

STATE OF MICHIGAN
IN THE SUPREME COURT

HOUDINI PROPERTIES, LLC,
a Michigan limited liability company,

Plaintiff/Appellant,

MSC Docket No.:

COA Docket No.: 266338

v

CITY OF ROMULUS, a Michigan
municipal corporation,

Defendant/Appellee.

Lower Court Case No.: 05-504139-CZ

132018 -
DEFENDANT/APPELLEE'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THIS COURT SHOULD GRANT LEAVE TO APPEAL THE DECISION OF THE COURT OF APPEALS WHICH HELD THAT PLAINTIFF'S SECOND LAWSUIT WAS PROPERLY ABATED PURSUANT TO MCR 2.116(C)(6) WHERE PLAINTIFF'S ADMITTED THAT ANOTHER ACTION WAS CURRENTLY PENDING WHICH INVOLVED THE SAME PARTIES AND RELATED TO THE SAME SUBJECT MATTER AS THE PRIOR SUIT, BUT WHERE PLAINTIFF FAILED TO JOIN ALL ITS CLAIMS.

- II. WHETHER THIS COURT SHOULD GRANT LEAVE TO APPEAL THE DECISION OF THE COURT OF APPEALS WHICH HELD THAT *RES JUDICATA* BARRED PLAINTIFF'S SECOND SUIT, WHERE ITS FIRST ACTION WAS DECIDED ON THE MERITS, BOTH ACTIONS INVOLVED THE SAME PARTIES, AND WHERE PLAINTIFF, EXERCISING REASONABLE DILIGENCE, COULD HAVE RAISED ALL CONSTITUTIONAL ISSUES IN THE PRIOR SUIT.

- III. WHETHER THIS COURT SHOULD GRANT LEAVE TO APPEAL THE DECISION OF THE COURT OF APPEALS WHICH HELD THAT AMENDMENT OF PLAINTIFF'S COMPLAINT WAS PROPERLY DENIED ON THE BASIS OF FUTILITY BECAUSE THE GRANT OF SUMMARY DISPOSITION WAS BASED ON THE FAILURE TO JOIN THE ACTIONS AND THE DOCTRINE OF *RES JUDICATA* AND WHERE, IN ANY EVENT, THE PROPOSED AMENDED COMPLAINT RAISED THE SAME ALLEGATIONS AND ISSUES RAISED IN THE INITIAL PLEADING.

STATEMENT OF JURISDICTION AND ORDER APPEALED FROM AND RELIEF SOUGHT

MCR 7.302 governs applications for leave to appeal to this Court. Plaintiff/Appellant seeks leave to appeal from the June 13, 2006 Court of Appeals' decision which affirmed the decision of the circuit court which granted summary disposition in favor of Defendant/Appellee, City of Romulus. Plaintiff's timely Motion for Reconsideration was denied on July 27, 2006. (Exs. A and B). MCR 7.302(B) requires an appellant to state grounds which merit this Court's review of the lower court's decision. Defendant opposes Plaintiff's application because it fails to meet the requirements of MCR 7.302(B).

It is well-established that a pleader is required to join every claim which it has against the opposing party in the same action if it arises out of the same transaction or occurrence. In filing its second suit, Houdini noted on the face of the complaint that another civil action was pending which involved the same parties and "that relates to the subject matter involved in this action." Both before the Zoning Board of Appeals, in seeking a variance, and in the circuit court, in seeking review of the denial of the variance, Houdini asserted that the City's zoning ordinance was unconstitutional. Nonetheless, Houdini raised the same claims in its second lawsuit. Under these circumstances, the circuit court properly granted Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(6) to abate the second action. Plaintiff's lawsuit was dismissed based on its failure to follow proper procedure in filing that suit. Although Plaintiff asserts that the circuit court could not consider all of Plaintiff's claims in one proceeding because both the court's appellate and original jurisdiction were implicated, there is nothing in the court rules which bars a circuit court from concurrently exercising its appellate and original jurisdiction to resolve claims which arise from the same transaction or occurrence. Plaintiff's decision to split its cause of action barred Plaintiff's second lawsuit based on longstanding principles of *res judicata* and the broad transactional approach to that doctrine endorsed by this Court. The Court of Appeals' decision

properly applied the court rules as construed by decisions of this Court. Accordingly, Defendant respectfully requests that the Court deny Plaintiff's Application for Leave to Appeal the decision of the Court of Appeals.

INTRODUCTION AND SUMMARY

This lawsuit involves regulation of land within the City of Romulus (hereafter "Defendant" or "City"). Plaintiff/Appellant, Houdini Properties, LLC (hereafter "Plaintiff" or "Houdini") owns a small parcel of land in the City and sought to erect a billboard on its property. Billboards are not a permitted use in an RC (regional center) zoning district which is designated for large scale development suitable to an area adjacent to an expanding Detroit Metropolitan Airport and Interstate 94. Plaintiff's property is located in an area near Metropolitan Airport which is largely vacant and undeveloped. In accord with the City's Master plan, it was rezoned in 2004 from business transitional ("BT") to regional center ("RC"). The existing area contains scattered single family residential and vacant lots. There is vacant land to the north, the I-94 expressway abuts the southern border, vacant land and Middlebelt Road to the east, and long-term parking facilities and a hotel to the west of Plaintiff's property. **(Ex. C, 1/05/04 Report of City Planning Consultant)**. Many of the lots in the area have been purchased by the FAA or Wayne County. In part because of that consolidation, the City rezoned the area to RC in 2004 to allow re-development for commercial uses. **(Ex. D, 11/18/04 Report of City Planning Consultant)**. Even before the rezoning, the area was designated on the Master plan as RC.

Plaintiff sought a variance to develop its lot with a billboard. Billboards are not a permitted use in either the BT (former zoning district) or RC (current zoning district). They are, however, permitted in other areas of the City. Plaintiff's variance application asserted that the City's zoning ordinance was unconstitutional, and that failure to approve the variance request would be unreasonable and result in a taking of Plaintiff's property. **(Ex. E, Plaintiff's application for a**

variance).

The City's planning consultant reviewed the request. Its report found no exceptional circumstances applicable to the property, which was similar in size and configuration to other lots in the area. (Ex. D). The roads in the area were graded, although not paved, providing access to residences in the area. The report noted that erecting a billboard would have had a negative impact on the area of the surrounding neighborhood, and would have cast a shadow on the lot to the north. (Id.). Plaintiff's variance request was subsequently denied by the City. Plaintiff appealed that decision to circuit court, pursuant to MCL 125.585(11),¹ again arguing the alleged unconstitutionality of the City's zoning ordinance. (Ex. F, **Plaintiff's circuit court brief appealing the zoning decision**). Soon after, Plaintiff filed the current lawsuit, again alleging an unconstitutional taking of property and substantive due process violation and seeking money damages. That Complaint plainly stated, as follows:

There is another civil action pending in the Circuit Court for the County of Wayne involving the parties hereto that relates [to] the subject matter involved in this action. That action is Case No. 04-438291-AA and is pending before the Honorable Gershwin A. Drain. That action is Plaintiff's appeal of a decision by the Defendant's Zoning Board of Appeals. (**Plaintiff's Ex. G, Complaint and Jury Demand**) (Emphasis supplied).

Due to the pendency of the prior suit and Plaintiff's failure to join its claims in one action, pursuant to MCR 2.203(A), Defendant moved for summary disposition pursuant to MCR 2.116(C)(6), to abate the second suit. Ultimately, the circuit court affirmed the decision of the Zoning Board of Appeals.² After reviewing the parties' briefs and conducting a hearing, the trial

¹ The City and Village Zoning Act, MCL 125.581 *et seq.*, was the governing statute at the time of Plaintiff's appeal. It has since been superseded by the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* All references are to the prior statute.

² Plaintiff then timely filed an application for leave to appeal that decision to the Court of Appeals.

court later determined that Plaintiff was required to join the two suits, finding them to be “substantially similar.” Because Plaintiff had failed to do so, however, the trial court concluded that Plaintiff’s additional claims in the current suit were barred by the doctrine of *res judicata* since they arose from the same transaction or occurrence. Plaintiff’s motion for leave to amend was denied as futile. **(Plaintiff’s Ex. H, 10/03/05 tr. of circuit court hearing).**

Plaintiff argues in this application that joinder was not required, apparently due to its belief that the circuit court lacked the authority (or ability) to concurrently adjudicate both Plaintiff’s appeal of the denial of its variance and a cause of action for an alleged unconstitutional taking and due process violation. Why the circuit court was without jurisdiction to consider a count relating to the denial of Plaintiff’s request for a variance and at the same time consider additional counts relating to the alleged unconstitutionality of the City’s zoning ordinance is left unanswered in Plaintiff’s application.

The Court of Appeals agreed that Plaintiff was required to join its actions pursuant to MCR 2.203(A). It stated that “Plaintiff’s contention that the actions are distinguishable based on the type of relief asserted is without merit because, despite Plaintiff’s assertion of different ‘theories of liability,’ proof of the same facts or evidence as required to sustain the previous action is necessary in this action.” **(Ex. A, *Houdini Properties, LLC v City of Romulus*, unpublished opinion per curiam of the Court of Appeals dated June 13, 2006 (No. 266338)).** It noted that in ***Macenas v Village of Michiana*, 433 Mich 380, 387; 446 NW2d 102 (1989)**, this Court stated that “[O]nce pleadings are filed in the circuit court which constitute a claim of appeal from a decision by a zoning board of appeals ... the circuit court acts as an appellate court.” Furthermore, “[i]f a proper appeal to circuit court is filed, a ‘cause of action’ is stated....” ***Macenas, supra* at 388.** The twin goals of “trial convenience and economy in judicial administration” would be defeated if Plaintiff’s argument were accepted. **(Ex. A, p. 2).**

Abatement of Plaintiff's current law suit was proper pursuant to MCR 2.116(C)(6), even though the first action had already been decided in Defendant's favor, because Plaintiff sought leave to appeal the first suit. The trial court's order affirming the ZBA's decision was appealed, and thus, the first suit was not resolved and continued, pending further action by the Court of Appeals. ***Darin v Haven*, 175 Mich App 144, 151; 437 NW2d 349 (1989).** (Ex. A, Opinion, p. 2).

Further, the Court of Appeals held that *res judicata* barred Plaintiff's subsequent action. Plaintiff raised the constitutionality of the City's zoning ordinance and asserted constitutional claims in its variance application and in its first suit, the appeal of the ZBA's denial of its variance request. The circuit court was statutorily authorized to consider such claims per MCL 125.585(11). Houdini sought to raise the same issues in this lawsuit. Plaintiff's continuing attempts to persuade the lower courts that its first cause of action, seeking reversal of the ZBA's decision denying its variance request, and this lawsuit involved different issues and lacked a common factual basis were unsuccessful, in light of this Court's adoption of a broad transactional approach to determine what constitutes a cause of action. ***Adair v State*, 470 Mich 105; 680 NW2d 386 (2004).**

Finally, the Court of Appeals concluded that Plaintiff's motion to amend was properly denied as futile, since the trial court's grant of summary disposition in favor of Defendant was based on the failure to join the actions and the doctrine of *res judicata*. (Ex. A, Opinion, p. 3). In any event, the Court of Appeals concluded that Plaintiff's proposed amended complaint "did not vary substantially from the initial pleading. It merely provided greater elaboration and was 'an expansion upon the initial claims, not the provision of a new issue or legal theory.'" (Ex. A, Opinion, p. 3).

The Court of Appeals' decision was correct. Plaintiff, like all other litigants, is required to comply with the procedural rules as adopted by this Court. One of these rules requires joinder of every claim that the pleader has against the opposing party. MCR 2.203(A). Despite repeatedly asserting claims related to the alleged unconstitutionality of the City's zoning ordinance in its

application for a variance before the ZBA, and in its first circuit court action appealing the denial of that variance, Plaintiff asserts that this lawsuit was not part of the same transaction or occurrence and did not need to be joined to its earlier lawsuit. Plaintiff provides no support for its claim that the circuit court was without jurisdictional authority to concurrently consider the denial of Plaintiff's request for a zoning variance while at the same time adjudicating this lawsuit, which also involved constitutional issues. Having failed to join all of its claims in the same proceeding, Plaintiff was subject to dismissal of those claims on the basis of MCR 2.116(C)(6), abatement of prior action, and MCR 2.116(C)(7), *res judicata*, after the trial court decided the first action in favor of the Defendant.

Plaintiff's application fails to raise any issue which merits this Court's review and Defendant respectfully requests that the application be denied.

COUNTERSTATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Location of Plaintiff's Property and Character of Surrounding Area

Plaintiff owns a parcel of property consisting of two lots on the north side of the I-94 corridor in the City of Romulus. The property was purchased in 1998, at which time the zoning classification for the parcel and surrounding area was "business transitional" ("BT"). The BT district was "designed to allow the gradual redevelopment of certain areas from residential to nonresidential in a way that would not negatively impact the existing residents in the area." Permitted uses included office, retail and service businesses, hotels, motels, and other special uses for light industrial development. Billboards were not a permitted use under the BT classification. The property was later rezoned to "regional center" ("RC") and the BT classification was eliminated. Although the City sent notice to property owners who would be affected by the rezoning, Plaintiff did not object. Billboards are not a permitted use in the RC district. Principal uses in the RC district include hotels and motels, office buildings and financial institutions, restaurants (excluding

fast food), lounges, theaters and entertainment establishments, high rise multi family units, retail businesses, personal service establishments, municipal and public utility buildings, nursery schools and child care centers, and accessory uses incidental to those listed. (**See Ex. I, City of Romulus Zoning Ordinance, Sec. 11.02**). A number of other uses are permitted in the district with special approval, such as long term parking facilities, car rental establishments, multi family dwellings, planned development areas, health clubs, spas, other indoor recreations and auto service centers. (**Id., Sec. 11.03**).

Rezoning property in the area to RC was consistent with the City's Master plan for development of the area which is located in proximity to the recently expanded Metropolitan Airport and I-94. Many of the lots in the area have already been consolidated through purchase by the FAA and Wayne County. Although scattered single family residences remain, the RC designation was consistent with surrounding land use – Middlebelt Road to the east, I-94 to the south, vacant land to the north, and hotel and parking facilities to the west. (**Ex. C**). Roads are maintained to provide access to the few residences remaining in the area. (**Ex. D**).

Plaintiff's Request for a Variance; Plaintiff's Inability to Satisfy the Standards Necessary to Obtain a Variance

In October 2004, more than six years after it purchased the property, Plaintiff applied for a building permit for a billboard. This is not a permitted use within the RC district, and is also discouraged by the Master plan. After the building department denied the application, Plaintiff applied for a use variance from the City's Board of Zoning Appeals ("ZBA") which was considered by the ZBA at a hearing held on December 1, 2003. (**See Ex. J, Minutes of Regular Meeting of the ZBA**). The City's zoning ordinance provides for a use variance only when the reviewing body "affirmatively finds that each of the following standards are met:"

Plaintiff's petition was reviewed under the "unnecessary hardship" criteria for a use variance, a finding of "unnecessary hardship" required demonstration of all of the following:

1. Exceptional or Extraordinary Circumstances. That there are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to other properties or uses in the same district or zone.
2. Preservation of Property Rights. That such variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property owners in the same zone and vicinity.
3. Impact to Surrounding Neighborhood. That the granting of such variance will not unreasonably increase the congestion in public streets, or increase the danger of fire, or endanger the public safety, or unreasonably diminish or impair established property values within the surrounding area.
4. Adequate Supply of Light and Air. That the proposed variances will not impair an adequate supply of light and air to adjacent property.
5. Substantial Justice. That allowing the variance will result in substantial justice being done, considering the public benefits intended to be secured by this Ordinance, the individual hardships that will be suffered by a failure of the Board to grant a variance, and the rights of others whose property would be affected by the allowance of the variance.
6. Minimum Variance. That the variance is the minimum variance that will make possible the reasonable use of the land, building or structure.
7. Purpose and Intent of Ordinance. That the granting of the variance will be in harmony with the general purpose and intent of this Ordinance and will not be injurious to the neighborhood, or otherwise detrimental to the public welfare. (Ex. D).

The ZBA considered the testimony presented by Plaintiff's representative and the City Planner, as well as a report prepared by the City's Planning Consultant. (Ex. D). After review, the ZBA denied the variance request. The ZBA found no exceptional or extraordinary circumstances or conditions which applied to the site which were not common to other similarly zoned lots in the immediate vicinity of the subdivision. It also found that allowing a billboard on Plaintiff's property would convey a "special privilege" to the landowner that was not enjoyed by others in the district and immediate vicinity. The billboard would not meet the twenty (20') foot side yard setback from the north property line and would cast a shadow on the lot to the north. The Board also concluded that granting the variance would not be in harmony with the purpose and intent of the RC district

and would be contrary to the recommendations of the Master plan for development of the Metro Center area. Finally, it noted that there were several other areas of the City that allowed billboards. (Ex. J, ZBA Minutes at p. 12).

Plaintiff Files its Original Cause of Action, an Appeal of the ZBA's Denial of its Variance Request

Following denial of its application for a use variance, Plaintiff sought review of the ZBA's decision in Wayne County Circuit Court, pursuant to MCL 125.585(11). MCL 125.585(11) provides for review as follows:

The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

- (a) **Complies with the constitution and laws of this state.**
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals. (Emphasis supplied).

In its circuit court brief, Plaintiff argued extensively that the City's zoning ordinance was unconstitutional. (Ex. F, Plaintiff's circuit court brief appealing ZBA decision, p. 7).

Plaintiff's Current Action Again Alleges the Unconstitutionality of the City's Zoning Ordinance

Approximately six weeks later, Plaintiff filed the present action, again alleging that the ZBA's decision to deny the use variance and apply the RC district to Plaintiff's property "constituted a taking of Plaintiff's property without just compensation ... [and did] not advance a reasonable governmental interest...." (See Ex. G, Complaint and Jury Demand, ¶¶ 25-28). The same argument had been raised by the Plaintiff in its circuit court appeal brief. (Ex. F).

Indeed, Plaintiff's Complaint stated:

There is another civil action pending in the Circuit Court for the

County of Wayne involving the parties hereto that relates [to] the subject matter involved in this action. (Ex. G).

The City filed a motion for summary disposition, arguing that the current action was based on the same transaction or occurrence as the previously filed zoning appeal and that Plaintiff was thus required to join all of the claims raised in the present action in its first suit. MCR 2.116(C)(6) states that summary disposition is proper when “[a]nother action has been initiated between the same parties involving the same claim.” For purposes of MCR 2.116(C)(6), case law holds that the issues do not have to be identical, only “substantially similar” and based on the same or substantially the same cause of action. *J.D. Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 600; 386 NW2d 605 (1986). In its response brief, Houdini requested the circuit court to consolidate the two suits. It also filed a restated motion for leave to file first amended complaint (withdrawing its prior motion for leave to file a first amended complaint).

After the City filed its Motion for Summary Disposition, the trial court affirmed the decision of the ZBA on August 26, 2005. Plaintiff filed an application for leave to appeal that decision to the Court of Appeals which remained pending until March 26, 2006 when it was denied. (Ex. K, Court of Appeals 3/22/06 Order(Docket No. 265158)). After the trial court ruled on the ZBA’s denial of Plaintiff’s variance request, the City filed a supplemental brief arguing that the trial court’s decision on the variance issue involved the same parties, and arose out of the same transaction as the current lawsuit. The current lawsuit also alleged that the ZBA’s denial of Plaintiff’s application for a use variance and application of the RC district to Plaintiff’s property “constituted a taking of Plaintiff’s property without just compensation ... [and did] not advance a reasonable governmental interest...” (Ex. G, Plaintiff’s Complaint, ¶¶ 25-28), just as Plaintiff had argued in the prior suit. In light of the trial court’s disposition of the variance denial, Defendant argued that not only was Plaintiff required to have joined its claims, but that its failure to do so resulted in those claims being barred by the doctrine of *res judicata*.

The trial court heard argument on September 7, 2005. Defendant's counsel argued that joinder of Plaintiff's claims pursuant to MCR 2.203 was mandatory and that Plaintiff failed to do so. Once the trial court ruled that the ZBA's decision was reasonable and complied with the Constitution and laws of this State, Plaintiff was precluded from pursuing those claims (which it had failed to join) by the doctrine of *res judicata*. (9/07/05 tr., pp. 5-6). Although Plaintiff claims that this argument "confused the trial court," there was nothing confusing about the fact that a party who fails to join all of his claims risks being barred from raising them in a subsequent suit by longstanding principles of claim preclusion.

The trial court initially orally denied Defendant's Motion for Summary Disposition, but requested Defendant's counsel to address the takings issue. Counsel noted that Plaintiff knew when it purchased the property that it was a small, vacant piece of land which would not meet the setback requirements for development and that it was bought solely for the purpose of erecting a billboard – a purpose which was not permitted. (9/07/05 tr., p. 9). Counsel noted that Plaintiff failed to provide any evidence to substantiate that the property could not be used for a purpose permitted in the RC zoning district:

This land has economically viable use. What they're saying is that they can't use it for this particular purpose. And I think the Court has already addressed whether that was a reasonable decision in the appeal.

But Plaintiff certainly – their property has value. It has use for other purposes. It could be assembled along with the other land in the area. And this was basically land speculation on their part, your Honor. (*Id.*, p. 10).

The trial court orally denied the City's motion (9/07/05 tr., p. 8) and took the remaining motions under advisement.

The next hearing took place on October 3, 2005. At that time, the trial court reconsidered its earlier decision regarding joinder, as well as *res judicata*, and concluded, after reconsidering the

pleadings and the court rules relating to joinder, that MCR 2.203(A) would apply:

And, you know, as reluctant as I initially was to find that joinder was required, or *res judicata* applied, I think in reviewing the facts and the arguments in the case, and looking at the court rule, and again, that *Sammon* [sic] case, even though it's unpublished, I think it is applicable. Because, essentially, you have the same parties, you have the same transaction arising out of the same set of facts. The issues are not identical, but they're pretty similar, or substantially similar, and for that reason, I think that, you know, the compulsory joinder rule applies, or *res judicata* applies. And so the court, accordingly, is going to grant the defendant's motion for summary judgment.

Now, I also looked at the motion to amend and, really, the issue there is futility. And I know that the court rules say that amendments should be granted liberally in those kind of things. But again, given my ruling on the summary disposition motion, and my ruling on the appeal, I really think it's a futile effort to allow an amendment raising an equal protection argument, which really arises out of the same set of facts, same transaction, same circumstances. So, the court is also, accordingly, going to deny the motion to amend. (10/03/05 tr., pp. 3-4).

The Court of Appeals Affirms the Order of the Circuit Court

Plaintiff appealed the trial court's ruling. After hearing oral argument on May 2, 2006, the Court of Appeals issued its opinion on June 13, 2006 affirming the order of the trial court. It concluded that compulsory joinder applied and that the actions filed by Plaintiff were required to be joined in accord with MCR 2.203(A). (Ex. A, Opinion, p. 1).

The court rejected Plaintiff's argument that summary disposition was improper under MCR 2.116(C)(6) because when the trial court ruled on the appeal the matter was no longer pending, so that two actions did not exist simultaneously. It concluded, relying on *Darin, supra*, that the pendency of the appeal acted to abate the second action. (Ex. A, p. 2).

Summary disposition was properly granted on the basis of *res judicata*. The ruling in the first suit, the appeal, was a decision on the merits. The same parties were involved in both actions. The same evidence would be used to prove allegations in the subsequent lawsuit, and Plaintiff's

zoning application had included arguments pertaining to the constitutional issues raised in Plaintiff's subsequent lawsuit.

Finally, because the trial court's grant of summary disposition was based on the failure to join the actions and the doctrine of *res judicata*, amendment of the complaint was futile.

Plaintiff now seeks leave to appeal.

STANDARD OF REVIEW

On appeal, a trial court's grant or denial of a motion for summary disposition is reviewed *de novo*. ***Reed v Reed*, 265 Mich App 131; 693 NW2d 825 (2005)**. A trial court's decision regarding amendment of a complaint is reviewed for an abuse of discretion. ***Liggett Restaurant Grp v Pontiac*, 260 Mich App 127; 676 NW2d 633 (2003)**.

Summary disposition is appropriate under MCR 2.116(C)(6) where "another action has been initiated between the same parties involving the same claim." The actions need not be identical, but only be based on "substantially" the same cause of action. ***J.D. Candler Roofing Co, Inc v Dickson*, supra at 600**. The applicability of *res judicata* is a question of law that is reviewed *de novo* on appeal. ***Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999)**.

ARGUMENT I

THE COURT OF APPEALS PROPERLY AFFIRMED THE LOWER COURT'S ORDER DISMISSING PLAINTIFF'S SECOND LAWSUIT WHERE, IN FILING A SECOND SUIT, PLAINTIFF ADMITTED THAT ANOTHER ACTION WAS CURRENTLY PENDING WHICH INVOLVED THE SAME PARTIES AND RELATED TO THE SAME SUBJECT MATTER AS THE PRIOR SUIT

A. The City's Zoning Ordinance was Reasonable in its Application to Plaintiff's Property and there was No Evidence to Show that it Denied Plaintiff a Reasonable Use of that Property

Although Plaintiff argues that the zoning ordinance was unconstitutional as applied to its

property, Plaintiff's current suit was dismissed pursuant to MCR 2.116(C)(6) because Plaintiff filed a second action while another suit was still pending, even though the two lawsuits involved the same underlying issue relating to the constitutionality of the City's zoning ordinance as applied to Plaintiff's use of its property. Abatement of the second action was therefore required. Once the trial court decided the first lawsuit in favor of the City, Plaintiff's claims in the second suit were barred by the doctrine of *res judicata*, because the first suit was decided on the merits, both actions involved the same parties, and the matter in the second action could have been raised in the first suit. Plaintiff's suit was dismissed because Plaintiff failed to follow the procedural requirements for pursuing its claims in circuit court and the Court of Appeals affirmed on this basis.

Even so, Plaintiff argues that the City's zoning ordinance was unreasonable and unconstitutional as applied to its property. A zoning ordinance is clothed with every presumption of validity. The touchstone of validity is the reasonableness of the ordinance. ***Kropf v City of Sterling Heights*, 391 Mich 139, 162; 215 NW2d 179 (1974)**. The burden of proving that a zoning ordinance is unconstitutional is on the plaintiff. ***Id.*** Contrary to Plaintiff's statement, the evidence was that the zoning of Houdini's property was reasonable. The City's Planning Consultants reviewed the proposed rezoning and concluded that it was compatible with the surrounding zoning. It was also consistent with Defendant's Master plan, which is evidence of reasonableness. ***Troy Campus v City of Troy*, 132 Mich App 441, 457; 349 NW2d 177 (1984)**. There has been increased interest in development in the area and infrastructure in the area was also available. **(Ex. C)**. Use of property is not static, but rather changes and develops based on the needs of the community. While at one time Plaintiff's property was part of a single family subdivision, most of the residences are now gone and the property is vacant. The character of the area changed as the City and the adjacent airport grew and expanded. Commercial and industrial uses now predominate. The zoning ordinance and the City's master plan reflect this change. The master

plan reflected an overall need to address future development in the area by directing it toward specified uses thereby planning for growth in a controlled manner. The rezoning of the property was consistent with the goals of the master plan. The rezoning therefore met the *Kropf* test of reasonableness.

There was no showing by Plaintiff that the property was without value or unmarketable under the existing zoning. Indeed, although the area had changed in character from residential, a market for the property exists. Many lots have been purchased by the FAA and Wayne County. The adjacent airport generates a substantial trade of passengers, visitors, and employees, making the area attractive for large scale development. (Ex. D). The burden was on Plaintiff to show that the property was unsuitable for use as zoned, or unmarketable as zoned. *Bevin v Brandon Twp*, 438 Mich 385; 475 NW2d 37 (1991). Plaintiff failed to provide evidence to support a taking under the “balancing test” as stated in *K&K Const Co, Inc v Dep’t of Natural Resources*, 456 Mich 570, 577; 575 NW2d 531 (1998), cert den’d 525 US 819; 119 S Ct 60; 142 L Ed2d 47 (1998). *K&K* analyzed the balancing test set forth in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed2d 631 (1978). To determine if a taking has occurred under the traditional “balancing test” established in *Penn Central*, the court considers three factors: (1) the character of the government’s action; (2) the economic effect of the regulation on the property; and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *K&K Const, supra* at 577, citing *Penn Central, supra* at 124.

