

STATE OF MICHIGAN
COURT OF CLAIMS

CITY OF GRAND RAPIDS,

Plaintiff,

No. 23-000083-MZ

HON. ELIZABETH L. GLEICHER

v

MICHIGAN DEPARTMENT OF CIVIL
RIGHTS and MICHIGAN CIVIL RIGHTS
COMMISSION,

Defendants.

**08/07/2023 AMICUS CURIAE BRIEF
OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN**

Mark P. Fancher (P56223)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6822
mfancher@aclumich.org
dkorobkin@aclumich.org

Miriam J. Aukerman (P63165)
Dayja S. Tillman (P86526)
American Civil Liberties Union
Fund of Michigan
1514 Wealthy SE, Suite 260
Grand Rapids, MI 49506
(616) 301-0930
maukerman@aclumich.org
dtillman@aclumich.org

Attorneys for Amicus Curiae

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Table of Contents

Index of Authorities iii

Interest of Amicus Curiae 1

Introduction..... 1

Background and Facts: The Case of Jesus Yanez..... 2

Argument 4

 I. Lawsuits and MDCR Administrative Proceedings Are Governed by Different Statutes and Different Statutory Requirements 4

 II. Comparing an MDCR Charge to a Lawsuit-Initiating Complaint Is an Invalid Red Herring..... 6

 III. A Three-Year Limit on MDCR Charges Would Be Legally and Practically Inconsistent With the Policy Rationale that Underlies Limitations Statutes..... 9

 IV. The Importance of MDCR’s Role in Protecting Civil Rights Confirms That Imposing a Limitations Period Designed for Court Actions on the Agency Is Inappropriate..... 11

Conclusion 13

Index of Authorities

Cases

In re Certified Question, 433 Mich 710; 449 NW2d 660 (1989) 5
Larson v. Johns-Manville Sales Corp, 427 Mich 301; 399 NW2d 1 (1986) 10
Sills v Oakland Gen Hosp, 220 Mich App 303; 559 NW2d 348 (1996) 10
Sun Valley Foods Co v Ward, 460 Mich 230; 596 NW2d 119 (1999) 5
US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass’n, 484 Mich 1; 795 NW2d 101
(2009)..... 5

Statutes

1961 PA 236 5
MCL 37.2601 5
MCL 37.2602 6
MCL 37.2705 6
MCL 600.5805 4
MCL 600.5869 5

Rules

Mich Admin Code R 37.4 5

Other Authorities

Kolker, ‘*Just Getting Revenge on Each Other*’: *Gang Shootings Contributed to the Most Violent Year*, WOODTV (March 11, 2021) 3
Schwartz, ‘*Well, Is There Blood on the Street?*’, Atlantic (April 2, 2023)..... 12
Schwartz, *Civil Rights Without Representation*, 64 Wm & Mary L Rev 641 (2023) 12

Interest of Amicus Curiae¹

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide, nonpartisan organization with over a million members dedicated to protecting civil rights and civil liberties. The ACLU frequently files amicus curiae briefs in state and federal courts, including on matters involving the Elliott-Larsen Civil Rights Act (ELCRA), and ACLU attorneys frequently represent clients who directly file civil litigation as well as clients who file administrative complaints with the Michigan Department of Civil Rights (MDCR). ACLU attorneys represent the complaining party in one of the open MDCR matters, the Ayala case, identified in Plaintiff's complaint.

Introduction

The ACLU is alarmed that, rather than engage in good-faith efforts to address institutional and cultural aspects of law enforcement that led to the mistreatment of ACLU client Jesus Yanez² by Grand Rapids police officers, the City of Grand Rapids instead seeks to avoid accountability altogether with a disingenuous, invalid proposition that MDCR, which employs an administrative process, is bound by statutory limitations intended for civil actions in our courts. The City's argument, if accepted, would result in the elimination of Mr. Yanez's opportunity to have his rights vindicated through MDCR procedures.

