

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CHRISTOPHER LEE DUNCAN, BILLY JOE  
BURR, JR., STEVEN CONNOR, ANTONIO  
TAYLOR, JOSE DAVILA, JENNIFER  
O’SULLIVAN, CHRISTOPHER MANIES, and  
BRIAN SECREST,

FOR PUBLICATION  
April 2, 2013  
9:05 a.m.

Plaintiffs-Appellees,

v

No. 307790  
Ingham Circuit Court  
LC No. 07-000242-CZ

STATE OF MICHIGAN and GOVERNOR OF  
MICHIGAN,

Defendants-Appellants.

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Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

BECKERING, J.

Defendants, the state and Governor of Michigan (collectively “the state”), appeal by leave granted from the trial court’s order dated December 15, 2011, denying the state’s motion for summary disposition. For the reasons set forth below, we affirm and lift the stay previously imposed by this Court.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

This case returns to this Court after a remand by our Supreme Court to the trial court. Plaintiffs filed suit challenging the sufficiency of the state’s indigent criminal defense system and sought, through a class action, injunctive relief to improve the quality of indigent representation throughout Michigan. Plaintiffs’ proposed class is comprised of present and future indigent criminal defendants subject to appointed counsel through our indigent criminal defense system. The state previously moved for summary disposition under MCR 2.116(C)(4), (7), and (8), arguing, among other things, that plaintiffs’ pre-conviction claims were nonjusticiable because plaintiffs (1) failed to meet the certification requirements of a class action, (2) failed to properly plead a valid cause of action against the state, and (3) lacked standing. The trial court disagreed and certified plaintiffs’ class.

On appeal, a majority of this Court held that

on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification. [*Duncan v State*, 284 Mich App 246, 343; 774 NW2d 89 (2009).]

In a dissenting opinion, Judge WHITBECK opined that the state was entitled to summary disposition for the following reasons: (1) granting relief to plaintiffs would violate the separation of powers; (2) plaintiffs failed to state a proper claim for relief, lacked standing, and pleaded unripe claims; and (3) plaintiffs' action was incorrectly certified as a class action. *Id.* at 346, 371, 376, 385-388, 395-399 (WHITBECK, J., dissenting).

The state sought leave to appeal to our Supreme Court. In *Duncan v State*, 486 Mich 906; 780 NW2d 843 (2010), our Supreme Court ordered as follows:

On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we hereby VACATE the trial court's order granting the plaintiffs' motion for class certification and REMAND this case to the Ingham Circuit Court for reconsideration of the plaintiffs' motion for class certification in light of this Court's opinion in *Henry v Dow Chemical Co*, 484 Mich 483 (2009).

As to the defendant's appeal of the decision on their motion for summary disposition, we hereby AFFIRM the result only of the Court of Appeals majority for different reasons. This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.

We do not retain jurisdiction.

The Supreme Court subsequently granted reconsideration and reversed this Court's decision for the reasons stated in Judge WHITBECK's dissenting opinion. 486 Mich 1071 (2010). However, our Supreme Court later reinstated its original order affirming this Court's decision and remanding the matter to the trial court. 488 Mich 957 (2010).

On remand, the trial court held a status conference and decided to permit the parties to conduct discovery before deciding plaintiffs' motion for class certification. Before a single deposition was taken, however, the state renewed its motion for summary disposition, arguing the following: (1) discovery was inappropriate because the Supreme Court remanded for consideration of plaintiffs' pending class-certification motion and not a renewed motion with the benefit of discovery; (2) plaintiffs' claims should not be certified as a class action; (3) plaintiffs lacked standing; (4) plaintiffs failed to state a proper claim for which relief could be granted; (4) *res judicata* barred plaintiffs' claims; and (5) plaintiffs could not object to the state's challenges due to judicial estoppel. The trial court denied the state's motion, holding that (1) it was premature to decide plaintiffs' class-certification motion because *Henry* required the court to

take discovery before deciding a certification motion, (2) it could not reconsider the state's MCR 2.116(C)(8) motion or plaintiffs' standing because both this Court and our Supreme Court had already decided those matters in plaintiffs' favor, and (3) the state failed to satisfy any of the elements of res judicata.

## II. ANALYSIS

### A. CLASS CERTIFICATION

The state first argues that the trial court erroneously failed to dismiss plaintiffs' motion for class certification when it denied the state's motion for summary disposition. The state suggests that the trial court inappropriately ordered discovery and insists that plaintiffs "have not met their burden of establishing that each certification prerequisite has been satisfied." We reject this argument.

We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). "[T]he analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact *and* discretionary determinations"; therefore, we review a trial court's factual findings regarding class certification for clear error and the decisions within the trial court's discretion for abuse of discretion. *Henry v Dow Chem Co*, 484 Mich 483, 495-496; 772 NW2d 301 (2009) (emphasis in original). State courts "have broad discretion to determine whether a class will be certified." *Id.* at 504. An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The interpretation and application of a court rule is a question of law that we review de novo. *Snyder v Advantage Health Physicians*, 281 Mich App 493, 500; 760 NW2d 834 (2008).

In considering whether to grant a motion for class certification, the requirements of MCR 3.501(A)(1) and (2) must be satisfied. *Henry*, 484 Mich at 488, 496. MCR 3.501(A)(1) requires that a proposed class of plaintiffs establish the following elements: (1) the class is sufficiently numerous as to make joinder of all members impracticable; (2) the common questions of fact or law predominate over matters relevant to the individual plaintiffs; (3) the claims of the class representatives are typical of the claims available to the entire class; (4) the class representatives will fairly and adequately represent the interests of the entire class; and (5) the class-action mechanism is superior to other methods of adjudication. *Id.* at 496-497. In evaluating the "superiority" element, MCR 3.501(A)(2) requires consideration of the following nonexclusive factors:

- (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
  - (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
  - (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

The trial court cannot “rubber stamp” allegations in a pleading that baldly proclaim that the class-certification requirements have been satisfied, but the trial court also cannot evaluate the merits of plaintiffs’ claims. *Henry*, 484 Mich at 502-503. “A court may base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met.” *Id.* at 502 (emphasis in original). “If the pleadings are not sufficient, the court must look to additional information beyond the pleadings to determine whether class certification is proper.” *Id.* at 503. “The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures.” MCR 3.501(B)(3)(b).

We conclude that the state’s argument fails for three reasons. First, the trial court did not certify plaintiffs’ action as a class action; it merely denied the dispositive motion until discovery could be completed. Second, the trial court did not abuse its discretion by postponing the class-certification question until discovery could be completed. The trial court is required to consider facts outside the pleadings if the pleadings are insufficient to establish plaintiffs’ entitlement to class certification. *Henry*, 484 Mich at 502-503. Under MCR 3.501(B)(3)(b), the trial court could postpone the class-certification question pending discovery.<sup>1</sup> Thus, its decision to do so did not fall outside the range of principled outcomes. Third, the trial court’s denial of the state’s motion on the basis that the motion was premature did not contravene the Supreme Court’s order. The trial court was in fact obeying our Supreme Court’s order to consider the class-certification question in light of *Henry*. On remand, a trial court is required to comply with a

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<sup>1</sup> Indeed, when explaining that a court must look to “additional information beyond the pleadings” if the pleadings are insufficient to determine whether class certification is proper, the *Henry* Court expressly referenced a trial court’s authority to permit discovery under MCR 3.501(B)(3)(b). *Henry*, 484 Mich at 503 & n 35.

directive from an appellate court. *Schumacher v Dep't of Natural Resources (After Remand)*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

Accordingly, the trial court did not err by denying the state's motion for summary disposition with respect to the issue of class certification.

## B. FAILURE TO STATE A CLAIM

Next, the state argues that the trial court erroneously denied its dispositive motion under MCR 2.116(C)(8) because plaintiffs plainly failed to plead a proper cause of action. We disagree.

This Court previously held that plaintiffs had properly stated "claims upon which declaratory and injunctive relief can be awarded," thus defeating the state's motion under MCR 2.116(C)(8). *Duncan*, 284 Mich App at 343. Our Supreme Court later affirmed, albeit in result only, opining that, "based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." *Duncan*, 486 Mich at 906. Thus, the only proper question for this Court to address is whether the state's argument is foreclosed under the law of the case doctrine.

