STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

SHERRY LOAR, MICHELLE BERRY,
and PAULETTE SILVERSON

Plaintiffs,

Supreme Court No. 140810
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' REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

Mackinac Center Legal Foundation
Patrick J. Wright (P54052)
140 West Main Street, P.O. Box 568
Midland, MI 48640
(989) 631-0900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

ARGUMENT

Defendants' tacit admission that Plaintiffs are not "public employees" invalidates all of their arguments

Defendants' brief in opposition to the application for leave is more noteworthy for what it doesn't say than for what it does. Defendants painstakingly avoid the central question of whether Plaintiffs are public employees or business owners and independent contractors. They do not address whether the interlocal agreement between Defendant Department of Human Services (DHS) and Mott Community College creating the Michigan Home Based Child Care Council (MHBCCC) somehow transformed Plaintiffs from business owners and independent contractors into government employees.[1] Defendants' decision to ignore these fundamental issues amounts to a concession that Plaintiffs are not public employees. Plaintiffs' nonpublic status prevents Defendants from arguing there was an alternative remedy available to Plaintiffs at the Michigan Employment Relations Commission (MERC) and leaves Defendants with no legal basis for their continuing choice to divert so-called "union dues" from Plaintiffs' subsidy checks.

Instead, Defendants begin by attempting to obfuscate the nature of Plaintiffs' claims. Defendants then contend that Plaintiffs had an alternative remedy that they failed to exercise – namely, objecting during the certification proceedings at the Michigan Employment Relations Commission. Also, they contend that other parties are necessary to adjudicate this matter and that this fact should have divested the Court of Appeals of jurisdiction.

These claims crumble upon inspection.

[1] At the Court of Appeals, Defendants already ceded that they could not confer on the MHBCCC the power to collectively bargain. Defendants do not mention that remarkable admission in their brief here.

Defendants' surest means of prevailing in the instant case would be to show Plaintiffs were public employees, either before the interlocal agreement was signed or afterward through implementation of the interlocal agreement itself. Yet nowhere in Defendants' response (or any of their filings at the Court of Appeals) do they make the claim that Plaintiffs are correctly designated as "public employees." The Public Employment Relations Act definition of "public employees," MCL 423.201(1)(e), is not cited in Defendants' brief, nor is a single case regarding the definition of a public employee in Michigan. MCR 7.302 and MCR 7.212(B) afforded Defendants the right to file a fifty-page brief in opposition to this application for leave. Defendants filed a brief that was twelve pages long. One must presume that if there were a good argument that Plaintiffs were actually public employees, Defendants would have used some of their forgone thirty-eight pages to present it. Not to do so would border on malpractice.

Defendants probably recognize that mounting any legal argument that Plaintiffs are public employees is hopeless. Defendant DHS's website is replete with indications that home-based day care providers (comprised of group homes, family homes, relative care providers and day care aides) are not government employees. [2] On its website, DHS has a relative care provider application — last modified in March 2010 — that requires applicants to acknowledge that "I understand that I am considered to be **self employed** and not an employee of DHS."[3] The DHS website also has a day care aide application form — last modified in March 2010 — that requires candidates to certify that:

[2] In brief, the four types of home-based day care providers within the purported "collective bargaining unit" are defined as follows: (1) group homes care for up to twelve kids at the provider's home; (2) family homes care for up to six kids at the provider's home; (3) relative care providers care for relatives' children in the provider's home, which must be different from the children's; and (4) day care aides care for up to four kids at the children's home. The definitions for these can be found in the glossary to DHS's online "Child Development and Care Handbook." http://www.michigan.gov/documents/dhs/DHS-PUB-0230_222206_7.pdf (last accessed May 7, 2010).

[3] http://www.michigan.gov/documents/dhs/DHS-0220-R_194100_7.pdf (emphasis added and last accessed May 7, 2010)

> I understand **the parent/substitute parent is my employer** (not DHS) and is responsible for the employer's share of any employer's taxes that must be paid, such as Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax (FUTA) taxes. My employer (parent/substitute parent) is also required to provide me with a W-2 at the end of the year for tax purposes.[4]

The first page of text in DHS's online "Child Development and Care Handbook"[5] — last revised in April 2010 — states:

> **All child care providers, except for [Day Care] Aides, are self-employed.** This means that the provider runs their own business. **If the provider is an Aide, he/she works for the parent of the child** and is a household employee of the parent under federal law. Under the Fair Labor Standards Act the parent has to pay the employer's share of any employer's taxes that need to be paid, such as Social Security, Federal Insurance Contribution Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes. Parents also have to give a W-2 form at the end of the year to the aide so they can do their taxes.[6]

All of this material on DHS's own website was last revised **after** Plaintiffs filed the instant lawsuit, making it clear that Defendants cannot construct an argument by which Plaintiffs are public employees. If Defendants had even a marginal legal case, the text cited in the paragraphs above could be changed. The persistence of this language despite Defendants' recent modifications strongly implies that Defendants recognize the futility of changing it. Plaintiffs are not public employees, as Plaintiffs' statutory and case law arguments so clearly demonstrate.