Mr. Yanez is not alone. Many people whose civil rights have been violated depend on the unique accessibility of MDCR and the opportunity it provides for legal redress. The ACLU

¹ No counsel for a party to this action has authored this brief in whole or in part, and no party or counsel for a party or any individual other than the amicus curiae, its members, or its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

² Plaintiff's complaint lists "Ayala" as the name of the matter because Jesus Yanez was a minor and the administrative complaint was filed on his behalf by his mother and next friend Catalina Ayala.

therefore urges this Court to grant MDCR's motion to dismiss so that the MDCR administrative process may continue.

Background and Facts: The Case of Jesus Yanez

Jesus Yanez's circumstances are representative of many who turn to MDCR. On March 11, 2019, Jesus, a visibly Latino 15-year-old, walked along Lynch Street in Grand Rapids with a Latino friend. Their destination was a barber shop. The only activity engaged in by the pair was walking in a residential neighborhood. Nevertheless, as the kids walked peacefully down the partially snow-covered street where there was neither foot nor vehicular traffic at the time, Grand Rapids police officer Austin Diekevers drove past them, returned, and approached them with his hand on his holstered gun to admonish them for walking in the street. (There was snow on the sidewalk.) The boys complied with the officer's directive immediately by moving to the sidewalk. The encounter should have ended there because whatever harm or hazard caused by walking down an empty street was mitigated by their compliance. But Officer Diekevers was not content to leave it at that.

Officer Diekevers told the pair he wanted to engage with them further. He demanded that they identify themselves and remove their hands from their coat pockets. He also made it clear that they were not free to leave. Jesus was initially reluctant to disclose his full name. Eventually, he identified himself fully with hopes that the pair would be allowed to continue on their way, even though the officer had suggested that his plan was to check the boys for warrants once he had their names.

The boys said they had to leave, and they began to walk away. The officer shouted: "No you don't, you're staying right here!" He ordered them to put their hands on top of their heads. Without giving the boys time to comply, Diekevers immediately grabbed Jesus by the arm and

repeated his demand for Jesus to put his hands on his head. Jesus pulled away from the officer's grip. The teens repeatedly asked the officer to "chill out," and insisted that Jesus had not done anything wrong. Officer Diekevers grabbed Jesus again, yelled that he was under arrest, and shouted for Jesus to show his hands. Without giving Jesus any time to comply, the officer drew his gun and pointed it at Jesus and his friend while shouting at them to put their hands on their heads and get down on the ground. Two other Grand Rapids police officers also arrived on the scene, one of whom pointed a taser at the boys. One officer instructed another to hold the subdued teenagers at bay with a firearm rather than a taser. "Go lethal" is what he is heard to say in a video record of the event. The boys were then handcuffed.

According to Officer Diekevers' report, he was not on Lynch Street in search of jaywalkers. His report states: "It should be noted that I was on proactive patrol in this specific area due to the recent increase in gang activity, including robberies and gang graffiti." Because it is not common for police officers to detain and interrogate pedestrians who violate minor ordinances and promptly come into compliance upon request, it is reasonable to infer that the officer assumed these youths were connected to gangs. At the time that these youths were approached, neither of the boys exhibited any behavior nor uttered statements that would in any way connect them to gangs. Gangs that are Latino and Black have been discussed in the mass media.³ Notwithstanding the existence of high-profile Latino gangs, not every Latino person is a gang member. The apparent presumption of Jesus' criminality based solely on his racial identity is what caused him to file a complaint with

³ Kolker, *'Just Getting Revenge on Each Other': Gang Shootings Contributed to the Most Violent Year*, WOODTV (March 11, 2021), <https://www.woodtv.com/news/target-8/gang-shootings-contributed-to-the-most-violent-year/>.

the Michigan Department of Civil Rights on or about April 30, 2019. This complaint was filed less than two months after the police encounter. See Compl. ¶¶ 13, 14, 16.

The MDCR opened an investigation on June 12, 2019. See Compl. ¶ 33. The MDCR promptly notified Grand Rapids. Exhibit A to the City’s complaint shows that Grand Rapids opened the case on June 25, 2019.