Whether the law of the case doctrine applies is a question of law that we review de novo. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). Generally, the law of the case doctrine provides that an appellate court's decision "will bind a trial court on remand and the appellate court in subsequent appeals." *Schumacher*, 275 Mich App at 127. "Where a case is taken on appeal to a higher appellate court, the law of the case announced in the higher appellate court supersedes that set forth in the intermediate appellate court." *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). However, "[r]ulings of the intermediate appellate court . . . remain the law of the case insofar as they are not affected by the opinion of the higher court reviewing the lower court's determination." *Id.* The law of the case doctrine has been described as "discretionary," as a general practice by the courts to avoid inconsistent judgments, as opposed to a limit on the power of the courts. *Foreman v Foreman*, 266 Mich App 132, 138; 701 NW2d 167 (2005). However, these decisions also acknowledge this Court's mandatory obligation to apply the doctrine when there has been no material change in the facts and no intervening change in the law. *Id.*; see also *Reeves v Cincinnati, Inc.*, 208 Mich App 556, 560; 528 NW2d 787 (1995) ("[T]he doctrine of law of the case is a bright-line rule to be applied virtually without exception."). Even if the prior decision was erroneous, that alone is insufficient to avoid application of the law of the case doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992); see also *Driver v Hanley*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

We conclude that the law of the case doctrine applies in this case regarding whether plaintiffs pleaded a proper cause of action. We previously held that plaintiffs pleaded causes of action for which declaratory and injunctive relief could be granted, and our Supreme Court affirmed. The state has not established a material change of fact or an intervening change in the law that would allow this Court to avoid application of the law of the case doctrine and reconsider the state's motion for summary disposition under MCR 2.116(C)(8).

The state contends that plaintiffs should be judicially estopped from relying on the law of the case doctrine because they argued before the Supreme Court that “there is no (C)(8) motion before you with respect to –on whether relief can be granted against the Governor.” Judicial estoppel prevents a party from asserting one position where they “successfully and ‘unequivocally’ asserted a position in a prior proceeding that is ‘wholly inconsistent’ with the position now taken.” *Szyszlo v Akowitz*, 296 Mich App 40, 51; 818 NW2d 424 (2012) (citations omitted). Significantly, “the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent.” *Paschke v Retool Indus*, 445 Mich 502, 510; 519 NW2d 441 (1994). This “prior success” model “focus[es] less on the danger of inconsistent claims, than on the danger of inconsistent rulings.” *Id.* at 510 n 4.

Judicial estoppel does not bar plaintiffs from relying on the law of the case doctrine to preclude reconsideration of the state’s motion pursuant to MCR 2.116(C)(8) because the state has not established the requirements of judicial estoppel. Even if plaintiffs made a wholly inconsistent statement with respect to whether the state’s motion under MCR 2.116(C)(8) was before the Supreme Court (the state has certainly not denied that it appealed this Court’s ruling on the motion to the Supreme Court), the state has not shown that such assertion was successful.<sup>2</sup> To the contrary, our Supreme Court affirmed this Court’s decision regarding the state’s motion for summary disposition under MCR 2.116(C)(8), albeit in result only.<sup>3</sup>

Therefore, the trial court did not err by denying the state’s motion for summary disposition under MCR 2.116(C)(8).

### C. STANDING

Next, the state argues that the trial court erred by failing to decide that plaintiffs lack standing in light of our Supreme Court’s decision in *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). The state insists that the intervening change in the law of standing in Michigan under *Lansing Schools* precludes application of the law of the case doctrine and, therefore, allows it to reargue the question of plaintiffs’ standing. We disagree.

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<sup>2</sup> Plaintiffs explain that the comment at issue pertained not to whether *any* (C)(8) motion was pending before the Supreme Court, but rather, to Justice Corrigan’s concern about whether these defendants were the proper parties, as compared to “the local funding units that are supposed to fund indigent defense in the counties,” wherein plaintiffs’ counsel indicated that the state had not sought to dismiss the case on this basis.

<sup>3</sup> The state contends that the language of the April 30, 2010 Supreme Court order is far more reflective of what one might expect concerning a motion for summary disposition pursuant to MCR 2.116(C)(10); but clearly, discovery had not yet taken place and the state had never filed a motion for summary disposition under MCR 2.116(C)(10).

We review de novo the issues of standing and the application of the law of the case doctrine. *Kasben*, 278 Mich App at 470; *Manuel v Gill*, 481 Mich 637, 642-643; 753 NW2d 48 (2008).

When this case was initially decided, Michigan used the federal tripartite standing test that required a plaintiff to demonstrate the following: (1) an injury in fact that was concrete, particularized, and either actual or imminent; (2) the injury was fairly traceable (causally linked to) the defendant’s conduct; and (3) the remedy sought would likely redress the plaintiff’s injuries. *Mich Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007), overruled by *Lansing Sch*, 487 Mich at 360-361, 378. However, our Supreme Court in *Lansing Schools* reinstated Michigan’s prior “prudential” standing test, which automatically conferred standing upon any party who has a “legal cause of action,” regardless of whether the underlying issue is justiciable. *Lansing Sch*, 487 Mich at 355, 372. The Court’s return to the old standard recognized that the purpose of the doctrine was to promote “sincere and vigorous advocacy” between the parties to the dispute. *Id.* at 355. “Under this approach, a litigant has standing whenever there is a legal cause of action” or the requirements of MCR 2.605 to seek a declaratory judgment are satisfied. *Id.* at 372. If a specific cause of action at law does not exist for the plaintiff, then the following analysis applies:

A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Id.*]

Although the law of the case doctrine does not necessarily apply when there has been an intervening change in the law, *Sinicropi v Mazurek*, 279 Mich App 455, 464-465; 760 NW2d 520 (2008), our Supreme Court clearly reinstated its original decision affirming this Court’s opinion in this case after it decided *Lansing Schools*. Our Supreme Court was surely aware of the change in the law when it reinstated its prior decision affirming this Court’s decision.<sup>4</sup> See *Bennett v Weitz*, 220 Mich App 295, 300; 559 NW2d 354 (1996) (“[O]ur Supreme Court presumably is aware of contrary common-law rules when fashioning court rules.”); *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007) (“[W]e assume that the trial court knew the law . . . .”). The law of case doctrine, therefore, applies because the Supreme Court implicitly decided under *Lansing Schools* the issue of plaintiffs’ standing. See generally *Driver*, 226 Mich App at 565 (explaining that the law of the case doctrine applies to issues decided—explicitly or implicitly—on appeal).

Furthermore, we reject the state’s suggestion that we discard *Lansing Schools* and apply the “federal” standing test because the new prudential test is unworkable and could lead to a violation of the separation of powers. We are “bound by the rule of stare decisis to follow the

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<sup>4</sup> In *Lansing Schools*, the Supreme Court restored Michigan’s standing jurisprudence to a limited, prudential doctrine that is less stringent than the prior “federal” standing test. The state has not shown how the prior rulings on standing were affected by *Lansing Schools*; indeed, it appears that the change in the law concerning standing would favor plaintiffs’ case and not the state.

decisions of our Supreme Court.” *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 447; 761 NW2d 846 (2008).

Accordingly, the trial court properly denied the state’s motion for summary disposition with respect to standing.

#### D. RES JUDICATA

Finally, the state argues that the doctrine of res judicata bars plaintiffs’ claims because plaintiffs are attempting to litigate the sufficiency of their indigent criminal defense counsel in this subsequent civil action when they could or should have raised the issue of ineffective assistance of counsel during their criminal proceedings. We disagree.

This Court reviews de novo a trial court’s decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). “The applicability of the doctrine of res judicata is a question of law that is also reviewed de novo.” *Id.*

The doctrine of res judicata precludes relitigation of a claim when it is predicated on the same underlying transaction that was litigated in a prior case. *Id.* at 334. The purpose of res judicata is to prevent inconsistent decisions, conserve judicial resources, and protect vindicated parties from vexatious litigation. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Michigan employs a broad approach to the doctrine of res judicata. *Id.*

The elements of res judicata are as follows: (1) the prior action was decided on the merits; (2) the prior decision was a final judgment; (3) both actions contained the same parties or those in privity with the parties; and (4) the issues presented in the subsequent case were or could have been decided in the prior case. *Stoudemire*, 248 Mich App at 334. For purposes of res judicata, parties are in privity with each other when they are “so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.” *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 421; 733 NW2d 755 (2007), quoting *Adair v State*, 470 Mich 105, 122; 680 NW2d 386 (2004).