Defendants realize that they cannot prevail on the central question of Plaintiffs' employment status, and that they cannot thereby defend DHS against the charge of improperly diverting Plaintiffs' earnings to an unrelated public employees union. So they try to make the case about something else. Yet Defendants' tacit admission that Plaintiffs are not public employees invalidates all of the arguments that Defendants explicitly make.

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[4] http://www.michigan.gov/documents/dhs/DHS-0220-A_194099_7.pdf (emphasis added and last accessed May 7, 2010).

[5] "Child Development and Care" is the name the DHS gives the state's day care subsidy program.

[6] http://www.michigan.gov/documents/dhs/DHS-PUB-0230_222206_7.pdf (emphasis added and last accessed May 7, 2010)

Defendants contend that Plaintiffs "had notice of the representation election and are members of the Union [Child Care Providers Together Michigan (CCPTM)]." Defendants' Brief in Opposition to Application for Leave to Appeal at 8. Then Defendants characterize Plaintiffs' claim of improper diversion of "dues" as one of "unfair labor practice" or a breach of the "duty of fair representation." *Id*. They also contend that Plaintiffs are challenging the composition of the bargaining unit. Defendants argue that all of these issues are within the exclusive jurisdiction of MERC and that Plaintiffs "should have raised these issues *when the case was before MERC or within the appeal period." Id*. at 9 (emphasis in original).

Defendants' reliance on MERC's actions is misplaced. MERC has jurisdiction only over matters involving public employees and therefore lacks jurisdiction over home-based day care providers. Any actions MERC may have taken purporting to bind Plaintiffs to a "collective bargaining representative" are void.

In *Lansing v Carl Schlegel, Inc*, 257 Mich App 627 (2003), the Court of Appeals affirmed MERC's decision that it lacked jurisdiction to decide an unfair labor practice claim brought by a private contractor. The Court first set out the PERA definition of "public employee" found in MCL 423.201(1)(e), which states in pertinent part:

> (e) "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission, or board, or in any other branch of the public service, subject to the following exceptions:
>
> > (i) Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state is not an employee of the state or that political subdivision, and is not a public employee.

Carl Schlegel, Inc, 257 Mich App at 632. The Court of Appeals explained the limits of PERA: "PERA addresses the bargaining rights and privileges of public employees, using the term

'public employee' to distinguish those individuals covered under PERA from private employees." *Id*. at 631. The Court of Appeals noted that the definition of "public employee" had been recently amended to narrow its scope:

> PERA does not similarly address the rights and privileges of private employees or define a "private employee." . . . [T]he legislative history, [Senate Fiscal Agency Bill Analysis, SB 1015, January 30, 1997] indicates that subsection 1(e)(i) was enacted [as part of 1996 PA 543] to further define the limits of PERA's coverage, i.e., to public employees, and to explicitly exclude from coverage workers hired by private entities that contract with the state.

Id. at 632. Further, the Court of Appeals stated "PERA is directed at public rather than private employees and it indicates no intent to regulate the labor relations of public employers generally." *Id*. at 637.

In *Prisoners' Labor Union at Marquette v Department of Corrections*, 61 Mich App 328 (1975), the Court of Appeals held that because prisoners are not "public employees," MERC lacked jurisdiction over a group of prisoners who sought certification as a labor union:

> To include inmates as "public employees" would thus [d]o violence to the reasonable meaning of that term as it is used in PERA. It would also threaten the exclusive jurisdiction granted to the Department of Corrections to control "prison labor and industry." [MCL 791.204]. If the Legislature really intended the Department of Corrections to have [e]xclusive jurisdiction over prison labor, then PERA must be read to accommodate that intent and inmates cannot be public employees subject to the jurisdiction of MERC.

Id. at 336-37.

MERC's lack of jurisdiction over Plaintiffs makes any action it took related to them void. In *Jackson City Bank Trust Co v Fredrick*, 271 Mich 538 (1935), this Court stated:

> When there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist.