MDCR commenced an investigation and received a response to the complaint from Grand Rapids. Discovery was requested by MDCR from Grand Rapids, but the City’s refusal to comply prompted enforcement litigation that is pending. MDCR’s unsuccessful efforts at conciliation resulted in the agency’s decision to file a charge of discrimination against the City.

Grand Rapids now attempts through the instant action to avoid accountability by asserting that the three-year statute of limitations established by the Revised Judicature Act, MCL 600.5805, and that governs ELCRA **lawsuits** applies to MDCR decisions to file **administrative charges** of discrimination. Grand Rapids further argues that the charge concerning Jesus Yanez is foreclosed because it was filed beyond the three-year period.

Argument

I. Lawsuits and MDCR Administrative Proceedings Are Governed by Different Statutes and Different Statutory Requirements.

The argument that the statute of limitations under the Revised Judicature Act governs the issuance of MDCR charges is not just misplaced, it is plainly wrong. The title of the statute defines its purpose in the following way:

AN ACT to revise and consolidate the statutes relating to the organization and jurisdiction of the **courts** of this state; the powers and duties of the **courts**, and of the **judges** and other **officers of the courts**; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in the **courts**; pleading, evidence, practice, and procedure in civil and criminal actions and proceedings in the **courts**; to provide for the powers and duties of certain state

governmental officers and entities; to provide remedies and penalties for the violation of certain provisions of this act.... [1961 PA 236, title (emphasis added).]

The repeated and exclusive reference to “courts” is highly significant. It is well established that the purpose of statutory construction is to give effect to the intent of the Legislature. To that end, those interpreting statutory language are not to obfuscate that which is already clear.

An overarching rule of statutory construction is “that this Court must enforce clear and unambiguous statutory provisions as written.” *In re Certified Question*, 433 Mich 710, 721; 449 NW2d 660 (1989) (quotation marks omitted). “If the language of [a] statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)

US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass’n, 484 Mich 1, 12; 795 NW2d 101 (2009).

The language of the Revised Judicature Act leaves no doubt about its intent: the limitations period under that statute governs civil actions in the *courts*, not proceedings of administrative agencies like MDCR. Its references are specific to the courts, and consequently so must be its application.

Even if *arguendo* the statute were to govern MDCR processes, its limitations provisions would not apply because MCL 600.5869 itself provides: “All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry.” This means that because the rights at issue are established by ELCRA, it is to that statute that one must turn to determine limitations.

MCL 37.2601(f) provides that the Michigan Civil Rights Commission is empowered to “[p]romulgate, amend, or repeal rules to carry out this act” Mich Admin Code R 37.4(6), in turn, provides that an aggrieved person may file a complaint with MDCR and that the complaint

shall be filed within 180 days from the date of the occurrence of the alleged discrimination, or within 180 days of the date when the occurrence of the alleged

discrimination was or should have been discovered. If the alleged discrimination is of a continuing nature, the date of the occurrence of the discrimination shall be deemed to be any date subsequent to the commencement of the discrimination up to and including the date upon which the discrimination shall have ceased.

Therefore, to the extent there is a limitations period related to MDCR procedures, it is this 180-day filing requirement governing the timing of complaints with MDCR by aggrieved parties. The Revised Judicature Act, by contrast, governs only the timing of complaints filed in the courts to institute litigation.

There is distinct authority for the initiation of proceedings in the courts and MDCR, and the distinctions are to be respected for important policy reasons. The Legislature intended special protection for civil rights as evidenced by the following provision of ELCRA: “This act shall not be interpreted as restricting the implementation of approved plans, programs, or services to eliminate discrimination and the effects thereof when appropriate.” MCL 37.2705(2). If Plaintiff’s position were to be adopted, its effect would be the elimination of the opportunity for aggrieved persons to pursue vindication of their rights when they have pursued them over time in good faith and with Plaintiff’s full knowledge. This is plainly contrary to MCL 37.2705.