We conclude that the state’s argument that res judicata bars plaintiffs’ claims lacks merit. Res judicata plainly applies to multiple claims arising out of a singular transaction. The issues presented in this civil case regarding the state’s alleged deprivation of plaintiffs’ constitutional rights through a deficient indigent criminal defense system were not and could not have been raised in the plaintiffs’ individual criminal prosecutions. See *Stoudemire*, 248 Mich App at 334. The remedy that plaintiffs seek via a class action, i.e., improvements to the indigent criminal defense system, could not have been achieved during plaintiffs’ prior criminal proceedings. Without an action such as this, and assuming plaintiffs’ allegations are true, indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless such representation adversely affects the outcome. Our system of justice requires effective representation, not ineffective but non-outcome determinative



representation. Further, as plaintiffs' proposed class includes indigent people who may not have been convicted of crimes, there has been no final decision on the merits in those cases. See *id.*

Affirmed. We lift the stay previously imposed by this Court and do not retain jurisdiction.

/s/ Jane M. Beckering  
/s/ E. Thomas Fitzgerald

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Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

WHITBECK, J. (*concurring in part and dissenting in part*).

I concur in part and respectfully dissent in part. I concur in the majority’s holding on class certification, judicial estoppel (as to result), and standing (as to result under the State’s first formulation of the issue, and fully as to the prospect of a panel of this Court overruling a Supreme Court decision).

But although these issues are important, they are actually ancillary to this case. The basic issue is whether the plaintiffs here, acting on behalf of themselves and all others similarly situated, have in their extensive civil complaint for declaratory and injunctive relief set forth claims on which relief can be granted. I do not believe that we can extract a law of the case from a series of confusing and contradictory Supreme Court orders to avoid this basic question. And I continue to believe that the claims the plaintiffs set forth are impossible for them to prevail on, even under the most liberal interpretation of those claims and even presuming, as we must, every single fact alleged to be true. Simply put, there are no judicially cognizable claims to be found here. I would therefore reverse and remand for the entry of summary disposition in favor the defendants.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

### A. OVERVIEW

The majority does an admirably concise job of laying out the background of this case, particularly since our Court's decision in the original appeal consumed fully 153 single-spaced pages in the Michigan Appellate Reports (of which, I readily admit, my dissent took up fully 56 single-spaced pages).<sup>1</sup> Clearly, this is a case of considerable complexity, with numerous important and interwoven issues. And equally clearly, there were considerable disagreements at both our level and the Supreme Court level about the proper approach to and outcome of these important issues.

Despite, however, the factual and procedural clarity of the majority opinion, there is one procedural aspect that justifies amplification: the various decisions of the Supreme Court on the original appeal of defendants State of Michigan and the Governor (collectively, the State) from this Court's original decision.<sup>2</sup>

The core of the problem is that, throughout the tortured history of this case before the Supreme Court, it is entirely unclear what conceptual approach the Court meant to utilize. On the one hand, perhaps that Court meant to utilize the standards for review of an MCR 2.116(C)(10) motion (no genuine issue as to material fact and the moving party is entitled to judgment or partial judgment as a matter of law) when considering what was primarily an MCR 2.116(C)(8) motion (failure to state a claim upon which relief can be granted). On the other hand, perhaps the Court meant to hold that a motion under MCR 2.116(C)(8) can be premature if a party files such a motion early in the proceedings before discovery has begun. I apologize in advance for mixing some argumentation into this statement of the procedural history, which normally would involve no argument. But I know of no other way to outline the conceptual problem inherent in the Supreme Court's various orders, a problem that in my view has bedeviled this second appeal from the outset.

### B. THE SUPREME COURT ORDERS

#### 1. THE APRIL 30, 2010 ORDER

Following the State's appeal, on April 30, 2010, the Supreme Court entered the following order:

Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, *we hereby vacate the trial court's order granting the plaintiffs' motion for class certification and remand this case to the Ingham Circuit Court for consideration of the plaintiffs' motion*

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<sup>1</sup> See *Duncan v State (Duncan I)*, 284 Mich App 246-399; 774 NW2d 89 (2009).

<sup>2</sup> *Id.*

for class certification in light of this Court's opinion in *Henry v Dow Chemical Co*, 474 Mich 483 (2009).

As to the defendants' appeal of the decision on their motion for summary disposition, *we hereby affirm the result only of the Court of Appeals majority for different reasons. This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.*<sup>3</sup>

The first paragraph of the April 30, 2010 order is reasonably straight-forward: the Supreme Court vacated the trial court's order on class certification and remanded to the trial court for it to consider the motion for class certification of the indigent criminal defendants who are plaintiffs here (the Duncan plaintiffs) in light of *Henry v Dow Chem Co*.<sup>4</sup>

The second paragraph of the April 30, 2010 order is considerably less straight-forward. The Supreme Court's first clause of the first sentence ("As to the defendants' appeal of the decision on their motion for summary disposition") obviously concerned the denial of the State's motion for summary disposition. As the majority of this Court noted in its original opinion, the State brought its motion for summary disposition "pursuant to MCR 2.116(C)(4),<sup>[5]</sup> (7),<sup>[6]</sup> and (8)."<sup>7</sup> Therefore, the Supreme Court in its April 30, 2010 order must have considered the majority's decision in the original appeal to this Court *under the court rules that the majority enumerated in its original opinion*, primarily MCR 2.116(C)(8). In this regard, I note that there was no reference whatever in the majority's opinion in the original appeal to this Court of the other common basis for summary disposition, MCR 2.116(C)(10).

But the second clause of the first sentence in the Supreme Court's April 30, 2010 order ("we hereby affirm the result only of the Court of Appeals majority for different reasons") adds a twist. Clearly, the Supreme Court approved the majority's decision in the original appeal to uphold the trial court's denial of summary disposition. But it did so for "different reasons." This is a relatively common jurisprudential technique that basically means "right result, wrong reason."<sup>8</sup> And, I believe we can presume, the following two sentences in the Supreme Court's April 30, 2010 order are there to explain the "right" reasons. But do they?

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<sup>3</sup> *Duncan v State (Duncan II)*, 486 Mich 906, 780 NW2d 843 (2010) (emphasis supplied).

<sup>4</sup> *Henry v Dow Chem Co*, 484 Mich 483; 772 NW2d 301 (2009).

<sup>5</sup> The trial court lacks subject matter jurisdiction.

<sup>6</sup> The moving party is immune as a matter of law.

<sup>7</sup> *Duncan I*, 284 Mich App at 259 (emphasis supplied).

<sup>8</sup> See, e.g., *Klooster v City of Charlevoix*, 488 Mich 289, 294; 795 NW2d 578 (2009); *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

To answer that question, I believe it necessary to take the third sentence apart. Assume that what the Supreme Court really meant in that sentence was: “This case is at its earliest stages and . . . it is premature to make a decision on the substantive issues.” There is ample case law to the effect that, when considering a motion for summary disposition *under MCR 2.116(C)(10)*, it is generally premature to decide such a motion until there has been an opportunity for full and complete discovery.<sup>9</sup> The basis for this approach is fairly easy to discern: it allows the party asserting the claims to flesh out the facts through interrogatories, requests to admit, depositions and the like.<sup>10</sup>

*But here, there was no motion at the trial court level under MCR 2.116(C)(10).* Therefore, the case law applicable to MCR 2.116(C)(10) simply has no bearing. Summary disposition is not premature “when a case can be quickly resolved with a ruling on an issue of law.”<sup>11</sup> The trial court appropriately grants summary disposition under MCR 2.116(C)(8) when “the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’”<sup>12</sup> Viewed in that light, I must with all due respect suggest that the Supreme Court in its April 30, 2010 order applied the wrong standard to a motion decided under MCR 2.116(C)(8).

But there is a second way to parse the sentence. Assume that what the Supreme Court really meant was: “. . . based solely on the plaintiffs’ pleadings in this case, it is premature to make a decision on the substantive issues.” Frankly, this interpretation is even worse. Motions for summary disposition under MCR 2.116(C)(8) are *always* based solely on a plaintiff’s pleadings.<sup>13</sup> Further, all factual allegations are taken as true and any reasonable inferences or conclusion are construed in a light most favorable to the non-moving party.<sup>14</sup> And courts must deny the motion unless the claims are so clearly unenforceable *as a matter of law that no factual development can possibly justify recovery.*<sup>15</sup>

MCR 2.116(D) provides that a party may raise the grounds under MCR 2.116(C)(8) “at any time.”<sup>16</sup> Thus, a motion under MCR 2.116(C)(8) *cannot* be premature if it is filed after a

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<sup>9</sup> *Davis v City of Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2006); see *Goldman v Loubella Extendables*, 91 Mich App 212, 218; 283 NW2d 695 (1979).

