# STATE OF MICHIGAN

# COURT OF APPEALS

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RONALD ENGLE,

Plaintiff-Appellant,

v

CITY OF LIVONIA and CITY OF LIVONIA RETIREMENT SYSTEM,

Defendants-Appellees,

and

JACK ENGEBRETON,

Defendant.

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UNPUBLISHED
April 24, 2007

No. 272618
Wayne Circuit Court
LC No. 06-604068-CZ

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm in part, reverse in part, and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, the city of Livonia's former fire chief, was hired in September 1993 and fired by then-mayor, Jack Kirksey, in October 1999. The Livonia Civil Service Commission (LCSC) upheld Kirksey's decision in March 2000. Thereafter, plaintiff sued the city and Kirksey, seeking an order vacating the LCSC's decision and damages for various other causes of action. The trial court dismissed all claims and this Court affirmed. *Engle v City of Livonia*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 240206).

In February 2006, plaintiff filed this action against the city, its current mayor, and the retirement board, asserting that he had been denied access to retirement funds available to him as part of the defined contribution plan. He also claimed that the city had violated the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, by failing to respond to "at least two requests in 2005," one of which was made "in the Spring of 2005." The trial court determined that plaintiff's pension claim was barred by res judicata and that plaintiff had failed to show a

violation of the FOIA. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

I. Res Judicata

"As a general rule, res judicata will apply to bar a subsequent relitigation based upon the same transaction or events . . . ." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The doctrine "bars relitigation of claims actually litigated and those claims arising out of the same transaction that could have been litigated." *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197; 590 NW2d 747 (1998), aff'd 464 Mich 711 (2001). "For the doctrine to apply (1) the former suit must have been decided on the merits, (2) the issues in the second action were or could have been resolved in the former one, and (3) both actions must involve the same parties or their privies." *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 215-216; 561 NW2d 854 (1997). The application of the res judicata doctrine is also reviewed de novo on appeal. *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

There is no dispute that the prior action was decided on its merits. *Roberts v City of Troy*, 170 Mich App 567, 577; 429 NW2d 206 (1988). Plaintiff's right to participate in the defined contribution plan and his access to funds therein upon leaving the city's employ were not issues raised in the first suit, but they could have been resolved in the first suit. Like the issues raised in the first action, the pension issues here stem from plaintiff's employment with the city and thus form part of the same transaction giving rise to the first action. *Adair v State of Michigan*, 470 Mich 105, 124-125; 680 NW2d 386 (2004). Finally, both plaintiff and the city were parties to the first action and are parties to the second action. Therefore, plaintiff's pension claim against the city is barred.

The issue in this case is whether the retirement board is in privity, as that term is defined in our understanding of the doctrine of res judicata with the city. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Adair* at 122 (citation omitted). However, this definition of privity does not necessarily apply when the parties at issue are governmental units. *Baraga Co v State Tax Comm*, 466 Mich 264, 269-270; 645 NW2d 13 (2002), reh den 466 Mich 1223 (2002). The *Baraga* Court followed CJS and Am Jur 2d in determining that a state agency was not in privity with two townships that had been parties to proceedings in the tax tribunal. *Id.* at 265-266, 270-271. Nevertheless, the *Adair* Court utilized the general definition of privity in determining whether some school districts and individual taxpayers were in privity with other school districts and individual taxpayers. *Adair*, *supra* at 470.

According to CJS, the general rule is that "a governmental body and its officers, boards, commissions, agents, representatives and employees are in privity and form but a single entity with respect to the application of the rule of res judicata." 50 CJS, Judgments, § 869, p 442. Under this authority, the city and its retirement board would be in privity. According to Am Jur 2d:

> A decision for or against one political subdivision or agency of a government binds other political subdivisions or agencies of the same government. However, some courts have created an exception to this rule where the agencies serve different functions or have different authority . . . . [Am Jur 2d, Judgments, § 624, p 197.]

The treatise notes that given "the peculiar statutory and regulatory schemes governing public retirement systems, courts have held that although the retirement systems have some attributes of the state, they are nevertheless not in privity with the state or any of its executive agencies. A lack of privity has also been found between a city and a statutorily-created pension system. *Id.*, § 626, at 198-199. Under this authority, the city and its retirement board may not be in privity.

