Order

Michigan Supreme Court
Lansing, Michigan

July 29, 2020

159539

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

ANTHONY HART,
Plaintiff-Appellant,

v

SC: 159539
COA: 338171
Ct of Claims: 16-000212-MM

STATE OF MICHIGAN,
Defendant-Appellee.

_____/

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 VACATE our order of September 25, 2019. The application for leave to appeal the February 7, 2019 judgment of the Court of Appeals is DENIED, because we are no longer persuaded that the questions presented should be reviewed by this Court.

CLEMENT, J. (*concurring*).

I concur with the Court's disposition of this matter. I write separately to draw attention to an issue that the parties have not raised, and upon which I would therefore have been uncomfortable deciding this case, but that I think is important and needs clarification: whether the Court of Appeals had jurisdiction to issue the opinion it did.

In defendant's motion for summary disposition in the trial court, it argued that this case should be resolved either on the basis of sovereign immunity or that plaintiff failed to plead a claim upon which relief could be granted. See MCR 2.116(C)(7) and (8). The trial court denied the motion on both grounds. Defendant then took a claim of appeal to the Court of Appeals. On appeal, that Court affirmed the trial court's (C)(7) holding to deny summary disposition on the basis of sovereign immunity, but reversed the trial court's (C)(8) holding and held that plaintiff had not made a claim upon which relief could be granted.

To understand my concern with whether the Court of Appeals had jurisdiction here, one must understand the bases of the Court of Appeals' jurisdiction. "The

jurisdiction of the court of appeals shall be provided by law . . . ."[1] Const 1963, art 6, § 10. As a result, "the jurisdiction of the Court of Appeals is entirely statutory." *People v Milton*, 393 Mich 234, 245 (1974). The principal statutory grant of jurisdiction to the Court of Appeals provides:

> (1) The court of appeals has jurisdiction on appeals from all final judgments and final orders from the circuit court, court of claims, and probate court, as those terms are defined by law and supreme court rule, except final judgments and final orders described in subsections (2) and (3). A final judgment or final order described in this subsection is appealable as a matter of right.
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> (2) The court of appeals has jurisdiction on appeal from the following orders and judgments that are reviewable only on application for leave to appeal granted by the court of appeals:
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> (a) A final judgment or final order of the circuit court under any of the following circumstances:
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> (*i*) In an appeal from a final judgment or final order of the district court . . . .
>
> (*ii*) In an appeal from a final judgment or final order of a municipal court.
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> (b) A final judgment or final order from the circuit court based on a defendant's plea of guilty or nolo contendere.
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> (c) Any other judgment or interlocutory order from the circuit court, court of claims, business court, or probate court as determined by supreme court rule.
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> (3) An order concerning the assignment of a case to the business court . . . is not appealable to the court of appeals. [MCL 600.308.]

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[1] The phrase "provided by law" indicates that the Constitutional Convention contemplated broad authority on the part of the Legislature to define this subject. "The committee on style and drafting of the constitutional convention of 1961 made a distinction in the use of the words 'prescribed by law' and the words 'provided by law.' Where 'provided by law' is used, it is intended that the legislature shall do the entire job of implementation. Where only the details were left to the legislature and not the over-all planning, the committee used the words 'prescribed by law.' " *Beech Grove Inv Co v Civil Rights Comm*, 380 Mich 405, 418-419 (1968).

In short, the scheme recognizes a dichotomy between appeals of right and appeals by leave. Appeals of right are available from "final orders" as this Court defines that term, except appeals of right are not available from circuit court orders reviewing lower court proceedings, guilty pleas, or orders assigning a case to the business court.[2] The statute allows appeals from these latter sorts of "final orders" (with the exception of business court assignments, which are not appealable at all), along with appeals from "[a]ny other judgment or interlocutory order," but "only on application for leave to appeal granted by the court of appeals."

