

Court of Appeals, State of Michigan

ORDER

In re Jarzynka

Docket No. 361470

LC No. 22-000044-MM

Stephen L. Borrello
Presiding Judge

Michael J. Kelly

Michael F. Gadola
Judges

The complaint for superintending control is DISMISSED because plaintiffs Jerard M. Jarzynka, Christopher R. Becker, Right to Life of Michigan, and the Michigan Catholic Conference lack standing to seek superintending control.

Plaintiffs seek superintending control over Court of Claims Judge Elizabeth L. Gleicher. Their complaint relates to Court of Claims Case No. 22-000044-MM, *Planned Parenthood of Mich v Mich Attorney General*. The parties to the Court of Claims action are Planned Parenthood of Michigan and Dr. Sarah Wallett (the plaintiffs); the Attorney General of the State of Michigan (the defendant); and the Michigan House of Representatives and the Michigan Senate (collectively, the Legislature) (the intervening parties). On May 17, 2022, Judge Gleicher entered a preliminary injunction in the Court of Claims case which, in relevant part, purported to enjoin Michigan county prosecutors from enforcing MCL 750.14.¹

We invited the parties to this action to submit supplemental briefs addressing whether dismissal for lack of jurisdiction was warranted under MCR 3.302. *In re Jarzynka*, unpublished order of the Court of Appeals, entered June 27, 2022 (Docket No. 361470). Having received supplemental briefs from plaintiffs and from Planned Parenthood of Michigan (who filed an appearance as an other party in this action), we conclude that dismissal for lack of jurisdiction is not warranted. “Superintending control is an extraordinary remedy, and extraordinary circumstances must be presented to convince a court that the remedy is warranted.” *In re Wayne Co Prosecutor*, 232 Mich App 482, 484; 591 NW2d 359 (1998). “Superintending control is available only where *the party seeking the order* does not have another adequate remedy.” *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994) (emphasis added), citing MCR 3.302(B). An appeal available to the party seeking an order of superintending control is “another adequate remedy” that is available to the party seeking the order, and it requires denial of the request. MCR 3.302(D)(2); *In re Payne*, 444 Mich at 687.

An appeal of the Court of Claims’ order is not available to either Right to Life of Michigan or the Michigan Catholic Conference, neither of whom were parties to the Court of Claims’ action.

¹ MCL 750.14 prohibits any person from administering any drug or substance or utilizing any instrument to procure a miscarriage unless necessary to preserve a woman’s life.

Therefore, dismissal of their complaint for superintending control is not mandated under MCR 3.302(D)(2).

As it relates to Jarzynka and Becker, Planned Parenthood of Michigan argues that they are state officials subject to the jurisdiction of the Court of Claims. As a result, they contend that, like the Legislature, Jarzynka and Becker could have intervened in the Court of Claims action and, subsequently, could have appealed the Court of Claims' decision. County prosecuting attorneys, however, are local officials, not state officials.

"The Court of Claims is a court of legislative creation" designed to "hear claims against the state." *Council of Organizations & Others for Ed About Parochiaid v State of Michigan*, 321 Mich App 456, 466-467; 909 NW2d 449 (2017) (quotation marks and citation omitted). MCL 600.6419(1)(a) grants the Court of Claims jurisdiction:

To hear and determine any claim or demand, statutory or constitutional . . . or any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

In relevant part, MCL 600.6419(7) defines "the state or any of its departments or officers" to include "an officer . . . of this state . . . acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a governmental function in the course of his or her duties." Our Supreme Court has determined that county prosecutors are "clearly local officials elected locally and paid by the local government." *Hanselman v Killeen*, 419 Mich 168, 188; 351 NW2d 544 (1984). Moreover, our Supreme Court has stated that a reviewing court should consider the following four factors to determine if an entity is a state agency that is subject to the jurisdiction of the Court of Claims:

(1) whether the entity was created by the state constitution, a state statute, or state agency action, (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes. [*Manuel v Gill*, 481 Mich 637, 653; 753 NW2d 48 (2008).]

The test requires an examination of the "totality of the circumstances" to determine "the core nature of an entity" so as to ascertain "whether it is predominantly state or predominantly local." *Id.* at 653-654. We adopt this test in order to determine whether a county prosecutor is a state official under MCL 600.6419(7).