The character of the governmental action involved rezoning the property to RC. The rezoning was comprehensive and general in character, not exclusively directed at Plaintiff’s property. This was evidence that the zoning reflected changes in the area and was a reasonable exercise of the City’s authority to zone under the police power. Plaintiff presented no evidence regarding the economic effect of the regulation, other than that Plaintiff could not erect a billboard

on the property under either the prior or current zoning. Although a billboard may have been the most lucrative use of the property, diminution in value is insufficient to establish a taking. *Bevin, supra* at 402-403. Finally, Plaintiff had no investment-backed expectation in erecting a billboard on the property, and indeed any such expectation would have been speculative, as evidenced by the fact that the property had not been developed in the six (6) years Plaintiff owned it prior to the City's comprehensive rezoning to RC. A claim for just compensation cannot be based on uncertain and speculative expected profits. *Dorman v Clinton Twp, 269 Mich App 638, 648; 714 NW2d 350 (2006)*. Moreover, billboards were not a permitted use in either the prior BT zoning classification or under current zoning.

The City's zoning ordinance and master plan were reasonable and thus constitutional. Moreover, Plaintiff provided no evidence that the ordinance constituted a regulatory taking under the balancing test of *K&K, supra*.

B. Once Plaintiff Decided to Pursue Both the Denial of its Variance Request and to Challenge the Constitutionality of the Zoning Ordinance, it was Required to Bring its Claims in One Suit

There is no question that the circuit court had both general original jurisdiction to hear civil actions (Const 1963, art VI, § 13) and appellate jurisdiction over the Zoning Board of Appeals' denial of Houdini's variance request. MCL 125.585(11). Defendant does not question Plaintiff's decision to pursue both an administrative appeal and an original action. The circuit court, a court of both general jurisdiction and limited appellate jurisdiction is authorized to consider and decide both such claims. Apparently, Plaintiff's argument is that the circuit court is not permitted to entertain the claims concurrently. The Court of Appeals in *Sammut v City of Birmingham, unpublished opinion per curiam of the Court of Appeals, dated January 4, 2005 (No. 250322) (Ex. L)* did not subscribe to Plaintiff's theory.

Houdini was not required to appeal the ZBA's denial of its variance request prior to filing an

original action, but once it chose to challenge both the denial of the variance and the constitutionality of the City's zoning ordinance, it was required to bring all claims arising from the alleged denial of its ability to use its property at one time, since the claims related to the same issue. That issue was whether the City's actions and zoning ordinance complied with the Constitution and laws of the state. Plaintiff was well-aware of this – Plaintiff's application for a variance contained a lengthy discussion regarding the constitutional issues involved in this case. Plaintiff argued that the ZBA's denial of the variance would constitute a taking of property and that there was no reasonable basis for the zoning of Plaintiff's property. (**Ex. E, application for use variance**). Plaintiff itself raised the question of whether the City's zoning ordinance was constitutional and argued that the Zoning Board of Appeals was required to grant the variance. Plaintiff's application stated: "[In] this case, application of the zoning ordinance to the subject property is unreasonable on its face and a use variance should issue." (**Ex. E, attached memorandum, p. 3**).

Plaintiff is correct, to the extent it argues that it was not required to appeal the decision of the Zoning Board of Appeals, but could have immediately filed a lawsuit in circuit court. Instead, it determined that it would both file such a suit and challenge the administrative determination of the ZBA. Once it voluntarily made that determination, it was required to join these claims for the circuit court's consideration. Houdini was well-aware of the close relationship between the two suits – Plaintiff noted on its Complaint that another civil action was pending which involved the same parties and "that relates to the subject matter involved in this action." (**Ex. G, Plaintiff's Complaint**).³

Defendant acknowledges that the circuit courts of the state have both appellate and original

³ It was therefore unsurprising that Defendant would raise the mandatory joinder rule of MCR 2.203(A) and seek summary disposition pursuant to MCR 2.116(C)(6).

jurisdiction. Plaintiff's argument that the circuit court is precluded from concurrent exercise of its jurisdiction, even under appropriate circumstances where such exercise would result in a more efficient use of the court's limited time and limited resources should be rejected, however. The same argument was rejected by the Court of Appeals in *Sammut, supra*, a decision which Plaintiff dismisses as "incorrect." (**Appellant's brief, pp. 30, 31**).

Plaintiff's application merely states the obvious. The circuit court acts as an appellate court in an appeal from a decision of a Zoning Board of Appeals. *Macenas, supra, 433 Mich at 387*. The circuit court's review of a decision of a Zoning Board of Appeals is limited to the record considered by the board. *Lorland Civic Ass'n v DiMatteo, 10 Mich App 129; 157 NW2d 1 (1968)*. Plaintiff next cites to several cases dealing with issues of ripeness and finality; again not an issue here. In *Sun Comm v Leroy Twp, 241 Mich App 665; 617 NW2d 42 (2000)*, after plaintiff's rezoning request was denied, it filed a suit in circuit court challenging the constitutionality of the township's zoning ordinance. Defendant argued that plaintiff was required to file an appeal seeking review of the denial rather than filing an original suit. The Court of Appeals disagreed, distinguishing between the legislative act of rezoning which was subject to immediate challenge and an administrative decision by the Township's Zoning Board of Appeals, which was challenged through appeal to the circuit court.

Paragon Properties Co v Novi, 452 Mich 568; 550 NW2d 772 (1996) focused on the necessity of a final decision prior to the court's adjudication of whether a taking had occurred, stressing the need for plaintiff to seek a variance, even where rezoning had been denied in order to meet the requirement of finality. *Id at 579-580*. *1st Rural Housing Partnership, LLC v Howell, unpublished opinion per curiam of the Court of Appeals, dated February 5, 2004 (No. 241192)*, an unpublished opinion of this Court (which ironically, considering Plaintiff's disparagement of *Sammut, supra*, it cites for its apparent persuasiveness) reiterated the same

distinction between a challenge to an administrative decision of the Zoning Board of Appeals and a constitutional challenge to the legislative actions of a township board. It concluded that Plaintiff had the option to either pursue the variance issue through an appeal, or abandon it and bring an original action in circuit court challenging the zoning ordinance, or both. Here, Plaintiff chose to do both, as it was entitled to do. Having made that choice, it was required to join all of its claims, however, which was not an issue in the **1st Rural Housing Partnership** case.

Plaintiff has ably pointed out the distinction between the circuit court's role as an appellate court and its authority pursuant to its original jurisdiction. What Plaintiff cannot explain is why the court is prevented from considering one count related to the denial of a request for a variance (based on the record below), and a second count related to Plaintiff's claim of a constitutional violation, in the exercise of its general jurisdiction to hear such claims. In fact, there is no rule preventing the joinder of such claims and there are substantial reasons for consolidating them, among them preservation of the court's limited time and resources. Indeed, Plaintiff requested that the trial court consolidate the actions. (**Plaintiff's Ex. R at 8-9**). Plaintiff asserts that the circuit court and the Court of Appeals "badly misunderstood" the "critical distinction" between the court's appellate and original jurisdiction. (**Appellant's brief, p. 28**). The Court of Appeals and the circuit court did not misunderstand the distinction, but rather recognized that its appellate and original jurisdiction permitted the circuit court to address all claims put forward by the Plaintiff. There was no error in that conclusion.

1. *Sammut, supra* Provided Persuasive Reasoning in Support of Defendant's Motion for Summary Disposition

Plaintiff asserts that in granting Defendant's Motion for Summary Disposition on the basis of MCR 2.116(C)(6) and the compulsory joinder rule of MCR 2.203(A) the trial court erred and relied on an "incorrect" unpublished decision of the Court of Appeals. ***Sammut, supra***. Although unpublished opinions lack precedential value pursuant to MCR 7.215(C)(1), that does not mean

that they cannot be persuasive in their reasoning. Although the trial court found the *Sammut* decision to be persuasive, the court also expressly considered MCR 2.203(A). (**Ex. H, 10/03/05 tr., p. 3**). Contrary to Plaintiff's argument that joinder was not an issue in *Sammut*, the opinion expressly referenced MCR 2.203(A)'s requirement that Plaintiff join claims against a defendant that "arise out of the transaction or occurrence that is the subject matter of the action." *Sammut*, p. 2. Because Plaintiff could, and should have joined its two claims, but did not, the second suit was barred by the doctrine of *res judicata*.

In granting the City's motion, the trial judge stated:

Because, essentially, you have the same parties, you have the same transaction arising out of the same set of facts. The issues are not identical, but they're pretty similar, or substantially similar, and for that reason, I think that, you know, the compulsory joinder rule applies, or *res judicata* applies.

And so the court, accordingly, is going to grant the defendant's motion for summary judgment. (**Ex. H, 10/03/05 tr., p. 4**).

The trial court also referred to the Court of Appeals' decision in *Sammut*. In *Sammut*, following a successful appeal of the ZBA's denial of their request for a variance, plaintiffs filed a second suit alleging that defendants violated their constitutional rights and seeking damages. The circuit court held, and the Court of Appeals agreed, that plaintiffs' claims were barred by *res judicata* because plaintiffs should have raised their constitutional claim in the earlier proceedings challenging the ZBA's decision. The Court of Appeals rejected plaintiffs' claim that they could not have raised the constitutional claim before the ZBA and therefore could not have raised it before the trial court, since MCL 125.585 did not authorize the trial court to award damages.

The Court of Appeals reasoned that MCL 125.585 did not restrict the circuit court's general jurisdiction under the Michigan Constitution and Revised Judicature Act. Const 1963, art VI, § 13; MCL 600.601 *et seq.* The correct procedure would have been to join their constitutional claim and their appeal per MCR 2.203 and they were indeed required to do so. (**Ex. L, p. 2**). In *Sammut*,

“there was no legal, jurisdictional or procedural bar to plaintiffs filing a lawsuit that sought review of the ZBA’s decision under MCL 125.585, and also sought damages for the alleged constitutional violation.” (*Id.*).

The same situation was involved here. Houdini claimed that denial of its use variance application was a violation of its constitutional rights, and indeed informed the ZBA of this claim in its application for a variance. The constitutional issue was central to Plaintiff’s variance application. Consideration of the constitutionality of the City’s zoning ordinance and the ZBA’s interpretation of that ordinance was also central to the trial court’s review of the ZBA’s decision pursuant to MCL 125.585(11). MCL 125.585(11) provides as follows:

The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

- (a) Complies with the constitution and laws of this state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

Houdini’s lawsuit, filed soon after its appeal, also raised constitutional issues arising from the same central issue, the permitted use of Plaintiff’s property. The same parties and the same issues were involved in both proceedings. Plaintiff’s argument that the trial court could have exercised either general or appellate jurisdiction, but not both at the same time, and that it lacked the ability to control its docket to accommodate two claims in one lawsuit is merely a red herring meant to distract the Court from the fact that the Plaintiff should have raised these claims together, since they involved the same issues. Because Plaintiff’s claims regarding the constitutionality of the City’s zoning ordinance were raised in the application for a use variance, as well as in the appeal, and again in its civil action, they were substantially similar and should have been joined.

2. **The Circumstances in *Sammut* were Substantially Similar to Those of the Current Lawsuit, Thus Providing a Reasonable Basis for the Trial Court's Consideration**

Plaintiff goes to some lengths to distinguish the *Sammut* decision from the circumstances of this suit. In essence, however, they are very similar. In both cases, plaintiffs filed suit seeking review of the denial of a variance request. In both cases, plaintiffs filed a second lawsuit claiming a violation of their constitutional rights and seeking damages. The trial court dismissed *Sammut's* second suit on the basis of *res judicata*, and the Court of Appeals affirmed, concluding that the constitutional claims should have been raised in earlier court proceedings. The opinion noted that the joinder rule of MCR 2.203(A) required plaintiff to join claims that arise out of the same subject or occurrence. Thereafter, *res judicata* applied to bar the second suit because it arose from the same transaction or events and the plaintiffs, exercising reasonable diligence, could have raised the issue in the prior litigation.

Houdini's proposed amended complaint contained allegations related to the difficulties in accessing the streets adjacent to its property due to lack of repair or abandonment of the streets (**Appellant's brief, p. 31**). Plaintiff claims these issues had nothing to do with the issues in the appeal to the circuit court. That is incorrect, however. The application for a variance filed by Plaintiff also discussed these same allegations in some detail and claimed that application of the existing zoning ordinance to Plaintiff's property was "unreasonable on its face." (**Ex. E, Plaintiff's variance application, p. 3**).

Houdini raised these issues before the Zoning Board of Appeals and again argued that the board's actions were unconstitutional in Houdini's appeal brief to the circuit court seeking review of the denial. Plaintiff again raised constitutional issues in this lawsuit. There was no inequity in requiring Plaintiff to join these claims to be considered by the circuit court which was also considering the legality of the ZBA's decision.

C. **The Court of Appeals Properly Held that MCR 2.203(A) Required Plaintiff to Join all of its Claims Rather than Splitting Them Into Two Lawsuits**

MCR 2.302(a) provides:

(A) Compulsory Joinder. In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

The Court of Appeals concluded that Plaintiff's claims arose out of the same transaction or occurrence, and that the same facts or evidence was essential to the two actions. The Court rejected Plaintiff's argument that the actions were distinguishable based on the type of relief asserted. (**Ex. A, Opinion, p. 1**).

The Court also concluded that Plaintiff's cause of action, the appeal, was subject to MCR 2.203(A) relying, in part, on this Court's decision in ***Macenas v Village of Michiana*, 433 Mich at 387** ("[O]nce pleadings are filed in the circuit court which constitute a claim of appeal from a decision by a zoning board of appeals ..., the circuit court acts as an appellate court.").