<sup>10</sup> See *Dep’t of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989).

<sup>11</sup> *Mackey v Dep’t of Corrections*, 205 Mich App 330, 333-334; 517 NW2d 303 (1994).

<sup>12</sup> *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep’t of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> This Court has affirmed in cases where the trial court granted summary disposition under MCR 2.116(C)(8) even before the moving party filed an answer.

party serves the complaint. At this stage in the proceedings, the rules deliberately stack the deck in favor of the non-moving party—usually the plaintiff. And that party cannot further flesh out the case to its benefit. In essence, the non-moving party’s case is factually as good as it ever will get when facing a motion under MCR 2.116(C)(8), because we must take every single fact that the non-moving party alleged in the complaint as true. Holding a motion under MCR 2.116(C)(8) in abeyance—as the Supreme Court essentially did in the last sentence of the second paragraph of its April 30, 2010 order (“Accordingly, the defendants are not entitled to summary disposition at this time.”)—defeats the very purpose of MCR 2.116(C)(8), which is to determine whether a plaintiff’s pleadings *alone* set out claims upon which a court can grant relief.

In summary, the Supreme Court’s April 30, 2010 order puts me in a considerable quandary. I think I know what the first paragraph of that order means: that the Supreme Court vacated the trial court’s order on class certification and remanded to the trial court to consider the Duncan plaintiffs’ motion for class certification in light of *Henry v Dow Chem Co.*

But I must admit that I really do not know what the second paragraph of that order means. There is no reasonable construction of that paragraph that provides the trial court or this Court with any guidance concerning how to proceed. Are we to assume that the Supreme Court’s “different reasons” meant for us to apply MCR 2.116(C)(10) standards to an MCR 2.116(C)(8) motion? Or are we to assume that the Supreme Court’s “different reasons” meant that an MCR 2.116(C)(8) motion really can be premature, despite the contrary language in the court rule? The only thing that I am sure of is that the State’s original appeal to the Supreme Court was in front of that Court based on the trial court’s denial of the State’s motion under MCR 2.116(C)(8), a denial that the majority of the prior panel in this matter specifically affirmed.<sup>17</sup>

## 2. THE JULY 16, 2010 RECONSIDERATION ORDER

Following the State’s motion for reconsideration of the April 30, 2010 order, the Supreme Court entered the following order:

We vacate our order dated April 30, 2010. On reconsideration, leave to appeal having been granted and the briefs and oral argument of the parties having been considered by the Court, we reverse the June 11, 2009 judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs’ claims are not justiciable. Accordingly, we remand this case to the Ingham Circuit Court for entry of summary disposition in favor of the defendants. The motion for stay is denied.<sup>18</sup>

<sup>1</sup> Justice MARKMAN concurred, stating in part:

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<sup>17</sup> *Duncan I*, 284 Mich App at 259.

<sup>18</sup> *Duncan v State (Duncan II)*, 486 Mich 1071, 1071; 784 NW2d 51 (2010).

I concur with the order granting defendant’s motion for reconsideration, vacating this Court’s order of April 30, reversing the Court of Appeals, and remanding to the trial court for entry of summary disposition in favor of defendants. In our prior order, we affirmed the result of the Court of Appeals, asserting that because “[t]his case is at its earliest stages and, based solely on the plaintiffs’ pleadings in this case, it is premature to make a decision on the substantive issues.” This was error for two reasons. *First, as defendants observe, this order vacated the Court of Appeals’ opinion without articulating any governing standards. Second, it is not premature to decide this case because the precise issue presented is whether plaintiffs have stated a claim on which relief can be granted, and this, as well as the threshold justiciability issues, can be determined on the face of the complaint. . . .*<sup>[19]</sup>

Chief Justice KELLY dissented. With respect to the second issue that Justice MARKMAN identified—whether the Duncan plaintiffs had stated a claim on which relief could be granted—Chief Justice KELLY stated:

At this preliminary stage, plaintiffs’ claims adduce facts that establish that they have standing, and that their claims are ripe. *Also they state a claim upon which relief can be granted. Today’s order slams the courthouse door in plaintiffs’ face for no good reason.*<sup>[20]</sup>

I agree, as set out above, that the precise issue before the Supreme Court was whether the Duncan plaintiffs had stated a claim on which relief could be granted, the standard set out in MCR. 2.116(C)(8). Indeed, I note that Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, appeared also to agree with that formulation of this issue. But this unanimity, at least as it related to the type of issue before the Justices, was not to last long.

### 3. THE NOVEMBER 30, 2010 RECONSIDERATION ORDER

Following the Duncan plaintiffs’ motion for reconsideration of the July 16, 2010 reconsideration order, the Supreme Court entered the following order:

On order of the Court, the motion for reconsideration of this Court’s July 16, 2010, order is considered, and it is granted. We vacate our order dated July

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<sup>19</sup> *Id.* at 1071 (emphasis supplied). Justices CORRIGAN and YOUNG joined the statement of Justice MARKMAN. According to Justice CORRIGAN, Justice WEAVER also voted in favor of the July 16, 2010 reconsideration order. *Duncan v State (Duncan IV)*, 488 Mich 957, 962, n 1; 790 NW2d 695 (2010).

<sup>20</sup> *Duncan II*, 486 Mich at 1075 (emphasis supplied). Justices CAVANAGH and HATHAWAY joined the statement of Chief Justice KELLY.

16, 2010, and we reinstate our order in this case dated April 30, 2010, because reconsideration thereof was improperly granted.<sup>21</sup>

This order is clear enough. It reinstates the Supreme Court's April 30, 2010 order, word for word, and with all its conceptual problems concerning the method for reviewing the trial court's denial of the State's motion for summary disposition under MCR 2.116(C)(8). Indeed, the statement of Justice DAVIS, concurring, makes this point crystal clear:

I agree with Chief Justice KELLY's dissent from the July 16, 2010, order, stating that the prior motion for reconsideration should have been denied because it added nothing new. To the extent the unanimous April 30, 2010, order was reconsidered because of concerns that it could not be complied with, I have reviewed the record thoroughly and I do not agree with those concerns. Furthermore, if those concerns eventually prove warranted, the trial court should, and is in the best position to, make that evaluation. The trial court has not yet had the opportunity to do so. *As the April 30, 2010, order stated, this case is at its earliest stages and a decision on its substantive merits is premature, but class certification should be reconsidered in light of Henry v Dow Chem Co, 484 Mich 483 (2009).* The original, unanimous order of this Court was correct, and no sufficient basis was presented for this Court to have reconsidered it.<sup>[22]</sup>

Chief Justice KELLY reiterated the same point, stating:

The dissenters have yet to raise a single argument of which this Court was unaware when it originally decided this case eight months ago. Indeed, Justice MARKMAN's dissenting statement consists almost entirely of a series of quotations from the Court of Appeals dissenting opinion. *He also claims that it is not premature to make a final decision on this case because the issues involved are fully laid out on the face of the complaint. We rejected that precise argument in our April order.*<sup>[23]</sup>

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, dissented on the same grounds as he laid out in his concurrence with the July 16, 2010 reconsideration order.<sup>24</sup> Justice CORRIGAN also separately dissented, joined by Justices YOUNG and MARKMAN, emphasizing the lack of standards contained in the April 30, 2010 order.<sup>25</sup> In this regard, Justice CORRIGAN quoted a recent article illustrating the "state of confusion created by the lack of a clear standard

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<sup>21</sup> *Duncan IV*, 488 Mich at 957.

<sup>22</sup> *Id.* at 957-958 (emphasis supplied). Justice HATHAWAY joined in the statement of Justice DAVIS.

<sup>23</sup> *Id.* at 960.

<sup>24</sup> *Id.* at 958-960.