First, the office of a county prosecutor was created by our State Constitution. Michigan's 1963 Constitution addresses county prosecutors in Article VII, which governs "Local Government." Const 1963, art 7, § 4 provides:

There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law.

Further, the general duties of county prosecutors are set forth by statute. MCL 49.153 provides that:

The prosecuting attorneys shall, *in their respective counties*, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested. [Emphasis added.]

While MCL 49.153 states that county prosecutors “shall appear for the state,” their authority is explicitly limited to “their respective counties.” We conclude that because our state constitution addresses county prosecutors as part of local government and because their authority is limited to their respective counties, the first *Manuel* factor cuts against a finding that county prosecutors are state officials. See *Manuel*, 481 Mich at 653. The next inquiry is “whether and to what extent the state government funds the entity.” *Manuel*, 481 Mich at 653. As recognized in *Hanselman*, 419 Mich at 189, county prosecutors are generally locally funded. Indeed, MCL 49.159(1) provides that “[t]he prosecuting attorney shall receive compensation for his or her services, as the county board of commissioners, by an annual salary or otherwise, orders and directs.” Accordingly, this factor weighs in favor of a determination that county prosecutors are local, not state officials.

The next inquiry is “whether and to what extent a state agency or official controls the actions of the entity at issue.” *Manuel*, 481 Mich at 653. This Court has recognized that the Attorney General has supervisory authority over local prosecutors. See *Shirvell v Dep’t of Attorney Gen*, 308 Mich App 702, 751; 866 NW2d 478 (2015), citing MCL 14.30. MCL 14.30 provides that “[t]he attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices.” Yet, despite the Attorney General’s supervisory authority, county prosecutors retain substantial discretion in how to carry out their duties under MCL 49.153. See *Fieger v Cox*, 274 Mich App 449, 466; 734 NW2d 602 (2007) (“Pursuant to MCL 49.153, prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings.”). Because county prosecutors have substantial discretion to carry out their duties to prosecute and defend cases in their respective counties, the fact that the Attorney General has supervisory authority does not transform what is otherwise a local official into a state official.

The final inquiry is “whether and to what extent the entity serves local purposes or state purposes.” *Manuel*, 481 Mich at 653. Taking all of the above into consideration, a county prosecutor represents the state in criminal matters (and in child protective proceedings),² but their authority only extends to matters in their respective counties and they exercise independent discretion in carrying out those duties. Stated differently, notwithstanding that county prosecutors represent the State of Michigan, they serve primarily local purposes involving the enforcement of state law within their respective counties.

In light of the four-part inquiry from *Manuel*, we conclude that, under the totality of the circumstances, the core nature of a county prosecutor is that of a local, not a state official. Because county prosecutors are local officials, jurisdiction of the Court of Claims does not extend to them. See *Mays v*

² See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 640; 591 NW2d 393 (1998) (stating that county prosecutors act “as the state’s agent for effectuation of the obligations of *parens patriae* in matters concerning the custody or welfare of children . . .”).

Snyder, 323 Mich App 1, 47; 916 NW2d 227 (2018) (“The jurisdiction of the Court of Claims does not extend to local officials.”). As a result, plaintiffs Jarzynka and Becker could not intervene in the Court of Claims action and an appeal of the Court of Claims’ decision was not available to them. Dismissal of the county prosecutors is, therefore, not warranted under MCR 3.302(D)(2).

We next consider whether the availability of an appeal by a party other than the party seeking superintending control is sufficient to deprive this Court of jurisdiction under MCR 3.302(D)(2). We conclude that, under the circumstances of this case, it is not. First, as the defendant in the Court of Claims action, the Attorney General could have appealed the decision enjoining it from enforcing MCL 750.14. The Attorney General, however, declined to do so. Second, as the Michigan House of Representatives and the Michigan Senate are intervening parties in the Court of Claims action, an appeal of that decision was available to them. They have, in fact, filed an application for leave to appeal the decision of the Court of Claims. However, that application remains pending, and there is no guarantee that leave to appeal will be granted or will otherwise be decided on the merits. We conclude that, under the facts of this case, the possibility that the decision by the Court of Claims *may* be challenged in an appeal brought by an individual or entity other than the one seeking superintending control is not the equivalent of “another adequate remedy *available to the party seeking the order*” of superintending control. MCR 3.302(B) (emphasis added). As a result, dismissal of the complaint for superintending control is not warranted based on the fact that an appeal is available to the Attorney General or to the Legislature.