II. Comparing an MDCR Charge to a Lawsuit-Initiating Complaint Is an Invalid Red Herring.

Implicit in Plaintiff’s position is the idea that an MDCR charge is the equivalent of a lawsuit-initiating complaint filed with a court. The comparison is inapt if for no reason other than an MDCR charge does not begin the administrative process. It occurs after the process is well underway. The event in the MDCR process that is comparable to the filing of a complaint in civil litigation is when an aggrieved person files a complaint with the MDCR.

MCL 37.2602 authorizes MDCR to, among other things, do the following:

(c) Receive, initiate, investigate, conciliate, adjust, dispose of, issue charges, and hold hearings on complaints alleging a violation of this act, and approve or disapprove plans to correct past discriminatory practices which have caused or resulted in a denial of equal opportunity with respect to groups or persons protected by this act.

(d) Require answers to interrogatories, order the submission of books, papers, records, and other materials pertinent to a complaint, and require the attendance of witnesses, administer oaths, take testimony, and compel, through court authorization, compliance with its orders or an order of the commission.

(e) Cooperate or contract with persons and state, local, and other agencies, both public and private, including agencies of the federal government and of other states.

The sequence of some of these activities is set out in Plaintiff's complaint in paragraphs 16 through 19. MDCR's decision to issue a charge does not usually occur until the agency has established (usually through an investigation, of which the respondent is on notice and with which the City of Grand Rapids here failed to cooperate) that a charge is warranted. This often means that facts and evidence have been submitted by both the complaining and responding parties, and this information has been considered carefully. This is very different from a litigation complaint, which, at the time of filing, contains untested allegations which a court has not seen and certainly has not considered.

In other ways, the litigation process and MDCR's method of "doing business" are very different:

- As noted, the Revised Judicature Act requires a lawsuit complaint to be filed with a court within three years rather than 180 days. What this means effectively is that a respondent to an MDCR complaint learns of potential exposure to liability long before a lawsuit defendant, which begs the question of why Plaintiff is complaining.

- In a lawsuit, the complaint is filed by the aggrieved party. An MDCR charge cannot be filed by the complainant but must instead be filed by MDCR. Consequently, if the statute of limitations for lawsuits were to be applied to MDCR charges, it would create a legal obligation that a complainant would be powerless to fulfill.
- When a lawsuit is filed, the complaint is filed with a court. Thereafter, the court functions as an indifferent, impartial arbiter. By contrast, MDCR's mission is to actively protect the civil rights of those who are aggrieved. This might mean MDCR will identify a systemic problem experienced by multiple complainants and may choose to investigate or address the problem in ways not limited by any single complaint, and in ways that are very different from how courts handle individual lawsuits. Here, for example, MDCR has been investigating numerous complaints against the Grand Rapids Police Department, which is comparable to the types of systemic investigations conducted by the U.S. Department of Justice—investigations that can take years to complete.
- Information gathering in a lawsuit occurs through discovery initiated and managed by the parties. Information gathering through MDCR is conducted exclusively by the agency by way of investigation.
- A determination of whether a litigation complaint is viable and suitable for trial occurs through a court's order denying a defendant's motion for summary disposition. MDCR's decision to charge a respondent may not be precisely comparable to a summary disposition ruling, but it too is based on a record. In the same way that one cannot say a court's order on a dispositive motion is a stand-alone event, it cannot be

said that a charge can be extracted from the MDCR process and regarded as distinct. Further, it cannot be regarded as the beginning of a process.

Given the stark differences between MDCR's administrative processes and litigation, it is neither useful nor proper to suggest that the statute of limitations under the Revised Judicature Act somehow supplants MDCR's administrative authority under ELCRA.

It is also significant that notwithstanding the differences between administrative processes and litigation, where similarities exist, they too make clear that use of the litigation limitations requirement is unworkable. Specifically, in the judicial system, cases must be filed within the applicable statute of limitations, but once filed, there is no deadline for when they must be completed. Discovery and investigation of claims take time, particularly when the producing party is recalcitrant. Personnel changes can cause delays. Time is consumed by settlement negotiations, brief writing and motions, and in some cases interlocutory appeals and remands.