<sup>25</sup> *Id.* at 961-966.



to which courts can look when adjudicating these types of systemic reform cases.”<sup>26</sup> That article also stated:

Unfortunately, as evidenced by the murky opinions issued in Hurrell-Harring<sup>[27]</sup> and Duncan many of the positive decisions lack clarity as to the standard to which plaintiffs are held, decreasing their precedential value for successive litigants.<sup>28</sup>

The standards issue is, of course, vitally important. But central to my point on the procedural status of the issue before the Court, the November 10, 2010 reconsideration order reinstates the exact conceptual problem that was present in the April 30, 2010 order. Justice DAVIS’s statement illustrates this problem nicely. By noting that “this case is at its earliest stages,” Justice DAVIS appeared to imply that the MCR 2.116(C)(10) standards regarding discovery as to material facts apply to an MCR 2.116(C)(8) motion. By noting that “a decision on its substantive merits is premature,” Justice DAVIS appeared to imply that a decision on an MCR 2.116(C)(8) motion can, in fact, be premature. Both of these implications confound the settled jurisprudence in Michigan on MCR 2.116(C)(8) motions. The Supreme Court’s final reconsideration order in this matter did nothing to alleviate this confusion.

#### 4. THE DECEMBER 29, 2010 RECONSIDERATION ORDER

Following the State’s motion for reconsideration of the November 30, 2010 reconsideration order, the Supreme Court issued the following order:

On order of the Court, the motion for reconsideration of this Court’s November 30, 2010, order is considered and denied, because it does not appear that the order was entered erroneously.<sup>[29]</sup>

Justice CORRIGAN dissented, mainly on the lack of standards grounds, but did refer to Justice MARKMAN’s earlier concurrence with the July 16, 2010 reconsideration order, in which he stated that, “it is not premature to decide this case because the precise issue presented is whether plaintiffs *have stated a claim upon which relief can be granted, and this, as well as the threshold justiciability issues, can be decided on the face of the complaint.*”<sup>[30]</sup> There were other concurrences and dissents,<sup>31</sup> but they do not directly address the question of whether the Duncan

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<sup>26</sup> *Id.* at 964, quoting Chiang, *Indigent defense invigorated: A uniform standard for adjudicating pre-conviction Sixth Amendment Claims*, 19 Temp Pol & Civ Rts L R 443, 461 (2010).

<sup>27</sup> *Hurrell-Harring v State of New York*, 15 NY3d 8; 930 NE2d 217 (2010).

<sup>28</sup> Chiang, *Indigent defense invigorated* at 462.

<sup>29</sup> *Duncan v State (Duncan V)*, 488 Mich 1011, 1011; 791 NW2d 713 (2010).

<sup>30</sup> *Id.* at 1014, quoting *Duncan III*, 486 Mich at 1071 (emphasis supplied).

<sup>31</sup> See *Duncan V*, 488 Mich at 1017-1019.

plaintiffs had stated a claim on which relief could be granted, the standard set out in MCR. 2.116(C)(8).

### C. CONCLUSION

The proceedings before the Supreme Court in this matter have something of a *Jarndyce v Jarndyce* flavor to them. Although this case has not dragged on for generations, as did the fictional case in Charles Dickens' *Bleak House*, it is approaching its 6-year anniversary. And the case could well serve as a ready reference point for the advocates of critical legal theory. To say that the confusing legal posture in which we find ourselves has undertones relating to the philosophical composition of the Supreme Court<sup>32</sup> would be an understatement.

But we must analyze and decide the case. In undertaking my analysis, I will rely on two points from the various Supreme Court orders that are uncontestable. First, the Supreme Court vacated the trial court's order on class certification and remanded to the trial court to consider the Duncan plaintiffs' motion in light of *Henry v Dow Chem Co.* Second, the precise issue before the Supreme Court, in all of its orders, was whether the Duncan plaintiffs stated a claim on which relief could be granted, the standard set out in MCR. 2.116(C)(8).

The fog of judicial combat obscures all else. Only Chief Justice KELLY's single sentence in a dissent to the effect that the Duncan plaintiffs have stated a "claim upon which relief can be granted"<sup>33</sup> illuminates the murk with any specificity. And I am completely uncertain as to what this solitary, summary sentence means as to the law of this case.

## II. CLASS CERTIFICATION

### A. THE SUPREME COURT'S APRIL 30, 2010 ORDER

As I outlined above, the Supreme Court's order of April 30, 2010, vacated the trial court's order on class certification and remanded to the trial court to consider the Duncan plaintiffs' motion for class certification in light of *Henry v Dow Chem Co.*<sup>34</sup>

### B. THE TRIAL COURT'S DECISION

On October 26, 2011, the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion on December 15, 2011. With respect to class

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<sup>32</sup> See *Duncan V*, 488 Mich at 1022 (CORRIGAN, J., dissenting) ("The majority's lack of restraint is especially troubling given that the electorate already decided on a newly composed Court in the November 2, 2010, election. Undaunted, the majority, now paced by the calendar alone, is content in its attempt to foreclose reconsideration. I believe that the majority's handling of this case belies the way an appellate court should function. Appellate courts should be marked by steadiness and consistency, not gamesmanship in a race against the clock.")

<sup>33</sup> *Duncan III*, 486 Mich at 1075; also see *Duncan V*, 488 Mich App at 960.

<sup>34</sup> *Duncan II*, 486 Mich at 906.

action certification, the trial court also denied the motion, holding that it was premature to decide the class certification issue because discovery was necessary.

### C. THE STATE'S APPEAL

On December 22, 2011, the State filed a timely interlocutory application for leave to appeal, an emergency motion for stay, and a motion for immediate consideration. On March 1, 2012, this Court granted the State's application and motions, staying further trial-court proceedings pending resolution of this appeal or further order of this Court.

On appeal, the State essentially argues two points. First, the State contends that

[W]hen the Michigan Supreme Court remanded the class certification issue for consideration under *Henry v Dow Chemical*, it contemplated review of the *pending* motion for class certification—not a new motion for class certification filed after a year of overbroad discovery. . . . Plaintiffs moved for class certification, with no discovery request, shortly after filing their Complaint. The Supreme Court Order was a mandate for the Circuit Court to consider that pending motion in light of *Henry*. Yet the Circuit Court would not consider the class action issue until discovery was complete.

Second, the State contends that no amount of discovery will change the class certification analysis. No matter what kind of factual record the Duncan plaintiffs develop, the State argues, they cannot demonstrate commonality or superiority, two of the essential elements for class action certification.

### D. STANDARD OF REVIEW

I agree with the majority's statement of the appropriate standard of review in this case. Under this standard, the analysis a trial court must undertake in order to determine whether to certify a proposed class may involve making both findings of fact *and* discretionary determinations. Therefore, we review a trial court's factual findings regarding class certification for clear error and the decisions within the trial court's discretion for abuse of discretion.<sup>35</sup> Further, state courts "have broad discretion to determine whether a class will be certified."<sup>36</sup> An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes.<sup>37</sup>

### E. THE MAJORITY'S DECISION

With respect to the State's first argument—that the trial court should have considered the State's motion on class action certification with respect to the *pending* class action—the majority

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<sup>35</sup> *Henry v Dow Chem Co*, 484 Mich at 495-496.

<sup>36</sup> *Id.* at 504.

<sup>37</sup> *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

contends that the trial court was in fact obeying the Supreme Court’s order to consider the class certification question *in light of Henry*.<sup>38</sup> I agree. And I also agree that *Henry* specifically allows a trial court to permit discovery under MCR 3.501(B)(3)(b), which states that “[t]he court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures.” (Emphasis supplied). Accordingly, the trial court could not have abused and did not abuse its discretion when postponing a ruling on class certification in light of the explicit language in both the Supreme Court’s April 30, 2010 order, in *Henry*, and in MCR 3.501(B)(3)(2).

With respect to the State’s second argument—that the Duncan plaintiffs cannot demonstrate commonality or superiority, two of the essential elements for class action certification—if this were the issue before us, I would agree with the State, for the reasons that I outlined in my original dissent in *Duncan I*.<sup>39</sup> But this is *not* the issue before us. To repeat, the Supreme Court in its April 30, 2010 order made it clear that the trial court on remand should re-examine the class action aspects this case in light of *Henry*. *Henry* and MCR 3.501(B)(3)(2) allow discovery under these circumstances. As the majority states, a trial court must comply with a directive from an appellate court.<sup>40</sup> Again, the trial court could not have abused and did not abuse its discretion when complying with the Supreme Court’s April 30, 2010 order. I therefore concur with the majority on this issue.

