STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST, Plaintiffs-Appellees,	FOR PUBLICATION April 2, 2013 9:05 a.m.
v STATE OF MICHIGAN and GOVERNOR OF MICHIGAN, Defendants-Appellants.	No. 307790 Ingham Circuit Court LC No. 07-000242-CZ Advance Sheets Version

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

BECKERING, J.

Defendants, the state and the Governor of Michigan (collectively "the state"), appeal by leave granted the trial court's order dated December 15, 2011, denying the state's motion for summary disposition. For the reasons set forth in this opinion, 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 consists of present and future indigent criminal defendants who require counsel appointed 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' preconviction claims were nonjusticiable because plaintiffs (a) had failed to meet the certification requirements of a class action, (b) had failed to properly plead a valid cause of action against the state, and (c) 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 Michigan*, 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 had failed to state a proper claim for relief, lacked standing, and had 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 in our Supreme Court. In *Duncan v Michigan*, 486 Mich 906 (2010), our Supreme Court ordered as follows:

> 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 [772 NW2d 301] (2009).
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> 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.
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> 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. *Duncan v Michigan*, 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. *Duncan v Michigan*, 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 had 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 had failed to state a proper claim for which relief could be granted, (5) res judicata barred plaintiffs' claims, and (6) plaintiffs could not object to the state's challenges because of judicial estoppel. The trial court denied the state's motion, holding that (a) it was premature to decide plaintiffs' class-certification motion because *Henry* required the court

to take discovery before deciding a certification motion, (b) 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 (c) the state had failed to establish 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 an abuse of discretion. *Henry*, 484 Mich at 495-496. 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).

For a court 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, 496-497. MCR 3.501(A)(1) requires that a proposed class of plaintiffs establish the following elements: (1) the class is sufficiently numerous that joinder of all members is impracticable, (2) the common questions of fact or law predominate over matters relevant to only 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
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> (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
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> (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 the 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. "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.[1] 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

[1] Indeed, when explaining that a court must examine "additional information beyond the pleadings" if the pleadings are insufficient to determine whether class certification is proper, the *Henry* Court expressly referred to 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*, 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 had 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 solely on the basis of "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 or intervening change in the law. *Id.*; see also *Reeves v Cincinnati, Inc (After Remand)*, 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 (After Remand)*, 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 had 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 whether relief can be granted against the Governor." Judicial estoppel prevents a party from asserting one position when that party "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) (citation 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 this assertion was successful.[2] 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.[3]

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) (*LSEA*). The state insists that the intervening change in the law of standing in Michigan under *LSEA* 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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[2] Plaintiffs explain that the comment at issue pertained not to whether *any* (C)(8) motion was pending before the Supreme Court, but 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," to which plaintiffs' counsel indicated that the state had not sought to dismiss the case on this basis.

[3] 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) that the injury was fairly traceable (causally linked to) the defendant's conduct, and (3) that the remedy sought would likely redress the plaintiff's injuries. *Mich Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 294-295; 737 NW2d 447 (2007), overruled by *LSEA*, 487 Mich at 378. However, our Supreme Court in *LSEA* reinstituted 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. *LSEA*, 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 (citation and quotation marks omitted). "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 *LSEA*. Our Supreme Court was surely aware of the change in the law when it reinstated its prior decision.[4] 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 *LSEA* the issue of plaintiffs' standing. See, generally, *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000) (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 *LSEA* 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 decisions of our

[4] In *LSEA*, 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 *LSEA*; indeed, it appears that the change in the law concerning standing would favor plaintiffs' case and not the state's.

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 effectiveness 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 resulted in a final judgment, (3) both actions involved 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 Michigan*, 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 single 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 through 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 that 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 the 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