"Moreover, Plaintiff's argument would defeat the purpose of MCR 2.203, which provides for liberal joinder of actions 'to achieve trial convenience and economy in judicial administration.'" (**Ex. A, Opinion, p. 2, quoting *Kubiak v Hurr*, 143 Mich App 465, 477; 372 NW2d 341 (1985)**).

The Court of Appeals holding was correct.

1. MCR 2.116(C)(6) Applied where Plaintiff's First Suit was Still Pending at the Time the Circuit Court Granted Defendant's Motion

MCR 2.116(C)(6) does not apply where another suit between the same parties and involving the same claims is no longer pending at the time the motion is granted. ***Fast Air v Knight*, 235 Mich App 541; 599 NW2d 489 (1999)**. Although Plaintiff correctly notes that the circuit court affirmed the ZBA's denial of Plaintiff's variance request on August 26, 2005, and that summary

disposition of this lawsuit was not granted until October 19, 2005, the rule still applied. Plaintiff continued its prior suit by filing an application for leave to appeal the trial court's decision with respect to the zoning ordinance. The Court of Appeals did not dispose of that application until March 2006 (**Ex. K, 3/22/06 Order of the Court of Appeals**).

In *Darin, supra*, the Court rejected plaintiff's argument that the pendency of an action in an appellate court will not constitute pendency of an action for purposes of MCR 2.116(C)(6). "[P]endency of an appeal abates a second action between the same parties on the same subject matter in the trial court." *Id.*, at 151. Plaintiff's application for leave to appeal remained pending in the Court of Appeals at the time the trial court granted summary disposition in October 2005, and until March 2006.

Plaintiff cites *Rossow v Brentwood Farms Development, Inc*, 251 Mich App 652, 654; 651 NW2d 458 (2002) for the proposition that the Court of Appeals did not have jurisdiction over Plaintiff's application for leave to appeal and that therefore no other case was pending and MCR 2.116(C)(6) could not apply to abate the second suit. Plaintiff's reliance on *Rossow* is misplaced. In *Rossow*, in a footnote, the Court noted defendant's argument that because claims by the third party plaintiffs remained to be decided at the time the trial court granted summary disposition for defendants, plaintiffs were not entitled to appeal as of right and the Court lacked jurisdiction absent an order granting leave to appeal. 251 Mich App at 653, n 1. Plaintiff herein was not entitled to file a claim of appeal, but rather was required to proceed pursuant to MCR 7.203(B). That rule provides the court with the authority to grant leave to appeal from "a judgment or order of the circuit court ... which is not a final judgment appealable of right." MCR 7.203(B)(1). The Court of Appeals clearly had jurisdiction to consider Plaintiff's application for leave to appeal and Plaintiff's argument, based on jurisdiction, is incorrect. The Court of Appeals correctly applied the rule.

2. The Court Properly Held that Plaintiff was Required to Join All of its Claims Against the Defendant Pursuant to MCR 2.203(A) and Abatement was Proper Pursuant MCR 2.116(C)(6)

Plaintiff seeks to differentiate its claims on the basis that a claim of appeal does not come within the definition of a “pleading” set forth in MCR 2.110(A). It is interesting to note, however, that this Court’s decision in *Macenas, supra*, quoted by Plaintiff earlier in its brief, states:

Once pleadings are filed in the circuit court which constitute a claim of appeal from a decision by a Zoning Board of Appeals, as in the instant case, the circuit court acts as an appellate court. **433 Mich at 387.** (Emphasis supplied).

In both the circuit court suit, seeking review of the denial of its variance request, and in its suit alleging a constitutional violation, Plaintiff stated claims against the Defendant which are based on substantially the same cause of action. That is apparent from a review of the variance application filed by Plaintiff (**Ex. E**), the brief filed by Plaintiff seeking review of the ZBA’s denial of the variance request (**Ex. F**), and Plaintiff’s brief herein. Plaintiff’s central argument is that the City’s zoning ordinance does not permit a reasonable use of its property and that issuance of a variance was required to prevent an unconstitutional taking. Review of the ZBA’s decision required the trial court to consider whether the decision complied with “the constitution and laws of the state.” The current lawsuit asserts that the zoning ordinance does not comply with constitutional requirements. There is significant overlap in the proofs.

In filing a second lawsuit in 2005, Plaintiff violated not only MCR 2.203(A), the compulsory joinder rule, but also acting in contravention of MCR 2.116(C)(6), the codification of the common law rule of the plea of abatement by prior action. MCR 2.116(C)(6) provides that “a motion for summary disposition may be based on the grounds that another action has been initiated between the same parties involving the same claim.” *Darin v Haven, supra*.

MCR 2.203(A) states, in pertinent part, as follows:

(A) Compulsory Joinder. In a pleading that states a claim against

an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

MCR 2.116 states, in pertinent part, as follows:

(B) Motion.

(1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule....

* * *

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

* * *

(6) Another action has been initiated between the same parties involving the same claim.

Importantly, MCR 2.116(C)(6) only requires that another action has been initiated between the parties in order to apply the rule. There is no question that Houdini filed two actions.

In her concurring opinion in *Rowry v University of Michigan*, 441 Mich 1; 490 NW2d 305 (1992) (Riley, J, concurring), Justice Riley endorsed the “broad, transactional approach” used by the Restatement of Judgments to determine whether two separate causes of action involve the same or substantially the same claim for purposes of MCR 2.116(C)(6).

The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from these theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations and the evidence needed to support the theories or rights. *Rowry*, at 21, n 5, quoting 1 Restatement Judgments 2d, § 24, p. 196.

The purpose of a dismissal under MCR 2.203(A) and 2.116(C)(6) is the same – to protect a Defendant from having to defend multiple suits based on the same or substantially the same causes of action.

The courts quite uniformly agree that parties may not be harassed

by new suits brought by the same plaintiff involving the same questions as those in pending litigation. If this were not so, repeated suits involving useless expenditures of money and energy could be daily launched by a litigious plaintiff involving one and the same matter. Courts will not lend their aid to proceedings of such a character, and the holdings are quite uniform on this subject. ***Chapple v Nat'l Hardwood Co*, 234 Mich 296, 298; 207 NW 888 (1926).**

"In this state the rule against splitting of causes of action is strictly enforced to prevent vexation and expense to a defendant ... it is a rule of justice that one shall present his whole cause of action in one suit." ***Coniglio v Wyoming Valley Fire Ins Co*, 337 Mich 38, 46; 59 NW2d 74 (1953).** Moreover, MCR 2.203 is mandatory; a plaintiff is required to join all causes of action in one suit and the pleader must join every claim he has against the opposing party at the time of serving the pleading if it arises out of the same transaction or occurrence. Plaintiff ignored the court rule in filing its second lawsuit.