I do note that the State asserts that, at the time they filed their complaint, not a single one of the Duncan plaintiffs had gone to trial or otherwise had his or her claims adjudicated. Further, according to the State, not a single one the Duncan plaintiffs later attempted to have their assigned attorneys replaced. If this is accurate, it certainly raises the question of whether the Duncan plaintiffs adequately, or even at all, now represent the class they seek to represent—all indigent adult persons who rely or will rely on the counties to provide them with defense services in felony cases<sup>41</sup>—since the Duncan plaintiffs were apparently satisfied with the representation that they received. But the State does not press this argument and, for that reason, I decline to analyze it.

### III. FAILURE TO STATE A CLAIM

#### A. THE SUPREME COURT’S ORDERS

To paraphrase my comments, above, on the various Supreme Court orders as they relate to the State’s assertion that the Duncan plaintiffs have failed to state a claim upon which relief can be granted, I find them supremely confusing. We can be certain that the precise issue before the Supreme Court, in all of its orders, was whether the Duncan plaintiffs stated a claim on

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<sup>38</sup> *Infra* at \_\_\_\_.

<sup>39</sup> See *Duncan I*, 284 Mich App at 395.

<sup>40</sup> *Infra* at \_\_\_\_, citing *Schumaker v Dep’t of Natural Resources (After Remand)*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

<sup>41</sup> *Duncan I*, 284 Mich at 391.

which relief could be granted, the standard set out in MCR 2.116(C)(8). We can be certain that this Court denied the State's motion for summary disposition under MCR 2.116(C)(8). We can be certain that the Supreme Court upheld this denial, but "for different reasons."

However, by analyzing the text of the various orders, we can speculate that one of those different reasons was the notion that since this case was in its "earliest stages," discovery might be necessary. We can also speculate that one of those reasons was the notion that ruling on a MCR 2.116(C)(8) motion would be "premature." We can further observe that applying MCR 2.116(C)(10) standards to a motion under MCR 2.116(C)(8) is inappropriate, the proverbial square peg in a round hole. We can finally observe that holding a MCR 2.116(C)(8) motion to be premature is contrary to settled law concerning such motions, the pounding of a larger square peg into the same round hole. Beyond that, there is little more that we can say and much less of which we can be certain.

## B. THE TRIAL COURT'S DECISION

As stated above, in October 2011, the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion in December 2011. With respect to the State's assertion that the Duncan plaintiffs had failed to state a claim on which relief could be granted, the trial court denied the motion holding that it had previously held that the Duncan plaintiffs had stated a claim on which relief could be granted and that decision had been affirmed by this Court and the Supreme Court.

## C. THE STATE'S APPEAL

On appeal, the State essentially argues three points. The first argument, at the threshold, relates to judicial estoppel. The State asserts that:

Judicial estoppel is properly applied here. [The Duncan p]laintiffs' counsel argued to the Michigan Supreme Court during oral argument on April 14, 2010 that "there is no (C)(8) motion before you with respect to – on whether relief can be granted against the Governor." . . . [The Duncan p]laintiffs ultimately prevailed because of, and thus benefitted from, this unequivocal representation, since the Supreme Court's April 30, 2010 Order affirming the denial of summary disposition stated that "it is premature to make a decision on the substantive issues" and effectively treated the earlier motion as fact-based under MCR 2.116(C)(10) rather than pleadings based under MCR 2.116(C)(8). . . . Having successfully benefitted from this representation, [the Duncan] plaintiffs cannot now invoke the authority of the trial court to override its earlier "bargain" with the Michigan Supreme Court and argue that this (C)(8) motion was previously raised and denied.

The State's second argument is that the Duncan plaintiffs have not pled facts sufficient to demonstrate a violation of US Const Amends VI and XIV or Const 1963, art 1, §§ 71 and 20 based on a generalized claim of widespread systemic deficiencies in Michigan's indigent defense system. The State goes on to assert that the Duncan plaintiffs have not established the requisite prejudice to the process in any individual criminal case arising from the alleged systematic deficiency such that the reliability of the ultimate outcome is suspect.

The State's third, and very much related, argument, is that allowing the Duncan plaintiffs' preconviction claims to go forward on the facts pleaded requires the presumption that the State has *per se* so prejudiced indigent criminal defendants that they have been or will be denied their constitutional right to effective counsel and a fair trial.

#### D. STANDARD OF REVIEW

We review a trial court's order denying summary disposition under MCR 2.116(8) *de novo*.<sup>42</sup> The trial court properly grants a motion MCR 2.116(C)(8) when "the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'"<sup>43</sup> A pleader's conclusory statements, when unsupported by facts, are not sufficient to state a cause of action.<sup>44</sup>

#### E. THE MAJORITY'S DECISION

##### 1. JUDICIAL ESTOPPEL

The majority holds that, even if the Duncan plaintiffs' counsel made a wholly inconsistent statement, "the [S]tate has not shown that such assertion was successful."<sup>45</sup> Frankly, I think this is reading too much into this comment. Whether counsel for the Duncan plaintiffs simply made an incorrect, but extraneous, assertion in the heat of a difficult argument before the Supreme Court or whether the Duncan plaintiffs are correct in their assertion that the State is taking counsel's statement out of context, it would be indeed a miscarriage to decide this important issue based on a single, stray comment. Thus, while I concur in the majority's result, I do not adopt its reasoning as I consider this something of a non-issue.

##### 2. LAW OF THE CASE

The majority asserts that the "only proper question for this Court to address is whether the state's argument [on failure to state a claim] is foreclosed under the law of the case doctrine."<sup>46</sup> The majority goes on to conclude that "the law of the case doctrine applies in this case regarding whether [the Duncan] plaintiffs pleaded a proper cause of action"<sup>47</sup> and asserts that the State has not established a material change of fact or an intervening change in the law that would allow us to avoid the application of the law of the case doctrine "and reconsider the state's motion for summary disposition under MCR 2.116(C)(8)."<sup>48</sup>

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<sup>42</sup> *Maiden v Rozwood*, 461 Mich at 119.

<sup>43</sup> *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

<sup>44</sup> *Kramer v City of Dearborn Heights*, 197 Mich App 723, 726; 496 NW2d 301 (1992).

<sup>45</sup> *Ante* at \_\_\_\_.

<sup>46</sup> *Ante* at \_\_\_\_.

<sup>47</sup> *Ante* at \_\_\_\_.

<sup>48</sup> *Id.*

I do not agree and I respectfully dissent for three reasons. *First*, bluntly, I do not know what the law of the case in this matter really is, given the mélange of Supreme Court orders with which we must contend. I hope that I have adequately explained my position on this aspect above. I have not been quite so bold as to state that, in its ultimate disposition, the Supreme Court was simply wrong on the law. But I do believe that the various orders with their contradictory and conclusionary statements cause sufficient confusion to make the proper application of the law case doctrine a decidedly dicey proposition.

*Second*, the Supreme Court effectively held the State’s motion under MCR 2.116(C)(8) in abeyance through the last paragraph of its April 30, 2010 order (“Accordingly, the defendants are not entitled to summary disposition *at this time*.”).<sup>49</sup> The words “at this time” certainly imply that the State was a liberty to file another motion for summary disposition at a later time, and this is exactly what the State did. Given this rather open invitation, there is considerable doubt in my mind that the law of the case doctrine applies at all.

*Third*, and without parsing the wording of the majority’s holding too closely, we are not reconsidering the State’s original motion. Rather, we are considering a new motion, in which the State does assert material changes of fact and an intervening change in the law. In my view, these three reasons combined constitute solid grounds on which to decline to apply the law of the case doctrine.

### 3. ACTUAL PREJUDICE

A simple syllogism summarizes the State’s argument on this aspect of the case:

**Major Premise:** Prejudice is an essential component of an ineffective assistance of counsel claim at any stage of the proceeding.

**Minor Premise:** The Duncan plaintiffs cannot establish prejudice.

**Conclusion:** Therefore, the Duncan plaintiffs have failed to state a claim upon which relief can be granted.

There can be no question that the State’s major premise is correct. The Sixth Amendment of the United States Constitution provides that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>50</sup> The Michigan Constitution contains the same right.<sup>51</sup> In *Gideon v Wainwright*,<sup>52</sup> the United States Supreme Court held that the Sixth Amendment right to counsel was “obligatory” with regard to the states through the operation of the Fourteenth Amendment. And in *Strickland v*

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<sup>49</sup> *Duncan II*, 486 Mich at 906 (Emphasis supplied).

<sup>50</sup> US Const, Am VI.