Having determined that the complaint for superintending control does not fail for want of jurisdiction under MCR 3.302, we next turn to whether plaintiffs’ complaint for superintending control must be dismissed for lack of standing. It is well-established that “a party seeking an order for superintending control must still have standing to bring the action.” *Beer v City of Fraser Civil Serv Comm*, 127 Mich App 239, 243; 338 NW2d 197 (1983). “Standing is the legal term to be used to denote the existence of a party’s interest in the outcome of a litigation; an interest that will assure sincere and vigorous advocacy.” *Id.* “A party lacks standing to bring a complaint for superintending control where plaintiff has shown no facts whereby it was injured.” *Id.* Here, as a legal cause of action is not provided to plaintiffs at law, this Court must determine whether plaintiffs have standing. See *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Under such circumstances, “[a] litigant may have standing . . . 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” *Id.*

Plaintiffs Jarzynka and Becker contend that they have standing because the Court of Claims’ preliminary injunction purports to bind them. The preliminary injunction provides in relevant part:

(1) Defendant [i.e., the Attorney General] and anyone acting under defendant’s control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14;

(2) Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant’s supervision that they are enjoined and restrained from enforcing MCL 750.14[.]

Although the injunction purports to enjoin anyone acting under the Attorney General's control and supervision, MCL 14.30 does not give the Attorney General "control" over county prosecutors. Rather, it provides that "[t]he attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices." Thus, although the Attorney General may supervise, consult, and advise county prosecutors, MCL 14.30 does not give the Attorney General the general authority to control the discretion afforded to county prosecutors in the exercise of their statutory duties.³

Moreover, under MCR 3.310(C)(4), an order granting an injunction "is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." As recognized by Planned Parenthood of Michigan in a footnote in their supplemental brief filed on July 1, 2022, in this action, plaintiffs Jarzynka and Becker are not parties to the action before the Court of Claims. Further, as local officials, they could not be parties to the Court of Claims action. See *Mays*, 323 Mich App at 47. Nor are they the officers, agents, servants, employees, or attorneys of the parties, i.e., the Attorney General, Planned Parenthood of Michigan, or Dr. Wallett. Additionally, they are not "in active concert or participation" with those parties given that the Attorney General, Planned Parenthood, and Dr. Wallett appear to agree that MCL 750.14 should not be enforced.

We conclude that on the facts before this Court, plaintiffs Jarzynka and Becker are not and could not be bound by the Court of Claims' May 17, 2022 preliminary injunction because the preliminary injunction does not apply to county prosecutors. As a result, Jarzynka and Becker cannot show that they were injured by the issuance of the preliminary injunction. See *Beer*, 127 Mich App at 243, or that they have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large," *Lansing Sch Ed Ass'n*, 487 Mich at 372. And, because they lack standing, their complaint for superintending control must be dismissed.

Plaintiffs Right to Life of Michigan and the Michigan Catholic Conference also lack standing. Although they do not favor the preliminary injunction, they have not suffered any injury as a result of it, *Beer*, 127 Mich App at 243, nor have they shown the existence of "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large,"

³ Although MCL 14.30 does not give the Attorney General the ability to control county prosecutors, other statutory provisions give the Attorney General limited control over county prosecutors. For example, MCL 49.160(2), provides that the Attorney General may determine that a county prosecutor is "disqualified or otherwise unable to serve." Under such circumstances, the Attorney General "may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve." Even that "control" over the prosecuting attorney, however, is limited. MCL 49.160(4) expressly provides that "[t]his section does not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney . . . to perform the necessary duties . . . or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney."

Lansing Sch Ed Ass'n, 487 Mich at 372. Their complaint for superintending control, therefore, must also be dismissed for lack of standing.

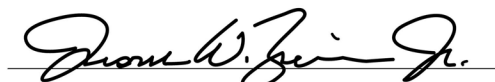

Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

August 1, 2022

Date


Chief Clerk