We have adopted court rules that track with and implement this scheme.[3] In MCR 7.203(A)(1), we have provided that the Court of Appeals "has jurisdiction of an appeal of right from" all final orders, but in MCR 7.203(A)(1)(a) and (b) we have carved out the same exceptions found in MCL 600.308(2)(a) and (b) (i.e., denying the Court of Appeals jurisdiction on a claim of appeal from an order resolving an appeal from a lower court to the circuit court, and from guilty and *nolo contendere* pleas). In MCR 7.203(B)(1) and (2), we have authorized the Court of Appeals to grant leave to appeal in those circumstances where an appeal of right is not available, which is consistent with MCL 600.308(2). We have defined a "final order" as: (1) "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," (2) an order designated as final in receivership and related proceedings, (3) "a postjudgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile" in domestic-relations actions, (4) "a postjudgment order awarding or denying attorney fees and costs," and (5) an order denying a motion for summary disposition[4] on the basis of governmental immunity under MCR 2.116(C)(7) or (10). MCR 7.202(6)(a).

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[2] See also MCL 600.309, which provides that "all appeals to the court of appeals from final judgments or decisions permitted by this act shall be a matter of right," minus these exceptions from MCL 600.308(2) and (3).

[3] Prior to 2016 PA 186, MCL 600.308(1) simply allowed appeals of right from final judgments and orders, but it did not define those terms or expressly refer to this Court's definition. This Court amended MCR 7.202 to include a definition of final judgments and orders well before then, on October 19, 1995. See 450 Mich clv, clv (1995). So, while we adopted the definition before the Legislature had invited us to do so, the Legislature has since amended MCL 600.308(1) to expressly incorporate our definition by reference.

[4] Note that an order *denying* summary disposition to a party, for any reason, is in some tension with the notion of being a "final order"—something the United States Supreme Court wrestled with in *Mitchell v Forsyth*, 472 US 511 (1985), the case our staff comment cited in support of our 2002 amendment to the definition of "final order" that added denials of summary disposition on the basis of governmental immunity. See 466

Under this scheme, the Court of Appeals apparently had jurisdiction to review the trial court's sovereign-immunity ruling under MCR 2.116(C)(7). The Legislature has conferred upon the Court of Appeals authority to hear appeals of right from final orders as this Court has defined them. See MCL 600.308(1); MCR 7.203(A)(1). This Court has defined "final order" to include orders denying summary disposition on the basis of governmental immunity under MCR 2.116(C)(7). See MCR 7.202(6)(a)(v). Thus, defendant's claim of appeal gave the Court of Appeals jurisdiction to review the trial court's sovereign-immunity holding.[5]

The question, however, is whether the Court of Appeals had jurisdiction to review the trial court's holding under MCR 2.116(C)(8) that plaintiff had stated a claim upon

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Mich xc, xcv (2002). This is presumably why the Legislature has specified in MCL 600.308(3) that an order concerning the assignment of a case to the business court cannot be appealed in the Court of Appeals—no English speaker would construe that as a "final order," but § 308(3) prevents this Court from defining it as a "final order" as we have done with orders denying summary disposition on the basis of governmental immunity.

[5] Strictly speaking, MCR 7.202(6)(a)(v) defines a final order as being an order denying *governmental* immunity, whereas the state here invoked *sovereign* immunity. "The term 'governmental immunity' derives from 'sovereign immunity,' and although the two are often used interchangeably, they are not synonymous. Sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions." *Ballard v Ypsilanti Twp*, 457 Mich 564, 567-568 (1998). If MCR 7.202(6)(a)(v) were understood as allowing an appeal of right *only* when "governmental" immunity but not when "sovereign" immunity is at issue, the Court of Appeals may well not have had jurisdiction over the sovereign-immunity issue in this case, either. That said, as *Ballard* noted, we have often used the terms interchangeably, and there is reason to believe such usage was intended in MCR 7.202(6)(a)(v). We have said that "a central purpose of *governmental* immunity" is "to prevent a drain on the *state's* financial resources, by avoiding even the expense of having to contest on the merits any claim barred by *governmental* immunity," *Mack v Detroit*, 467 Mich 186, 203 n 18 (2002) (emphasis added), which refers to the "state" being protected by "governmental" rather than "sovereign" immunity. Our inclusion of orders denying governmental immunity in the definition of "final orders" furthers the "central purpose" of immunity stated in *Mack* by allowing for immediate appellate review before a government entity is forced to take on "the expense of having to contest on the merits" a claim it alleges the trial court should have barred—reasoning that applies with equal force to the state as to local units of government and would be consistent with our opinion in *Fairley v Dep't of Corrections*, 497 Mich 290 (2015). That said, MCR 7.202(6)(a)(v) admittedly reads as it does. For the purpose of this analysis, I assume that the definition of a "final order" in MCR 7.202(6)(a)(v) includes a denial of sovereign immunity.