Similar circumstances can delay administrative proceedings. A complaint filed with MDCR must be filed within the (much shorter) 180-day deadline. Once the case has been initiated however, there is—just as with judicial proceedings—no deadline for completion. In the administrative context as in the judicial context, investigation, personnel changes, settlement efforts, briefing, appeals, etc. all take time. Consequently, limiting MDCR to three years to make charging decisions is not only unreasonable and unworkable, but it is a requirement that does not even exist for litigation.

III. A Three-Year Limit on MDCR Charges Would Be Legally and Practically Inconsistent With the Policy Rationale that Underlies Limitations Statutes.

Plaintiff is a grievant without a grievance. The pending lawsuit complains of non-compliance with the statute of limitations, but the statute is inapplicable, and it would be irrelevant and superfluous to Plaintiff's circumstances if it applied.

The policies that underlie statutes of limitations are clear:

Statutes of limitation are designed to encourage the rapid recovery of damages, to penalize plaintiffs who have not been assiduous in pursuing their claims, to afford security against stale demands when the circumstances would be unfavorable to a just examination and decision, to relieve defendants of the prolonged threat of litigation, to prevent plaintiffs from asserting fraudulent claims, and to remedy the general inconvenience resulting from delay in asserting a legal right that is practicable to assert.

Sills v Oakland Gen Hosp, 220 Mich App 303, 312; 559 NW2d 348 (1996).

The Michigan Supreme Court stated the purpose succinctly when it said:

In summary, the primary purposes behind statutes of limitation are: 1) to encourage plaintiffs to pursue claims diligently, and 2) to protect defendants from having to defend against stale or fraudulent claims.

Larson v Johns-Manville Sales Corp, 427 Mich 301, 311; 399 NW2d 1 (1986).

Amicus is at a loss to understand how these concerns are in any way relevant to Plaintiff's circumstances. Plaintiff essentially argues that it is prejudiced by not knowing of its exposure to liability within a three-year period. One is left to presume that Plaintiff has concerns comparable to those specified in *Sills* (i.e., stale or fraudulent demands, the inconvenience of delayed assertion of legal rights, etc.). However, because of MDCR's 180-day filing requirement, Plaintiff was on notice of claims and potential claims long before the three-year period ran.

As to all of the concerns that are the basis for statutes of limitations, they are fully addressed by MDCR filing requirements – and then some. If the concern is aggrieved persons who have not assiduously pursued their claims, MDCR complainants are compelled to act within 180 days. If the concern is that stale demands will compromise a would-be defendant's ability to effectively defend, then knowledge of an MDCR complaint puts them on early notice of the controversy and they are in a better position to build a defense than they would have been if a would-be plaintiff waited three years.

Plaintiff argues that an MDCR charge is a thing unto itself – in effect, an action of sorts that is detached and unrelated to the prerequisite complaint that must be filed with MDCR within 180 days of the violation. Such is an invalid proposition. But assuming for the sake of discussion that a charge is its own action, a three-year statute of limitations for it would be unworkable. As a practical matter, MDCR cannot bring a charge until after it has conducted an investigation. MDCR is never the aggrieved party, and consequently, it must depend entirely on the complainant and the respondent to provide the information it needs to make a charging decision. If MDCR were limited by a three-year deadline to file charges, then smart respondents would derail the process by simply stalling and delaying for more than three years before providing the agency with the information it needs to make a charging decision. Fortunately, the law does not require MDCR to operate within those constraints.

IV. The Importance of MDCR’s Role in Protecting Civil Rights Confirms That Imposing a Limitations Period Designed for Court Actions on the Agency Is Inappropriate.