Id. at 544-45.

In *Bowie v Arder*, 441 Mich 23, 54 (1992), this Court stated:

> The jurisdiction of a court arises by law, not by the consent of the parties. Parties cannot give a court jurisdiction by stipulation where it otherwise would have no jurisdiction. When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void. Further, a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings.

Id. (citations omitted).

In *Blackburne & Brown Mortgage Company v Ziomek*, 264 Mich App 615 (2004), the Court of Appeals discussed collateral attacks on judgments from other states:

> Although the Full Faith and Credit Clause requires recognition of the judgments of sister states, "collateral attack may be made in the courts of this [s]tate by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it." . . . The United States Constitution does not compel Michigan courts to give a foreign judgment full faith and credit when the jurisdiction of the foreign court has been successfully attacked. . . .

Id. at 620-21 (citations omitted).

Since MERC had no jurisdiction, its certification decision is void. Plaintiffs were under no obligation to appear at MERC and tell that body that it did not have jurisdiction. By not appearing at MERC, Plaintiffs, just like defendants who question the jurisdiction of an out-of-state court and fail to appear there, waive only the opportunity to challenge the merits of the underlying claim. So in the instant case, Plaintiffs cannot argue that there were not enough signatures to start the certification process and cannot challenge the mechanics of the election. Nor can Plaintiffs challenge the issues that Defendants identify: (1) unfair labor practice in certifying union; (2) breach of duty of fair representation in certifying union; or (3) composition of the bargaining unit that was certified. What Plaintiffs can challenge is jurisdiction, and the fact that Plaintiffs are not public employees means that MERC lacked jurisdiction.

Lack of jurisdiction means that MERC's certification of CCPTM as Plaintiffs' collective bargaining agent is void; thus, CCPTM did not have the power to engage in "collective

bargaining" on Plaintiffs' behalf. MERC's lack of jurisdiction also means that the only parties involved in this action from Plaintiffs' perspective are Plaintiffs and Defendants. Defendants are the ones who are illegally diverting "union dues" from Plaintiffs' subsidy checks.[7] The issuance of a check is plainly a ministerial act, and this Court has ruled it proper to issue a writ of mandamus related to an "unconstitutional diversion of monies." *Kosa v State Treasurer*, 408 Mich 356, 383 (1980). Further, because MERC lacked jurisdiction, Plaintiffs had more no obligation to resort to that forum than they would have had if the issue had been brought before a Superior Court Judge in Nome, Alaska. A forum without jurisdiction cannot serve as an "alternative remedy" that would prevent the issuance of a writ of mandamus.

The jurisdictional argument shows that MERC was not a necessary party to this action and that the Court of Appeals was not deprived of jurisdiction. MERC's lack of jurisdiction also shows that CCPTM is not a necessary party. With a voided certification, the union has no interest to protect; it is limited to acquiring entirely voluntary members and seeking entirely voluntary dues.[8] A more lengthy refutation of Defendants' necessary-party jurisdictional argument was set forth at the Court of Appeals.[9] In essence, that argument is that the Court of Appeals retains jurisdiction over an original action for mandamus even where a defendant who is not a state official is joined or intervenes. See, e.g., *Citizens Protecting Michigan's Constitution v Secretary*

[7] It should also be remembered that Defendants are the ones who sought to convert Plaintiffs from independent contractors and private business owners into public employees through an interlocal agreement, an action that they now disavow. (Defendants' disavowal is discussed at length in the application for leave to appeal.)

[8] Unions can exist without being granted mandatory collective bargaining power. *Smith v Arkansas State Highway Employees, Local 1315*, 441 US 463 (1979). Therefore, CCPTM can continue to exist even without mandatory collective bargaining power — the major reason that Plaintiffs do not challenge the CCPTM's formation.

Assuming Plaintiffs were to prevail, the CCPTM could seek dues only from those who voluntarily joined it. If some home care providers wanted to pay dues to the CCPTM to continue to lobby on their behalf, they could do so. But CCPTM would have no legal right to dues from any provider who did not voluntarily join. And more relevant to this case, Defendants would have no right to divert a portion of the subsidy payments the providers earn to CCPTM (or any other union).

[9] [Plaintiffs'] Brief in Support of Answer to Defendants' Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4) at pp. 10-14.

of State, 482 Mich 960 (2008) (mandamus action filed at Court of Appeals and not dismissed despite the presence of a party who was not a state officer intervening at Court of Appeals).