which relief can be granted. The definition of "final order" in MCR 7.202(6)(a) does not include an order denying a (C)(8) motion. Moreover, MCR 7.203(A) makes clear that parties cannot bootstrap their way to appellate review. It provides that an appeal of right from an order denying summary disposition on the basis of governmental immunity "is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1). The trial court's (C)(7) decision was, undoubtedly, a different "portion of [its] order" than its (C)(8) decision, and MCR 7.203(A) makes clear that even though the claim of appeal gave the Court of Appeals jurisdiction over defendant's appeal of the (C)(7) sovereign-immunity decision, that did not then mean the Court of Appeals had jurisdiction to review the (C)(8) decision.

> Where the language of a court rule is clear and unambiguous, it must be enforced as written. We therefore conclude that in an appeal by right from an order denying a defendant's claim of governmental immunity, such as this one, [the Court of Appeals] *does not have the authority* to consider issues beyond the portion of the trial court's order denying the defendant's claim of governmental immunity. To conclude otherwise would render part of the court rule nugatory. [*Pierce v City of Lansing*, 265 Mich App 174, 182 (2005) (emphasis added; citation omitted).]

If the trial court's (C)(8) decision was not a "final order," and the Court of Appeals' jurisdiction over the (C)(7) decision did not extend to reviewing the (C)(8) decision as well, then the (C)(8) decision must be part of the group of "[a]ny other . . . interlocutory order[s] from the . . . court of claims" in MCL 600.308(2)(c), which are outside the definition of a "final order" in MCR 7.202(6)(a). Such orders are "reviewable *only* on application for leave to appeal granted by the court of appeals." MCL 600.308(2)(c) (emphasis added).

The jurisdictional difficulty here is that defendant never filed an application for leave to appeal the trial court's (C)(8) ruling in the Court of Appeals under MCR 7.203(B)(1). As was noted in *Pierce*, the Court of Appeals "does not have the authority" to review a nonfinal order under MCR 7.202(6)(a) on an appeal of right. Nor is *Pierce* an anomaly. During the era when the Court of Appeals published all of its decisions,[6] it held on many occasions that the failure to file an application for leave to appeal when one is required denies that Court jurisdiction to review questions presented in an improper claim of appeal.[7] However, it thereafter began holding that it could treat an improper claim of

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[6] On May 12, 1972, this Court amended GCR 1963, 821.1, to allow the Court of Appeals to issue unpublished opinions. See 387 Mich xxxix (1972); cf. Toth, *A Critique of the Unpublished P.C.*, 58 Mich B J 653 (1979).

[7] See, e.g., *Solner Inv Co v Thoms*, 2 Mich App 189, 190 (1966); *Sears, Roebuck & Co v Holmes*, 2 Mich App 190, 191 (1966); *Earp v Detroit*, 11 Mich App 659, 660 (1968); *City of Dearborn v Pulte-Strang, Inc*, 12 Mich App 161, 162-163 (1968); *Hope v Weiss*,

appeal as an application for leave to appeal and grant it, in order to reach important legal questions.[8] Since then, the Court of Appeals has lived on both sides of this fence. It has held that without a proper application for leave to appeal having been filed and granted, it lacked jurisdiction to entertain an appeal,[9] but it more often asserts discretion to treat an improper claim of appeal as an application, and then grants this constructive application in order to reach the legal questions presented in the name of judicial economy.[10]