In *Bianchi v San Diego*, 214 Cal App 3d 563; 262 Cal Rptr 566 (1989), the plaintiff police officer claimed worker's compensation benefits. The worker's compensation appeals board (WCAB) determined that the plaintiff had sustained a compensable work-related injury that left him partially permanently disabled. *Id.* at 565. The plaintiff then applied to the city's retirement board for a disability retirement. The board determined that certain injuries were work-related but not permanently disabling while other injuries were permanently disabling but not work-related and denied the application. *Id.* at 565-566. The court held that collateral estoppel did not preclude the retirement board from redetermining the issues previously decided by the WCAB. The determining factor was whether the retirement board is "an independent administrator of an entity distinct from the" governmental body or whether it "is merely the agent for the employer in administering the employer's retirement fund, and has no independent existence, powers or responsibilities[.]" *Id.* at 570 n 6. The court found that the city and retirement board were not in privity with respect to the WCAB proceedings. It explained:

> The retirement system is established as an independent entity; all funds for the system are required to be segregated from city funds, placed in a separate trust fund under the exclusive control of the Retirement Board, and may only be used for retirement system purposes. The Retirement Board also acts as an independent administrator empowered to conduct actuarial studies to determine conclusively the amounts of contributions required of the City and participating employees. The board has the sole authority to determine the rights and benefits from the system, and to control the administration of and investments for the fund. The Retirement Board has twelve members, the majority of whom are not City officers . . . . Most significantly, the retirement system is a contributory system, based on actuarial tables established by the Retirement Board, with contributions to the fund paid equally by the City *and its participating employees.* Indeed, the system also encompasses noncity entities and employees. [*Id.* at 571 (emphasis in original, citation and footnotes omitted).]

It is unclear from the record whether Livonia's retirement board is an independent authority like San Diego's or is simply an administrative arm of the city. Because the burden of establishing the applicability of res judicata is on defendants as the parties asserting the doctrine, *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006), and the evidence in the record is insufficient to determine the nature of the board's status, we therefore reverse the trial court's order dismissing plaintiff's claim against the board and remand for further proceedings.

Plaintiff claims that it would be unjust to bar his claim against the city because he has a constitutional right to his retirement benefits. Const 1963, art 9, § 24 provides in part that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Accrued financial benefits include pension payments or retirement allowances. *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 654; 698 NW2d 350 (2005). However, simply because a constitutional right is involved does not preclude the application of res judicata. In *Adair*, for example, the Court held that that certain claims brought under the Headlee Amendment, Const 1963, art 9, §§ 29-34, were barred by prior litigation. *Adair*, *supra* at 120-127. Further, there is no evidence that plaintiff had any accrued benefits under the defined contribution plan. He acknowledged in October 1999 that he had been "denied the opportunity to select the defined contribution pension option" and asked to be advised "what process I have to follow to select the defined contribution pension option and then roll it over into my IRA." And, contrary to plaintiff's claim, the city did not admit that he is "due and owing" $120,147.35 under the defined contribution plan. Rather, the city simply acknowledged that he would be entitled to that sum if he had enrolled or was still seeking to enroll in the plan, but made it plain that plaintiff had never enrolled in the plan. Because plaintiff never enrolled in the defined contribution plan, he could not have any accrued benefits thereunder. Therefore, plaintiff has not shown that art 9, § 24 has any application here.

## II. FOIA

Questions of statutory interpretation are reviewed de novo on appeal. *Herald Co, Inc v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). Factual findings are reviewed for clear error. *Id.* at 472

A person has a right to inspect a public record of a public body upon written request unless the record is exempt from disclosure. MCL 15.233(1); MCL 15.235(1). A public record is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created," other than computer software and records that are exempt. MCL 15.232(e). The request must be submitted to the FOIA coordinator of the public body and must describe the record "sufficiently to enable the public body to find the public record." MCL 15.233(1). If the request is sent to some other employee of the public body, that employee is required to forward it to the FOIA coordinator. *Id*. The public body must respond within five days (or longer if the requesting person agrees). MCL 15.235(2). The public body may grant the request, deny the request, grant the request in part and deny it in part, or claim an additional period, up to ten days, in which to respond. *Id*.

The evidence showed that plaintiff submitted only one request to the city under the FOIA in 2005. That request was submitted in December of that year and the city submitted a timely response. Plaintiff did not submit a request to the city under the FOIA in the spring of 2005. Rather, he wrote a letter complaining that he had not received a proper response to a request made in December 2004. Plaintiff's complaint does not contain a claim relating to the December 2004 request and plaintiff cannot litigate issues or claims not raised in the pleadings, *Belobradich v Sarnsethsiri*, 131 Mich App 241, 246; 346 NW2d 83 (1983), unless they are tried with the express or implied consent of the parties. MCR 2.118(C)(1). Further, a claim under the FOIA must be filed "within 180 days after a public body's final determination to deny a request." MCL 15.240(1)(b). A failure to respond in the manner prescribed by § 5(2) constitutes

a final determination to deny the request. MCL 15.235(3). Therefore, any claim premised on the December 2004 request is untimely. Plaintiff has shown no error in the trial court's ruling.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello