STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN FILM COALITION, Plaintiff-Appellee,	UNPUBLISHED August 21, 2012
v	No. 304000 Oakland Circuit Court
STATE OF MICHIGAN, DEPARTMENT OF TREASURY and ROBERT J. KLEINE, TREASURER, Defendants-Appellants.	LC No. 2010-115635-CZ

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent because I do not believe that the Coalition has established that it has standing to seek a declaratory judgment on behalf of its members. Accordingly, I disagree with the majority that we may even reach the substance of the Coalition's claims.

Whether a party has standing to seek a declaratory judgment is an issue of law, reviewed de novo.[1] The basic rule of standing in Michigan was articulated in *Lansing Schools Education Association v Lansing Board of Education*: "[A]litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment."[2]

In turn, a party meets the requirements of MCR 2.605 and may seek a declaratory judgment "[i]n a case of actual controversy."[3] "The essential requirement of the term 'actual controversy' under

[1] *Groves v Dept of Corr*, 295 Mich App 1, 4; 811 NW2d 563 (2011).

[2] 487 Mich 349, 372; 792 NW2d 686 (2010).

[3] MCR 2.605(A)(1).

the rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised."[4]

Importantly, "[a] case of actual controversy does not exist . . . where . . . the injury sought to be prevented is merely hypothetical."[5] For example, in *Feiger v Commissioner of Insurance*,[6] the plaintiffs, an attorney and his law clerk, sought a declaratory judgment in their challenge to the constitutionality of 1986 PA 178, which "amend[ed] and add[ed] sections to the Revised Judicature Act, particularly regarding medical malpractice litigation."[7] The plaintiffs argued that an actual controversy existed and that declaratory judgment was proper because, inter alia:

> [B]y conferring standing upon him, the thousands of hours spent by judges, attorneys and clients litigating the numerous challenges to the act which will undoubtedly arise and the costs incurred will be avoided. The settling of [plaintiffs'] challenge to the statute will allegedly obviate the need for multiple suits by other parties. Further, [the plaintiffs argue that] because of the liberal policy underlying the declaratory judgment rule, to make the courts more accessible to the people, it behooves this Court to find that [the] plaintiff[s have] standing.[8]

This Court rejected that argument, and held:

> [R]egardless of the liberal policy underlying the declaratory judgment rule, a plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. Without such limitation, courts would be continually called upon to decide abstract questions on hypothetical issues. The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief.[9]

Plaintiff, the Michigan Film Coalition, is a voluntary, unincorporated association of commercial film producers. At the time the Coalition filed its complaint, none of its members had formally applied for the tax credit. Moreover, there is no evidence that any of the Coalition's members were told by the Film Office or the Department of Treasury that they would be denied the credit were they to apply for it. Rather, in September, 2008, the Coalition sent a

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[4] *Lansing Schools Ed Ass'n*, 487 Mich at 372 n 20 (citations and quotations omitted).

[5] *Chrysler Corp v Home Ins Co*, 213 Mich App 610, 613; 540 NW2d 485 (1995).

[6] 174 Mich App 467; 437 NW2d 271 (1988).

[7] *Id*. at 469.

[8] *Id*. at 472.

[9] *Id*.

letter to the governor, alleging that the Department of Treasury had decided to exclude commercial production from eligibility for the tax credit. The governor's office referred the Coalition to the Department of Treasury. In January, 2009, the Chief Deputy Treasurer responded to the Coalition and explained that, in the Department of Treasury's view, according to the plain language of the statute, "many of the commercial productions to which [the coalition] refer[s in its letter to the Department of Treasury] would not qualify for the Film Production Credit . . . ." However, the letter did not say, categorically, that none of the Coalition's individual members would be eligible for the credit. Rather, the letter responded to the hypothetical scenario presented in the Coalition's letter, where the Coalition asked in general terms whether its members would be eligible for the credit were they to apply for it.

Here, as in *Feiger,* the Coalition asks this Court to weigh in on a hypothetical injury: whether the Coalition's individual members would suffer tax liability if they were to apply for the credit and have it denied. Accordingly, there exists in this case no actual controversy, and the Coalition lacks standing to seek a declaratory judgment. The injuries alleged by the Coalition have not yet come to pass: None of the Coalition's members has in fact applied for the tax credit, and the Coalition has not presented evidence that any of its individual members would be denied the tax credit were they to apply. By contrast, the principle basis for the Coalition's entire declaratory judgment action is the letter to the Coalition from the Department of Treasury, which speaks in broad strokes about the nature and purpose of the tax credit, and which was responsive to the Coalition's inquiry regarding its members generally. Accordingly, the Coalition has not "plead[ed] and prove[d] facts which indicate an adverse interest necessitating the sharpening of the issues raised,"[10] thus meeting the threshold requirement for standing to seek a declaratory judgment, because the Coalition has not shown that one of its members would be denied the tax credit were it sought.

Phrased another way, standing focuses on whether a litigant is the "proper party to request adjudication of a particular issue and not whether the issue itself is justiciable."[11] A group, such as the Coalition, has standing to seek a declaratory judgment when "(1) its members would otherwise have standing to sue in their own right; [and] (2) [the] interests it seeks to protect are germane to organization's purpose . . . ."[12] Accordingly, if one of the Coalition's members had standing, or would have standing, so would the Coalition. Even so, "a plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."[13] Here, the Coalition's lawsuit amounted to a request that the circuit court issue an advisory opinion with regard to whether its individual members were

[10] *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20 (citations and quotations omitted)

[11] *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (citations and quotations omitted).

[12] 2 Mich Civ Jur, Associations and Societies § 31.

[13] *Feiger*, 174 Mich App at 472.

eligible for the tax credit, where the Coalition has not shown that any of its members would have been denied the credit were it sought.

/s/ Kathleen Jansen