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12 Mich App 404, 405 (1968); *Highland Park v Werch*, 15 Mich App 536, 537 (1969); *People v Smith*, 16 Mich App 606, 607 (1969); *People v Abess*, 17 Mich App 617, 618 (1969); *Chevrolet Local 659, UAW-CIO v Reliance Ins Cos*, 21 Mich App 123, 124-125 (1970); *People v Markunas*, 23 Mich App 616, 617-618 (1970); *Conlon v State Treasurer*, 23 Mich App 646, 647-648 (1970); *In re Freedland Estate*, 28 Mich App 580, 581-582 (1970); *Downriver Loan Co v Gabbert*, 37 Mich App 411, 412-413 (1971); see also *Standard Bldg Prod Co v Woodland Bldg Co*, 1 Mich App 434, 437 (1965) (dismissing the appeal because "[i]t is only by granted application for leave to appeal that a matter of this nature may be brought before the Court," but not expressly using the word "jurisdiction"); *Cassidy v Wisti*, 43 Mich App 356, 363 (1972) (holding that "any review of the order setting aside the default judgment must await the possible filing of an application for leave to appeal," but not expressly using the word "jurisdiction"). We affirmed the Court of Appeals' unpublished order dismissing a claim for lack of jurisdiction in *Lasher v Mueller Brass Co*, 392 Mich 488, 498-499 (1974).

[8] See, e.g., *People v Martin*, 59 Mich App 471, 482-483 (1975), overruled on other grounds by *Jackson Co Prosecutor v Court of Appeals*, 394 Mich 527 (1975); *People v Currie*, 59 Mich App 659, 660 (1975); *Moore v Ninth Dist Judge*, 69 Mich App 16, 19 (1976); *Oakland Co Prosecutor v Forty-Sixth Dist Judge*, 72 Mich App 564, 567 (1976); *Tenney v Springer*, 121 Mich App 47, 51 (1982); *Krajewski v Krajewski*, 125 Mich App 407, 409 n 1 (1983), rev'd on other grounds 420 Mich 729 (1984); *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 324-326 (1983); *Lindner v Lindner*, 137 Mich App 569, 571 n 1 (1984). The "treated as" solution was not unknown before unpublished opinions were allowed. See *People v Jebb*, 3 Mich App 118, 119-120 (1966).

[9] See, e.g., *Ulery v Coy*, 153 Mich App 551, 555-556 (1986), vacated on other grounds 428 Mich 879 (1987); *Zimmerman v Zimmerman*, 177 Mich App 8, 10 (1989); *Konal v Forlini*, 235 Mich App 69, 75-76 (1999); *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 91 (2002); *People v Perks*, 259 Mich App 100, 115 (2003); see also *McDowell v Detroit*, 264 Mich App 337, 344 n 2 (2004) (outlining circumstances under which "it would be incumbent on defendants to file an application for leave to appeal rather than a claim of appeal"), rev'd on other grounds 477 Mich 1079 (2007). We have also affirmed the Court of Appeals' dismissing a claim of appeal for lack of jurisdiction. See *Children's Hosp of Mich v Auto Club Ins Ass'n*, 450 Mich 670, 677 (1996).

[10] See, e.g., *SNB Bank & Trust v Kensey*, 145 Mich App 765, 770 (1985); *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 78 n 2 (1986); *Jackson Printing Co, Inc*

Nowhere is this tension better demonstrated than in *Pierce* itself; immediately after concluding that it "[did] not have the authority" to entertain the appeal because to do so would "render part of the court rule nugatory," the Court of Appeals then said, in the *very next sentence*, that it would "[n]evertheless, in the interest of judicial economy, . . . consider the [improper (C)(10) interlocutory appeal] as on leave granted." *Pierce*, 265 Mich App at 182-183. This Court has apparently endorsed this process, albeit without analysis and relying only on Court of Appeals authority, in a few recent family-law cases.[11]

