

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

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ROBERT DAVIS,

Plaintiff-Appellee,

v

STATE OF MICHIGAN, HIGHLAND PARK  
SCHOOL DISTRICT FINANCIAL REVIEW  
TEAM, GOVERNOR, SUPERINTENDENT OF  
PUBLIC INSTRUCTION and HIGHLAND PARK  
SCHOOL DISTRICT EMERGENCY  
MANAGER,

Defendants-Appellants,

and

HIGHLAND PARK SCHOOL DISTRICT,

Defendant.

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UNPUBLISHED

April 9, 2013

No. 310709

Ingham Circuit Court

LC No. 12-000266-CZ

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendants appeal as of right from a declaratory judgment granting plaintiff relief pursuant to Const 1963, art 9, § 32 (the Headlee Amendment). Because plaintiff's Headlee Amendment claim is barred by res judicata, we vacate the judgment and remand for dismissal of plaintiff's complaint with prejudice.

**I. FACTS**

On January 27, 2012, pursuant to the now-repealed Local Government and School District Fiscal Accountability Act, MCL 141.1501 *et seq.*,<sup>1</sup> the Governor appointed an

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<sup>1</sup> The version of this legislation then in effect, 2011 PA 4, MCL 141.1501 *et seq.*, was repealed with the rejection of Proposal 1 in the November 2012 election. However, this Court has held that the repeal by referendum of 2011 PA 4 caused 1990 PA 72, MCL 141.1201 *et seq.*, to

emergency financial manager to the Highland Park School District. On January 27, 2012, a contract was signed providing that the local government was responsible for paying the emergency manager's salary and any other necessary expenses. On January 30, 2012, plaintiff sued the Governor, the state superintendent of public instruction, and the Highland Park financial review team, alleging that the appointment of the emergency manager violated the Open Meetings Act, MCL 15.261 *et seq.* The trial court agreed and essentially invalidated the appointment. Defendants appealed to this Court, which granted defendants' request for preemptory reversal, *Davis v Highland Park Sch Dist Fin Review Team*, unpublished order of the Court of Appeals, entered January 4, 2013 (Docket No. 309219), and held that the Highland Park financial review team was not a "public body" under the Open Meetings Act and it was therefore not required to comply with the act.

While the appeal in Docket No. 309219 was pending, the emergency manager stepped down from his position. Thereafter, the financial review team reconvened and ultimately the emergency manager was reappointed. On March 2, 2012, an amended and restated employment contract was submitted with allegedly the same terms as the first contract. Thereafter, plaintiff filed the present suit against the Governor, the state superintendent of instruction, the Highland Park financial review team, and the emergency manager. The trial court ultimately ruled that the appointment of an emergency manager under 1990 PA 72 violated the Headlee Amendment.

## II. ANALYSIS

Rather than addressing the trial court's constitutional ruling, we instead first turn to defendant's argument that plaintiff's claim is barred by res judicata. We do so because it is always preferable to decide a case on non-constitutional grounds if possible. See *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960) rev'd in part on other grounds 468 Mich 763; 664 NW2d 185 (2003) ("[F]ew principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort."). It clearly is possible in this case. The applicability of res judicata is a question of law subject to de novo review on appeal. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004) aff'd in part and rev'd in part on other grounds 486 Mich 468; 785 NW2d 119 (2010).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the current action are identical to those essential to a prior action. *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). "The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication." *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006). Res judicata requires that: "(1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies." *Id.* at 531. The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Plaintiff's first lawsuit was decided on the merits by the February 29, 2012, order of the

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remain in effect. *Davis v Roberts*, unpublished order of the Court of Appeals, entered November 16, 2012 (Docket No. 313297).

Ingham Circuit Court.<sup>2</sup> Therefore, the first and second elements of *res judicata* are met. Moreover, the matter contested in the second case could have been raised and resolved in the first case. The test to determine whether the two actions involve the same subject is whether the claims involve the same transaction. *Adair*, 470 Mich at 123-124. *Res judicata* bars litigation in the second action not only of those claims actually litigated in the first action, but of claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not. *Id.* at 121. Whether actions arise from the same transaction depends on the relationship of the facts in time, space, origin or motivation, and whether they form a convenient trial unit. *Id.* at 125.

At its core, the first action involved a challenge to the appointment of an emergency manager for the school district under 2011 PA 4, while this second action also involves a challenge to the appointment of an emergency manager for the school district, with the only material difference between the two lawsuits being the legal theory upon which plaintiff relied in challenging the appointment of an emergency manager for the school district. But, all of the facts necessary for a Headlee challenge existed at the time the first lawsuit was filed. In fact, plaintiff goes to great lengths in his complaint to note that the first appointment and the second appointment are essentially the same appointment because the review team was the same, the required reports were just re-dated, and the employment contract was just re-dated. On these facts, it is clear that both lawsuits involve a challenge to the same transaction, and nothing prevented plaintiff from pursuing the Headlee violation claim in the first lawsuit. Therefore the third element is met.

Finally, “[t]he parties to the second action need be only substantially identical to the parties in the first action” because “the rule applies to both parties and their privies.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003). Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant. *ANR Pipeline Co v Dep’t of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). A privity includes a person so identified in interest with another that he represents the same legal right. *Adair*, 470 Mich at 122. Plaintiff is the same in both cases, and defendants are essentially the same with the exception of the addition of the emergency manager in the second case. However, there is a substantial identity of interests between the emergency manager and the previous defendants, so the emergency manager’s interests were presented and protected even though he was not a party to the first action. Therefore, this element is also met, and plaintiff’s complaint was barred by *res judicata*. The trial court erred in ruling otherwise.

Reversed and remanded for entry of an order dismissing plaintiff’s complaint with

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<sup>2</sup> This Court has held that “[t]he rule in Michigan is that a judgment pending on appeal is deemed *res judicata*.” *City of Troy v Hershberger*, 27 Mich App 123, 127; 183 NW2d 430 (1970). Further, this Court held that “[o]nly in a case where the second appeal itself prevents the prior judgment from being operative is the *res judicata* effect of the prior judgment inoperative.” *Id.*, citing *McHugh v Trinity Bldg Co*, 254 Mich 202; 236 NW 232 (1931). In other words, even if an appeal is pending, a judgment by the trial court can have a *res judicata* effect.

prejudice. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Christopher M. Murray