There is no legal obligation for the CCPTM to be a party to this action. Nor has the CCPTM sought to intervene or file an amicus brief, either here or at the Court of Appeals. But as noted in the application for leave to appeal, this case is in a somewhat odd procedural posture in part because Defendants have not addressed the public-employee issue. If Defendants' latest waiver is not enough for this Court to deem that Defendants have ceded this issue, then it may be necessary to order a direct answer to that question either here or after a remand to the Court of Appeals. In either circumstance, this Court could offer the CCPTM an opportunity to intervene, or if necessary, order it made a party.

The addition of the CCPTM will not change Defendants' central problem — that Plaintiffs are not public employees. Moreover, consider a lengthy e-mail written by Nick Ciaramitaro, a member of the state bar, a former representative in the Michigan House, and a current political representative of the American Federation of State, County and Municipal Employees (one of the parent unions of the CCPTM). On September 13, 2009 — three days before the instant action was filed at the Court of Appeals — Mr. Ciaramitaro e-mailed a message that included the following text to MHBCCC Chairman of the Board Larry Simmons, MHBCCC Executive Director Dr. Elizabeth Jordon, and others:

> As you know, CCPTM20and [sic] MHBCC [sic] are somewhat unusual entities. As our economy changes, representation of workers must evolve. In most instances, employees of a particular employer band together in a union and negotiate wages, hours and terms and conditions of employment with a given employer. Here, a group of people who provide a critical public service **as independent contractors** are reimbursed for their labors by the State. In order to deal with working conditions, the Department of Human Services and Mott Community College, under the auspices of the Urban Cooperation Act, created a Council to act as an employer of record to negotiate provisions. Much of that contract however is dependent on legislative or administrative action by the State

> of Michigan. In many ways this is an experiment with little guidance from statute and virtually no administrative or judicial precedent to follow.
>
> . . .
>
> The Interlocal Agreement came about at the recommendation of Michigan AFSCME and the UAW with the support of the Executive Office. . . .
>
> A number of issues have arisen that cannot be addressed through the collective bargaining process and that are subjects of legislation and public policy. Some of those issues are of concern to the two unions that organized child care providers. The Lt. Governor's office, as part of the current Administration have [sic] an interest in these issues as well. The Department is deeply involved with these issues and I would hope the Council [MHBCCC] is concerned as well. To deal with these legislative and public policy issues, I suggested that these interested parties meet and the Lt. Governor's office helped in getting it to happen expeditiously.

Attachment A (emphasis added).[10]

Were the CCPTM to appear, it would not be bound by what is in that e-mail. But the CCPTM was named a defendant in the case of *Schlaud v Granholm*, No 1:10-cv-00147-RJJ. In that case, a purported class of home-based day care providers brought suit and claimed that under the First Amendment, they could not be forced to pay union dues. In a motion to dismiss that federal claim, the CCPTM did not explicitly admit that home-based day care providers are not public employees. The CCPTM did, however, focus on cases where a sufficient state interest was found to justify fees in *nonemployment* relationships, such as membership in the state bar association:

> As is apparent from the bar-membership cases, the existence of state interests that justify the limited infringement on individual First Amendment rights that result from mandatory payment of dues or fees to a collective representative is not limited to the employer-employee relationship. Indeed, the Court has applied the principles just discussed to contexts as diverse as the required payment by state university students of activity fees that benefit student organizations or the mandatory assessments for generic advertising and other purposes required of agricultural producers pursuant to government marketing regulations.

[10] This document was obtained pursuant to a Freedom of Information Act request filed with MHBCCC.

Brief of [CCPTM] in Support of Motion to Dismiss in *Schlaud v Granholm* at 9 (citations omitted).[11] Of course, in the instant case, the only state interest proffered by Defendants for the diversion of "union dues" is that Plaintiffs were deemed to be public employees by MERC, which lacked the jurisdiction to do so.

RELIEF REQUESTED

Given that Defendants have (understandably) waived the right to argue that Plaintiffs are public employees, Plaintiffs request a peremptory reversal. Alternatively, this Court could grant leave to appeal. Further, it could order Defendants to either explicitly admit or deny that Plaintiffs are not public employees and discuss the consequences of that view, including the impact of that designation on MERC's jurisdiction over the certification process and the legitimacy of that process. A remand to the Court of Appeals for a discussion of all of these issues and a decision on the merits would also be appropriate.

Respectfully Submitted,

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Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorney for Plaintiffs

Dated: May 10, 2010

[11] This document is available on the federal PACER system, but can be provided at the Court's request.