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v Mitan, 169 Mich App 334, 336 n 1 (1988); *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 200 n 1 (1995); *Waatti & Sons Elec Co v Dehko*, 230 Mich App 582, 585 (1998); *In re Investigative Subpoena*, 258 Mich App 507, 508 n 2 (2003); *Detroit v Michigan*, 262 Mich App 542, 545-546 (2004); *Newton v Mich State Police*, 263 Mich App 251, 259 (2004), overruled on other grounds 477 Mich 856 (2006); *Walsh v Taylor*, 263 Mich App 618, 626 (2004); *Martin v Secretary of State*, 280 Mich App 417, 422 n 2 (2008), rev'd on other grounds 482 Mich 956 (2008); *Amerisure Ins Co v Plumb*, 282 Mich App 417, 419 n 1 (2009); *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61-62 (2011); *Wardell v Hincka*, 297 Mich App 127, 133 n 1 (2012); *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354 (2013); *Rains v Rains*, 301 Mich App 313, 320 n 2 (2013); *Ronnisch Constr Group, Inc v Lofts On The Nine, LLC*, 306 Mich App 203, 205 n 1 (2014), aff'd on other grounds 499 Mich 544 (2016); *Nickola v MIC Gen Ins Co*, 312 Mich App 374, 377 n 2 (2015), rev'd on other grounds 500 Mich 115 (2017); *In re Ballard*, 323 Mich App 233, 235 n 1 (2018); *In re Attorney General Petition*, 327 Mich App 136, 145 n 2, argument on app for lv to appeal ordered 505 Mich 939 (2019); *Stumbo v Roe*, ___ Mich App ___, ___ n 1 (2020) (Docket No. 353695), lv den ___ Mich ___ (2020). There is at least one pre-1972 example of the judicial economy rationale as well. See *People v Sattler*, 20 Mich App 665, 669 (1969).

[11] See *Varran v Granneman*, 497 Mich 928, 928 (2014) ("If the Court of Appeals determines that the [trial court]'s order is not appealable by right, it may then dismiss the . . . claim of appeal for lack of jurisdiction, or exercise its discretion to treat the claim of appeal as an application for leave to appeal and grant the application."); *Varran v Granneman*, 497 Mich 929, 929 (2014) (same); *Madson v Jaso*, 499 Mich 960, 960 (2016); *Ozimek v Rodgers*, 499 Mich 978, 978 (2016); *Royce v Laporte*, 501 Mich 1025, 1025 (2018); *Royce v Laporte*, 501 Mich 1025, 1025-1026 (2018). The invitation to "exercise discretion" was accepted in *Varran v Granneman*, 312 Mich App 591, 607 (2015), but declined in *Madson v Jaso*, 317 Mich App 52, 68 (2016), vacated 501 Mich 1024 (2018), and *Ozimek v Rodgers*, 317 Mich App 69, 81 (2016), overruled by *Marik v Marik*, 501 Mich 918 (2017). We also directed its use without analysis to resolve procedural tangles in *Lasher*, 392 Mich at 499; *In re Complaint of the City of Marshall Against Consumers Power Co*, 440 Mich 914 (1992); and *Grand Traverse Co v Michigan*, 441 Mich 919 (1993).

In my view, this situation presents a quandary. On the one hand, the Court of Appeals clearly has the authority to grant applications for leave to appeal, see MCR 7.203(B)(1). Because that prerogative belongs to the Court of Appeals as an institution, it may seem like a pointless formalism to conclude that the Court lacks the authority to adjudicate an issue because it was brought as a claim of appeal, when the Court would have had the authority to confer upon itself the ability to adjudicate the issue had it been brought as an application for leave to appeal instead.[12] It seems extraordinarily inefficient for the same institution that could have granted a proper application for leave to appeal en route to adjudicating an issue, to instead conclude that its hands are tied because the issue was brought as an improper claim of appeal instead. In addition, MCR 7.211(C)(2)(a) allows for a motion to dismiss in the Court of Appeals for lack of jurisdiction, but requires that such a motion be made "before [the appeal] is placed on a session calendar." This could be construed as a sort of limitations period on challenging the jurisdiction of the Court of Appeals, which might indicate that such defects can be waived if not timely raised.