<sup>51</sup> Const 1963, art 1, § 20.

<sup>52</sup> *Gideon v Wainwright*, 372 US 335, 342; 83 S Ct 792; 9 L Ed 2d 799 (1963).

*Washington*,<sup>53</sup> the Court laid out a two-pronged standard for evaluating the effectiveness of counsel. As I said in my original dissent in *Duncan I*:

The Court . . . enunciated a two-part standard for assessing counsel’s assistance to a convicted defendant who claims that such assistance was “so defective as to require reversal of a conviction or death sentence. . . .” The first component required a showing that counsel’s performance was “deficient;” that is, that counsel made errors “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” The second component required a *showing that the deficient performance prejudiced the defense*; that is, that counsel’s errors “were so serious as to deprive the defendant a fair trial, a trial whose result is reliable.”<sup>[54]</sup>

There can also be no question that the State’s minor premise is correct: the *Duncan* plaintiffs cannot show actual, individualized deficient performance by their counsel. At the time of the filing of the original complaint, according to the State, appointed counsel represented each of the *Duncan* plaintiffs, criminal charges were pending as none of the *Duncan* plaintiffs had gone to trial or otherwise had their cases adjudicated, and none of the *Duncan* plaintiffs had attempted to have their assigned counsel replaced.<sup>55</sup> Further, according to the State, each of *Duncan* plaintiffs has been adjudicated guilty and sentenced. (The record remains silent regarding whether any of these individuals have made postconviction claims of ineffective assistance of counsel.) Thus, the *Duncan* plaintiffs’ claims of prejudice are merely conclusory statements; the *Duncan* plaintiffs cannot support them with facts.

There is a simple reason that the *Duncan* plaintiffs did not—and did not even attempt to— show actual, individualized prejudice flowing from assigned counsel’s allegedly deficient performance: the *Duncan* plaintiffs made all of their claims *preconviction*. By the very nature of such claims, it would be impossible for the *Duncan* plaintiffs to show actual, individualized prejudice because any deficient performance had not yet occurred. If it were that simple, the State’s conclusion that the *Duncan* plaintiffs failed to state claims on which relief could be granted would undoubtedly be correct, and this lawsuit would have been over years ago. But, of course, it is not that simple. As a substitute for actual, individualized prejudice, the *Duncan* plaintiffs have essentially attempted to show prejudice *per se*.

#### 4. PREJUDICE *PER SE*

Another simple syllogism summarizes the State’s argument on this aspect of the case:

**Major Premise:** Absent certain blatant instances amounting to the denial of counsel (that is, prejudice *per se*), appointed counsel is presumed competent

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<sup>53</sup> *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

<sup>54</sup> *Duncan I*, 284 Mich at 354-355 (citations omitted, emphasis supplied).

<sup>55</sup> *Id.* at 357-358.



unless a defendant can meet his or her burden to demonstrate a constitutional violation.<sup>56</sup>

**Minor Premise:** The Duncan plaintiffs cannot establish prejudice *per se*.

**Conclusion:** Therefore, the Duncan plaintiffs have failed to state a claim on which relief can be granted

As the State points out, there are only a limited number of “blatant instances” in which we can presume prejudice. They include:

- when counsel has systemically been denied<sup>57</sup> or is systematically denied at a critical stage;<sup>58</sup>
- where counsel is not present for a post indictment line-up—a critical stage);<sup>59</sup>
- where the right to a pretrial hearing has been denied;<sup>60</sup> and
- where there is joint representation of co-defendants and a conflict of interest is apparent.<sup>61</sup>

Otherwise, the United States Supreme Court has held, that “[c]laims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemaking.”<sup>62</sup> Since none of the Duncan plaintiffs’ claims fit into the specific categories that the Court enumerated as constituting prejudice *per se*, the question becomes whether there are other grounds on which to recognize such preconviction claims. I conclude there are not.

As the State points out, neither the United States Supreme Court nor the Michigan Supreme Court has recognized the type of preconviction claims that the Duncan plaintiffs assert

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<sup>56</sup> *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

<sup>57</sup> *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 2d 387 (1970), citing *Powell v Alabama*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932).

<sup>58</sup> *Cronin*, 466 US at 659.

<sup>59</sup> *United States v Wade*, 388 US 218, 237; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

<sup>60</sup> *Pugh v Rainwater*, 483 F2d 778, 787 (CA 5, 1973), rev'd in part on other grounds by *Gerstein v Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975).

<sup>61</sup> *United States v Gonzalez-Lopez*, 548 US 140, 152; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

<sup>62</sup> *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F2d 637, 647 (CA 4, 1988), citing *Cronin*, 466 US at 648, and *Strickland*, 466 US at 668.

here, and for good reason. And as I pointed out in my original dissent in *Duncan I*<sup>63</sup> and as Justice MARKMAN concisely and mercifully summarized in *Duncan III*,<sup>64</sup> there are a variety of factors—including standing, ripeness, causation, the type of claim the Duncan plaintiffs assert, the type of relief the Duncan plaintiffs seek, and, ultimately, justiciability—that lead, inexorably, to the conclusion that the Duncan plaintiffs have not stated a claim on which relief can be granted. Simply put, there are no grounds on which to recognize such preconviction claims, as they are entirely speculative in nature.

The causation factor alone illustrates the intractable problems that the Duncan plaintiffs face with their preconviction claims. As I said in my dissent in *Duncan I*:

The majority states that throughout its opinion it has indicated that the Duncan plaintiffs will have to establish a “causal connection between the deficient performance and the indigent defense systems being employed. That is simply not the causal connection that is relevant in this case. The Duncan plaintiffs have sued the [S]tate and the Governor. Therefore, the relevant causal connection must be between the inaction of the [S]tate and the Governor and the alleged deficient performance at the local level.

Now, as if repeating a mantra, the Duncan plaintiffs repeatedly aver that there is such a causal connection. But there is not a single fact that they allege in their complaint that supports their generalized assertions that the alleged inaction of the [S]tate and the Governor *caused* the deficient performance that the Duncan plaintiffs outline. Moreover, simply repeating the same words again and again does not change their character.

Undoubtedly, the complaint alleges causation. But it does not allege the *necessary* causation. Unsupported generalized allegations are just that, unsupported and generalized. With all due respect to the Duncan plaintiffs and the majority, there is no way it can possibly be proved that the failure of the [S]tate and the Governor to do an undefined something specifically *caused* the deficiencies they allege. Intuitively, one might guess that the something is correlated with the alleged deficiencies, even though that something remains undefined beyond mere generalized assertions of inaction. But correlation is not causation, and a hunch is not a basis upon which a court can grant declaratory and injunctive relief.<sup>[65]</sup>

## F. CONCLUSION

The above statement is as true today as it was in 2009. The majority here fails to address the central issue in this case: whether the Duncan plaintiffs have stated a claim on which relief

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<sup>63</sup> *Duncan I*, 284 Mich App at 343-399.

<sup>64</sup> *Duncan III*, 486 Mich at 1071-1073.

<sup>65</sup> *Duncan I*, 284 Mich App at 372-373 (footnotes omitted, emphasis in the original).

can be granted. While I agree that judicial estoppel does not apply, I also conclude that the law of the case doctrine does not bar our consideration of this central issue. And I further conclude that the Duncan plaintiffs cannot establish that they were prejudiced, whether through demonstrating actual prejudice or by adequately supporting the substitution of a presumption of prejudice *per se* for the actual prejudice requirement inherent in *Strickland*. I would reverse the trial court on this issue and remand for the entry of summary disposition in favor of the State.

#### IV. STANDING

##### A. THE SUPREME COURT'S ORDERS

The Supreme Court's orders do not address the subject of standing.

##### B. THE TRIAL COURT'S DECISION

As stated above, in October 2011, the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion in December 2011. With respect to the State's assertion that the Duncan plaintiffs lacked standing, the trial court ruled that it had previously ruled that the Duncan plaintiffs had standing.

##### C. THE STATE'S APPEAL

On appeal, the State argues two points. First, the State asserts that the Duncan plaintiffs claims are not justiciable because they lack standing under Michigan's new standard contained in *Lansing Sch Ed Ass'n v Lansing Bd of Ed.*<sup>66</sup> Second, and alternatively, the State asserts that the *Lansing Sch Ed Ass'n* standard is unworkable and should be overturned, because it allows a litigant to bring a claim without demonstrating an actual injury.

