not grounded solely on discretionary considerations or the conclusion that such a writ was not the proper remedy. Absent any suggestion by

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8 *Miller Dollarhide, PC v Tal*, 174 P3d 559 (Okla 2006) (citing "Judgment Granting Or Denying Writ Of Mandamus Or Prohibition As Res Judicata," 21 ALR3d 206, 248 (Supp 2003)).

9 *Hoffman v Silverhorn*, 137 Mich 60, 64 (1904).

the Court as to its basis for denying such an extraordinary remedy, the Court's order cannot be regarded as a decision on the merits of the complaint.

III. The matters presented in the instant case could not have been resolved in the prior action.

In addition to relying upon a prior decision on the merits, the doctrine of *res judicata* cannot apply to bar a subsequent claim unless the matters presented in the instant case were, or could have been, resolved in the prior action.[10] Necessarily, such an element requires that the prior action possessed the proper jurisdiction to decide the matters at issue.[11]

In contrast to the Court of Appeals' discretionary original jurisdiction over extraordinary writs, the Court of Appeals has "no original jurisdiction to issue a declaratory judgment."[12] Nor does that Court's general power under MCR 7.216(A)(7) permit it to exercise original jurisdiction over an action for declaratory relief.[13] Consequently, even if CBFM had joined its separate declaratory claims with its emergency complaint for mandamus, such claims would not have been within the scope of the Court of Appeals' original subject-matter jurisdiction to resolve.

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10 *Garrett*, 314 Mich App at 441.
11 See *Stolaruk Corp. v Dep't of Transp*, 114 Mich App 357, 360 (1982).
12 *Musselman v Governor*, 200 Mich App 656, 667 (1993).
13 *Id*.

Moreover, given that CBFM did, in moving to amend its complaint, seek a declaratory ruling that its November 6 tendering of its petition to Defendants constituted filing,[14] it follows plainly that that claim could not have been resolved in the first action by virtue of the fact that its motion to amend was denied without comment.

In contemplating the potential need for plaintiffs seeking mandamus relief to split their causes of action between courts, the section of the statute serving to confer such original jurisdiction further provides:

> The supreme court may provide by rule for the joinder of claims or consolidation of actions in the court of appeals or the circuit court if those claims or actions include a prayer for mandamus against a state officer and arise out of the same circumstances or raise a similar issue of law.[15]

Absent the Supreme Court having acted to adopt such a rule as applied to actions under MCR 7.203(C)(2), it would be neither fair nor consistent with legislative intent to preclude separate actions for relief as though it had.

IV. Defendants have waived the defense of *res judicata*

"The burden of proving the applicability of the doctrine of *res judicata* is on the party asserting it."[16] In their brief on motion for summary disposition,

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14 Motion to amend and supplement the complaint, *CBFM v Secretary of State*, No. 346280 (November 8, 2018) at 2.

15 MCL 600.4401(2).

16 *Garrett*, 314 Mich App at 441.

Defendants affirmatively disclaimed the defense of *res judicata*."[17] True, Defendants have not filed a responsive pleading. But they could hardly reverse themselves now. No new case facts have appeared which might prompt a change of heart, and there have been no new developments in the doctrine of *res judicata* in Michigan since Defendants filed their motion and brief for summary disposition on March 7, 2019.

V. Conclusion and relief requested

Wherefore, Plaintiffs respectfully request that the Court deny Defendants' motion for summary disposition and compel them to answer discovery.

Respectfully submitted,

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17 Defendants' motion for summary disposition at 7 n 2.