On the other hand, "the jurisdiction of the Court of Appeals is entirely statutory." *Milton*, 393 Mich at 245. To hear an appeal from a denial of a (C)(8) motion, MCL 600.308(2)(c) undoubtedly requires that it be on leave granted. Indeed, MCL 600.308(2) is clearly written to function as a limitation on the Court, as it says that the orders listed in it "are reviewable *only* on application for leave to appeal granted." If the Court of Appeals has "discretion" to disregard what is clearly expressed in MCL 600.308(2) as a limitation on the Court's jurisdiction, it would seem the limitation has been rendered nugatory. And the deadline in MCR 7.211(C)(2)(a) need not necessarily be construed as a limitations period on challenging the Court's jurisdiction. The Court submits motions to motion panels, which are distinct from the merits panels that hear cases which have been calendared. See MCR 7.211(D), (E)(1). The motion panels are not merely distinct from merits panels in their responsibilities; they also have a distinct composition, being drawn specifically from the judges in each Court of Appeals district instead of from the Court's entire roster of judges. Compare MCR 7.201(D) ("The court shall sit to hear cases in panels of 3 judges. . . . The judges must be rotated so that *each judge sits with every other judge* with equal frequency . . . .") (emphasis added) with COA IOP 7.211(D) ("The motions and answers are accumulated and submitted to regularly scheduled motion docket panels *at each of the Court's location*s.") (emphasis added). The deadline in MCR 7.211(C)(2)(a) could be construed as apportioning responsibility to decide the jurisdictional question between a motion panel and a merits panel without eliminating it as a live issue.

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[12] Note, though, that the Court of Appeals here did not acknowledge this jurisdictional issue so as to at least recite that it was treating the claim of appeal as an application for leave to appeal and granting it (as it has done in other cases). That said, it would be unsatisfying to have this issue turn on such a pro forma recitation.

I think this is an important issue. While the convenience of treating improper claims of appeal as applications for leave to appeal (and granting them) is attractive, I am uncomfortable with how it renders nugatory significant chunks of MCR 7.203 and MCL 600.308—particularly where the Court of Appeals' jurisdiction is purely a function of the statutory grant of authority. I think more rigorous attention needs to be paid to this in the future, whether in the form of focused judicial consideration of the issue, possible revision of the court rules, or reform of the underlying statute. I believe we need a readier and clearer explanation of something that it seems to me ought to be straightforward—the boundaries of the appellate jurisdiction of the Court of Appeals—preferably an explanation that does not result in situations like *Pierce*, where the Court considered an issue it expressly held it lacked the authority to consider.

MCCORMACK, C.J. (*dissenting*).

I respectfully dissent from the Court's order denying leave to appeal. Before addressing governing legal principles, the bigger picture should not get lost. In 2014, the plaintiff, Anthony Hart, was arrested. He was then convicted. He was then incarcerated for at least 17 months.[13] His "crime" was failing to register his address with Michigan's sex-offender registry. The problem is that, in fact, Mr. Hart was not required to register at all. Not since 2011. He was incarcerated for no unlawful act whatsoever. Served time. No crime.

For beginning in 2011, state law unambiguously *required* the Michigan State Police (MSP) to remove his name from the registry. MCL 28.728(9). The MSP did not do so. The state realized its mistake 17 months too late. Upon doing so, the state released Mr. Hart. He sued, alleging the state's failure to remove him from the registry led to his unconstitutional arrest and detention. Although the burden of demonstrating that the government violated an individual's constitutional rights is high, the plaintiff has met it.

I would reverse the Court of Appeals judgment and reinstate the Court of Claims' order denying the defendant's motion for summary disposition. The citizens of Michigan would be surprised indeed to learn that Michigan law provides no recourse for blatantly lawless incarceration.

To back up, in 2001, the plaintiff was 16 years old when he was adjudicated for violating former MCL 750.520(e), fourth-degree criminal sexual conduct.[14] As the

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[13] There is some discrepancy in the record about whether the plaintiff served 17 or 19 months of his sentence. The plaintiff and the Court of Claims say 19; the Court of Appeals says 17.

[14] This section has since been amended and is now MCL 750.520e.

statute then required, the plaintiff was designated as a Tier II sex offender and mandated to register his address with the sex-offender registry biannually for 25 years under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. Ten years later, the Legislature amended the SORA, so that as of July 1, 2011, individuals like the plaintiff—those who were adjudicated before these amendments to be juvenile Tier II offenders—were no longer required to register. As part of the amendments, the MSP was required to remove individuals like the plaintiff from the registry. See MCL 28.728(9) (requiring that, "[i]f the department determines that an individual . . . is no longer required to register under this act, the department shall remove the individual's registration . . . within 7 days after making that determination").