##### D. STANDARD OF REVIEW

Whether a party has standing is a question of law that we review *novo*.<sup>67</sup>

##### E. THE MAJORITY'S DECISION

Noting that while the law of the case doctrine does not necessarily apply when there has been an intervening change in the law, the majority reasons that "our Supreme Court clearly reinstated its original decision affirming this Court's opinion in this case *after* it decided *Lansing Sch Ed Ass'n*."<sup>68</sup> Chronologically, this is certainly true. But I am not sure that it decides the issue as the State has postured it.

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<sup>66</sup> *Lansing Sch Ed Ass'n v Lansing Bd of Ed.*, 487 Mich 349; 792 NW2d 686 (2010).

<sup>67</sup> *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008).

<sup>68</sup> *Ante* at \_\_\_\_ (emphasis supplied).

In this regard, I repeat my conclusion, stated at length in *Duncan I*<sup>69</sup> that, because of the peculiar preconviction status of the case, the Duncan plaintiffs lacked standing.<sup>70</sup> I remain convinced that, for the same reason, the Duncan plaintiffs continue to lack standing under even the more relaxed standards contained in *Lansing Sch Ed Ass'n*. But the State's position appears to be that, since the law has changed—even though the change, as the majority notes, has made it easier to show standing<sup>71</sup>—the trial court erred when it declined to revisit the issue. Essentially, the State has wrong-footed itself; it can hardly be considered error when a trial court does not rehash a previous conclusion in light of a new standard that would actually makes it easier to reach the same result. Thus, I concur in the majority's result, although not for the same reasons that it articulates. In any event, if I am correct that the Duncan plaintiffs have not stated a claim on which relief can be granted, the issue need not be decided.

As to the State's second argument to the effect that we should somehow overrule the Supreme Court's decision in *Lansing Sch Ed Ass'n*, I fully concur in the reasoning and the result that the majority sets out.<sup>72</sup> While I recognize that the State would like to have the ruling in *Lansing Sch Ed Ass'n* set aside, it is almost risible to suggest that this Court do so. Panels of this Court do not overrule decisions of the Supreme Court. To suggest otherwise is to disregard the judiciary's hierarchical system and the very concept of *stare decisis*. And, again, if I am correct that the Duncan plaintiffs have not stated a claim on which relief can be granted, the issue need not be decided.

## V. RES JUDICATA

### A. THE SUPREME COURT'S ORDERS

The Supreme Court's orders do not address the subject of *res judicata*.

### B. THE TRIAL COURT'S DECISION

As stated above, in October 2011, the State filed a renewed motion for summary disposition in the trial court. The trial court denied this motion in December 2011. With respect to the State's assertion that *res judicata* controlled, the trial court ruled that *res judicata* did not bar the action.

### C. THE STATE'S APPEAL

The State argues that the doctrine of *res judicata* prevents the problem of multiple suits litigating the same cause of action. "The doctrine bars a second, subsequent action when (1) the

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<sup>69</sup> *Duncan I*, 284 Mich at 365- 371.

<sup>70</sup> *Id.* at 371.

<sup>71</sup> *Ante* at \_\_\_\_, fn 4.

<sup>72</sup> *Ante* at \_\_\_\_.

prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.”<sup>73</sup>

The State contends the Michigan Supreme Court takes a broad approach to the doctrine of *res judicata*, holding that it “bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.”<sup>74</sup> The State concludes that all three prongs of the test for the application of *res judicata* have been met here.

#### D. STANDARD OF REVIEW

As the majority states, we review de novo a trial court’s decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law.<sup>75</sup> “The applicability of the doctrine of *res judicata* is a question of law that is also reviewed de novo.”<sup>76</sup>

#### E. THE MAJORITY’S DECISION

The majority holds that:

The issues presented in this civil case regarding the state’s alleged deprivation of plaintiffs’ constitutional rights through a deficient indigent criminal defense system were not and could not have been raised in the plaintiffs’ individual criminal prosecutions. See *Stoudemire*, 248 Mich App at 334. The remedy that plaintiffs seek via a class action, i.e., improvements to the indigent criminal defense system, could not have been achieved during plaintiffs’ prior criminal proceedings. Further, as plaintiffs’ proposed class includes indigent people who may not have been convicted of crimes, there has been no final decision on the merits in those cases. See *id.*<sup>[77]</sup>

Obviously, the majority is here relying on the third prong of the *res judicata* test: that the issues presented in the subsequent case “were or *could have been decided* in the prior case.” (Emphasis supplied). But it *is* possible that the issue of deficiencies in the indigent criminal defense system could have been raised and decided in the individual prosecutions of the individual Duncan plaintiffs.

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<sup>73</sup> *Adair v State of Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

<sup>74</sup> See *Adair*, 470 Mich at 121, citing *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); *Sewell*, 463 Mich at 575.

<sup>75</sup> *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

<sup>76</sup> *Id.*

<sup>77</sup> *Ante at* \_\_\_\_.

After all, broad issues of lack of representation and lack of effective representation were raised and decided in both *Gideon* and *Strickland*. Not every request for major changes in the law need be decided on a class action basis through the exercise of declaratory and injunctive relief; in fact, most are not. And only if the class action route is the *exclusive* route by which to pursue such changes must the proposed class include persons not yet convicted of crimes, for which there have been no decisions on the merits, as is the case here. Therefore, I dissent on this point, but I again note that if I am correct that the Duncan plaintiffs have failed to state a claim on which relief can be granted, then we need not reach this issue.

## VI. CONCLUSION

The State's appeal in this case raises a number of important issues, some new and some the same or virtually the same as it raised in its initial appeal to this Court and before the Supreme Court. Sorting these issues out is a considerable job in and of itself, and the majority has proceeded carefully and methodically, issue by issue, to do just that. For these reasons and as I have set out above, I concur in the majority's holdings with respect to class certification, judicial estoppel (as to result), and standing (as to result, under the State's first formulation of the issue, and fully as to our overruling *Lansing Sch Ed Ass'n*).

But I profoundly disagree with the majority's conclusion that the "only proper question for this Court to address" is whether the State's argument on the failure of the Duncan plaintiffs to state a claim on which relief can be granted is "foreclosed under the law of the case doctrine."<sup>78</sup> To the extent that there is a law of the case in this matter growing out of the Supreme Court's various orders—and I doubt that there really is—it is so confusing and contradictory as to defy application. Under such circumstance, as I have outlined, I would hold that the Duncan plaintiffs have, even when accepting each of the facts that they assert as true, failed to state a claim on which a court, any court, can grant relief.

And as to relief, an additional comment is in order. As I stated in my original dissent in *Duncan I*,<sup>79</sup> there is no question that it is the ultimate responsibility of the judiciary to say "what the law is."<sup>80</sup> But those seeking judicial intervention must first establish that "their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable."<sup>81</sup> And, then, "a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a

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<sup>78</sup> *Ante* at \_\_\_\_.

<sup>79</sup> *Duncan I*, 284 Mich at 385.

<sup>80</sup> *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803).

<sup>81</sup> *Raines v Byrd*, 521 US 811, 820; 117 S Ct 2312; 138 L Ed 2d 849 (1997).

preliminary injunction.”<sup>82</sup> “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.”<sup>83</sup>

Adding to these stringent requirements is the concept of judicial restraint: that certain modesty with which we should contemplate intervening in public policy matters that more properly belong before the legislative and the executive branches. Here, the Duncan plaintiffs seek sweeping declaratory and injunctive relief. But the Supreme Court has recognized that normally, when dealing with the legislative and executive branches, declaratory relief is sufficient. In *Straus v Governor*, the Court said:

[D]eclaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, §1, to conform their actions to constitutional requirements or confine them within constitutional limits. Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations.<sup>[84]</sup>

It is with that sense of judicial restraint and modesty—a recognition of the limits of judicial power, of the historic efficacy of case-by-case adjudication, and of the proper regard for those branches whose primary responsibility it is to make public policy—that I suggest we should consider the issues involved in this case. Under this approach, we should now end the Duncan plaintiffs’ long hegira.

I would reverse and remand for the entry of summary disposition in favor of the State.

/s/ William C. Whitbeck

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<sup>82</sup> *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008) (quotations marks and citations omitted), quoting *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 225-226; 634 NW2d 692 (2001).

<sup>83</sup> *Pontiac Fire Fighters*, 482 Mich at 9.

<sup>84</sup> *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999) (quotations marks and citations omitted).