Any victim of police misconduct who seeks vindication of their civil rights faces a series of challenges that include, but are not limited to, overcoming qualified immunity, the credibility contest between police officers and victims that is often weighted in the officers’ favor, the expense of litigation, and the time required for a lawsuit to be litigated to completion. Perhaps the greatest challenge, particularly for victims of limited means, is finding and retaining legal counsel. Law Professor Joanna Schwartz explains:

Finding a lawyer who takes civil rights cases is only the first challenge; the next is convincing that attorney to represent you. I have interviewed dozens of civil rights attorneys who practice around the country, and most I spoke with turn down the vast majority of potential clients who come their way and only accept cases with horrific facts, serious injuries, irrefutable evidence, and sympathetic plaintiffs. Attorneys’ selectivity means that people with weak cases will have a hard time finding a lawyer. But people whose constitutional rights have been violated may also be unable to find a lawyer if they live in a part of the country with few or no

experienced civil rights attorneys; if no video evidence or credible witnesses support their claims; if they are unsympathetic for any reason, including if they have criminal records; or if they cannot prove substantial medical costs or other damages.⁴

For these reasons and others, MDCR has been of vital importance to victims of civil rights violations. Jesus Yanez has been fortunate to receive legal assistance from the ACLU of Michigan, but the organization's resources are limited, and the MDCR process is less resource-intensive than full-scale litigation. And for people who cannot find counsel, the MDCR's administrative process provides an accessible way to seek redress. Victims of civil rights violations need to be able to seek accountability regardless of whether they can find counsel and regardless of whether their injuries are tangible or horrific enough that counsel will take on their case.

But even for Jesus Yanez and his counsel, MDCR provides opportunities that may not be present in litigation. Unlike litigation, where discussions of settlement are usually delayed until after years of discovery and motion practice, MDCR's process moves efficiently toward a conciliation discussion, which for Jesus Yanez is important because of his primary interest in achieving police reforms.

By any standard, Jesus Yanez's encounter with police officers was terrifying, and people of goodwill have hopes that no other child will have such an experience. Mr. Yanez certainly hopes to prevent such conduct. The question he and others like him face is how reform can be achieved most effectively. When lawsuits are filed, ultimately they are often reduced to a question of dollars-and-cents damages unless the defendant is willing to negotiate non-monetary relief. Judges often

⁴ Schwartz, *Civil Rights Without Representation*, 64 Wm & Mary L Rev 641, 650 (2023), <https://scholarship.law.wm.edu/wmlr/vol64/iss3/3>. See also Schwartz, 'Well, Is There Blood on the Street?', Atlantic (April 2, 2023), <https://www.theatlantic.com/ideas/archive/2023/04/civil-rights-lawyers-cases-supreme-court/673587/>.

lack the capacity to become involved in the nitty-gritty of re-crafting police policies, selecting training programs, and developing other measures that might be regarded as helpful to reform.

MDCR, on the other hand, offers possibilities not only for the parties to engage, but also for representatives of the agency to actively participate, and even to play an advocacy role when doing so is necessary to accomplish its mission as a protector of civil rights. To constrain MDCR with a time limitation that was never intended for its work is to close the door on Jesus Yanez and the many just like him whose opportunities to fight the injustices they have experienced are already extremely limited.

Conclusion

Faced with the prospect of taking responsibility for police misconduct, Grand Rapids has cynically resorted to a legal argument that is not only invalid, but which is also breathtakingly callous in its disregard for the plight of victims of civil rights violations. Fortunately, the City's legal position is in such stark conflict with applicable law that it cannot be credibly accepted. There is no three-year limitation on MDCR's ability to file charges, and the ACLU respectfully requests that this Court reject any such suggestion by Plaintiff and grant MDCR's motion to dismiss.

Respectfully submitted,

/s/ Mark P. Fancher
Mark P. Fancher (P56223)
Daniel S. Korobkin (P72842)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6822
mfancher@aclumich.org
dkorobkin@aclumich.org

Miriam J. Aukerman (P63165)
Dayja S. Tillman (P86526)
American Civil Liberties Union

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1514 Wealthy SE, Suite 260
Grand Rapids, MI 49506
(616) 301-0930
maukerman@aclumich.org
dtillman@aclumich.org

Counsel for Amicus Curiae
American Civil Liberties Union of Michigan

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