The plaintiff complied fully with the SORA until 2011, but the MSP never removed him from the registry that year as the statute required. So the plaintiff continued to comply. In 2013, he made a single-digit error in reporting his address, for which he was arrested and charged with violating his requirements to register, MCL 28.729. He pled *nolo contendere* and was assessed a $325 fine. Then in 2014, he did not verify his address. Acting in accordance with an MSP policy, an MSP agent sent a verified letter to the Hillsdale Police Department to inform them that the plaintiff did not verify his address and that he was out of compliance with the SORA because he was required to fulfill these obligations until 2054.[15] The plaintiff was prosecuted for the felony of failing to meet his registration obligations under the SORA for a second time, MCL 28.729. He pled guilty and was sentenced to serve 16 to 24 months in prison and pay additional fines and fees. After he served longer than his minimum sentence, the Department of Corrections figured out that the plaintiff was serving a sentence for a crime it was legally impossible to commit because he was not required to register. The Department notified the MSP, the plaintiff was released, and his convictions were vacated.

The plaintiff sued the state of Michigan, alleging constitutional torts based on violations of his rights to (1) be free of unreasonable searches and seizures and (2) due process. Const 1963, art 1, §§ 11, 17. Before discovery, the state moved for summary disposition for two reasons: the claims were barred by governmental immunity, MCR 2.116(C)(7), and the plaintiff failed to adequately state a constitutional tort claim, MCR 2.116(C)(8). The Court of Claims denied both motions. It held that the plaintiff properly alleged a constitutional tort because he alleged that the state knew that law enforcement would use information contained in the registry to arrest noncompliant actors, yet the state neither properly trained its officers to detect changes in the SORA nor made

[15] It is unclear why the MSP believed the obligations continued until 2054, a year well beyond the plaintiff's initial 25-year reporting requirement period, but it is more evidence that the state's policies on the registry were unconstitutionally flawed.

necessary efforts to ensure the registry was accurate. These failures caused the violations of the plaintiff's constitutional rights.

The state appealed. The Court of Appeals reversed, holding that the Court of Claims erred by denying the state's (C)(8) motion, and remanded for entry of summary disposition in favor of the state.[16] *Hart v Michigan*, unpublished per curiam opinion of the Court of Appeals, issued February 7, 2019 (Docket No. 338171).

The panel correctly framed the issue: the state can be sued for violations of its Constitution only if it would be liable under the standards set in 42 USC 1983 as explained in *Monell v New York City Dep't of Social Servs*, 436 US 658 (1978).[17] *Id*. at 6, citing *Reid v Michigan*, 239 Mich App 621, 628 (2000). That is, the state can only be liable if a state custom or policy was primarily responsible for its employee's actions resulting in the constitutional violation. *Hart*, unpub op at 6, citing *Carlton v Dep't of Corrections*, 215 Mich App 490, 505 (1996). And where no information is alleged about other harms resulting from the policy, a plaintiff must allege that the state was deliberately indifferent in order to survive summary disposition. *Hart*, unpub op at 7-8, citing *Canton v Harris*, 489 US 378 (1989) and *Bd of Co Commr's of Bryan Co, Okla v Brown*, 520 US 397 (1997). That is, the plaintiff must allege a "*direct and obvious causal link* between the failure to train and the deprivation of constitutional rights that demonstrates 'deliberate indifference.' " *Hart*, unpub op at 8.

The panel held that the plaintiff's allegations were legally insufficient on the conclusory grounds that "the alleged failure to train MSP employees in this SORA context does not carry the same obvious or clear dangers of a constitutional violation." *Id*.

Grants and denials of motions for summary disposition are reviewed de novo, which means the issue is reviewed independently without deference to the lower courts. *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 417 (2019). And a court must consider the plaintiff's factual allegations to be true and construe them in the plaintiff's favor. *Spiek v Dep't of Transp*, 456 Mich 331, 338-339 (1998); see also *Maiden v Rozwood*, 461 Mich 109, 119 (1999).

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[16] The Court of Appeals held that the defendant's (C)(7) motion was properly dismissed because governmental immunity is not a defense to constitutional tort claims. *Hart*, unpub op at 5, citing *Smith v Dep't of Pub Health*, 428 Mich 540, 544 (1987). The defendants did not cross-appeal this issue, so I do not address it further.

[17] In *Monell*, 436 US at 660-661, the plaintiffs were a class of female employees who sued because their municipal employer, as a matter of policy, compelled pregnant employees to take unpaid leaves of absence before they were medically necessary.

In *Canton*, 489 US at 389, the Court held that a failure-to-train claim is actionable in those rare cases in which a plaintiff demonstrates that the failure shows a deliberate indifference. The Court acknowledged that sometimes a pattern or practice is not the only way to show deliberate indifference because "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id*. at 390. The Court added context in a footnote:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v Garner*, 471 US 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.
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> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need. [*Id*. at 390 n 10].

The Court of Appeals here concluded that the plaintiff's allegations fell short of showing the deliberate indifference required to make the causal link between the state's policies and the violations of his constitutional rights. It held that "the failure to train employees on how to update the SORA after pertinent legislative changes does not possess the same direct causal link to a constitutional violation, being illegally arrested." *Hart*, unpub op at 8. The panel explained why it viewed the plaintiff's case differently than the failure to train officers about deadly force: the plaintiff's allegations were "distinguishable from the fleeing felon example in *Canton* because it is not 'a moral certainty' or 'patently obvious' that people who are on the [registry] (properly or not) will fail to keep the [registry] updated and be arrested as a result." *Hart*, unpub op at 8. It noted that the state would not have arrested and convicted the plaintiff for conduct that was not criminal if the plaintiff (1) had stated a correct address when complying with a statute with which he was not required to comply, (2) had been aware of the change in the law and taken steps to remove himself from the registry, or (3) had been represented by an attorney who noticed the plaintiff could not have been guilty of the offense. *Hart*, unpub op at 8 n 6.

Put simply, the panel held that because people who are not required to be on the registry might, in theory, take steps to avoid the state's failure to remove them and

illegally arrest and detain them, they are better positioned than fleeing felons to avoid being victims of constitutional torts.

So the plaintiff was not entitled to relief because he could have avoided his illegal arrest and detention by complying with a law that he was not required by law to comply with? Or by taking the initiative to ask the state to please follow the law's express requirement that the state remove him from the registry? Or by somehow figuring out that the state provided him with deficient counsel and asking for the effective assistance of counsel the constitution guarantees him to avoid his unconstitutional conviction and sentence?

No, the constitutional-tort standard takes plaintiffs as they are. It does not ask courts to hypothesize what steps a *plaintiff* might have taken to avoid the tort altogether. By that logic, the plaintiff might have taken any number of steps not to be in the situation he was in. Indeed, by that logic, the plaintiffs in *Monell* might have avoided the constitutional tort in that case by avoiding becoming pregnant. Or by changing jobs. What-if is not the proper analysis.

Nobody disputes that the plaintiff was illegally arrested and incarcerated *because*, *in fact*, the MSP failed to update the registry as unambiguously required by law and then sent false information to the local prosecutor. That's what the plaintiff pled: that the state's inadequate training regarding its registry policies caused his illegal arrest and detention. It is "so obvious" because people who are not required to comply with reporting requirements will certainly not do so, which will result in their illegal arrest and detention. *Canton*, 489 US at 390 n 10. It was not only "so obvious" that these failures would result in the plaintiff's illegal arrest; it was exactly what happened. The plaintiff presented a well-pled direct causal link between the state's policy corresponding to this statutory duty and the alleged constitutional deprivation. *Id.* at 385.

Deliberate indifference is a steep pleading requirement. But the uncontested facts the plaintiff has pled, viewed in a light most favorable to him, lead to the conclusion that he has met it. I would reverse.

BERNSTEIN and CAVANAGH, JJ., join the statement of MCCORMACK, C.J.