MCR 2.116(C)(6) is the codification of the common law rule of the plea of abatement by prior action. ***Rowry, supra***. MCR 2.116(C)(6) works hand-in-hand with MCR 2.203(A) to prevent duplicative lawsuits. The court rule protects parties from the harassment of new suits filed by the same plaintiffs and involving the same questions as those in pending litigation. ***Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666; 341 NW2d 783 (1983).**

The most recent published opinion regarding abatement is ***Fast Air Inc, supra***. The court in ***Fast Air*** was called upon to decide an issue of first impression, that is whether a motion made under MCR 2.116(C)(6) may be granted where the earlier action between the same parties and involving substantially similar claims was dismissed **before** the court ruled on the motion. The court concluded the second suit could not be dismissed, because the original action was no longer pending. The opinion did, however, reaffirm the longstanding principle that parties may not be harassed by new suits brought by the same plaintiff involving the same questions as those in pending litigation. **235 Mich App at 546.**

The requirement that both lawsuits are based on the “same or substantially the same cause of action,” was analyzed by the court by *Candler, supra*. The court held that an action brought by a roofer against one of the owners of a supermarket for breach of contract to re-roof involved the same issues as did a prior pending lawsuit brought by both of the owners against the roofer for declaratory judgment. The court rejected the roofing company’s argument that because its claim was framed as a tort, whereas the other suit alleged breach of contract, the claims in the two cases were different. **149 Mich App at 600**. “[M]CR 2.116 does not require all parties and all issues to be identical.” Rather, the two suits must “be between the same parties” and involving the same claims. **149 Mich App at 598**. The two suits need only be based on the same or substantially the same cause of action. *Ross*, **128 Mich App at 666-67**. The *Candler* court concluded that it was apparent that the “factual and legal issues to be litigated” were the same in both cases.” **149 Mich App at 600**. “Resolution of either action would require examination of the same operative facts.” *Id.*

Cosgrove v Lansing Bd of Ed, **164 Mich App 110; 416 NW2d 316 (1987)** reached the same conclusion. Plaintiffs first filed an unfair labor practices charge with the Michigan Employment Relations Commission. Next they filed suit in circuit court seeking essentially the same relief. The circuit court case should have been dismissed because plaintiff had previously filed a charge with MERC which was still pending. **164 Mich App at 113**.

Kruger v White Lake Twp, unpublished opinion per curiam of the Court of Appeals, dated April 2, 2002 (No. 226900) (Ex. M). *Kruger* considered the application of MCR 2.116(C)(6)⁴ involved a lawsuit filed in 1999 alleging that after arresting the decedent, defendant police officers failed to properly transfer her for medical attention and failed to place her in a secure location, but

⁴ Appellees recognize that unpublished opinions of this Court lack precedential value (MCR 7.215(C)(1)), but may nonetheless be instructive in providing analysis on how the Court reached its conclusion.

instead, allowed her to escape from custody. She suffered fatal injuries after being hit by a vehicle. Plaintiffs pled a 42 USC § 1983 claim against defendants.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(6) based on the fact that plaintiff had initiated a prior action against defendants in Oakland County Circuit Court in 1997 involving substantially the same cause of action, based on identical facts and issues. In response, plaintiff argued that the court rule did not apply because the parties to the action were not identical and plaintiff had no previous opportunity to allege violations of 42 USC § 1983. The trial court rejected this argument and granted summary disposition to the defendants, (even though it had previously denied plaintiff's motion to amend to add a civil rights claim because it found that amendment would have substantially prejudiced the defendants at the late stage of the litigation, and that the delay was inexcusable).

On appeal, the Court of Appeals found that the civil rights suit was properly dismissed pursuant to MCR 2.116(C)(6). Although it recognized that the 1997 action did not name the exact parties as did the 1999 suit, complete identity of parties was not necessary to abate a subsequent action. Likewise, the fact that plaintiff had not asserted a §1983 claim in the 1997 action did not preclude dismissal. Both cases were premised on identical factual allegations and the "gist" of both complaints was that the decedent was not properly monitored and protected and was not properly transferred to a medical facility after she was taken into custody. The *Kruger* court found that the underlying purpose of the court rule – to prevent litigious harassment – was best served by application of the court rule and affirmed dismissal of the lawsuit.

Here, a review of the case law makes clear that summary disposition was properly granted to the City. The basis for the prior and current suits was Houdini's claim that the City's zoning ordinance was unconstitutional as applied to its property and that the ZBA's interpretation of the ordinance was arbitrary. Plaintiff's first lawsuit remained pending since Plaintiff appealed the circuit court's decision to the Court of Appeals. Therefore, MCR 2.116(C)(6) applied and Plaintiff's

second suit was properly dismissed.

ARGUMENT II

THE COURT'S HOLDING THAT RES JUDICATA BARRED PLAINTIFF'S SECOND SUIT WAS CORRECT, WHERE MICHIGAN HAS ADOPTED A BROAD TRANSACTIONAL APPROACH TO CLAIM PRECLUSION, AND WHERE PLAINTIFF, EXERCISING REASONABLE DILIGENCE, COULD HAVE RAISED ALL CONSTITUTIONAL ISSUES IN THE PRIOR CASE

In affirming the trial court's order granting summary disposition in favor of Defendant based on the doctrine of *res judicata*, the Court of Appeals concluded that "the same evidence involved in the appeal would be used to prove allegations contained in the subsequent lawsuit." It noted that Plaintiff's application for the zoning variance included arguments regarding the constitutional issues raised by Plaintiff in its subsequent lawsuit, which the circuit court was statutorily authorized to consider per MCL 125.585(11)(a). (**Ex. P, Opinion, p. 3**).

Plaintiff argues that *res judicata* should not apply to bar Plaintiff's subsequent suit because the facts and evidence in the second suit were not identical to those of the prior suit. (**Appellant's brief, p. 40**). This narrow application of the doctrine of *res judicata* has been repeatedly rejected by this Court. ***Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999)**. The doctrine applies to bar not only claims already litigated, but also those which arise from the same transaction that the parties could have raised, but did not. ***Id.*, at 586**. Even a cursory review of the brief filed by the Plaintiff seeking review of the ZBA's denial of its variance request reveals that Plaintiff raised issues related to the constitutionality of the City's zoning ordinance.⁵

Now Plaintiff seeks to convince this Court that it sought review on only limited grounds, having nothing to do with issues of the reasonableness of the zoning ordinance in its application

⁵ Plaintiff's first argument in its brief seeking administrative review of the ZBA's decision was captioned: "The Zoning Ordinance, as Applied to the Property, is Undeniably Unconstitutional." (**Ex. F, Plaintiff's circuit court appeal brief, p. 7**). Plaintiff acknowledged that "much of the facts and case law that follows was provided by Houdini in a memo to the Zoning Board of Appeals, as part of the use variance application. (**See Ex. F, p. 7, fn. 5**).

to Houdini's property. This is demonstrably untrue. The issues are undeniably intertwined, and should have been joined. The failure to do so resulted in preclusion of those claims in this lawsuit.

Houdini has acknowledged that the prior suit resulted in a final order and that the litigation involved the same parties, but asserts that the issue is not whether the two actions are "pretty similar" or "substantially similar" as the circuit court concluded, but whether the facts in evidence are so identical that the current suit would be a re-litigation of the prior suit. That, however, is not the test.

This Court has adopted a transactional approach to determine what constitutes a "cause of action." In ***Adair v State*, 470 Mich at 123-124**, the determinative question was whether the claims in the current case arose as part of the same transaction as did the claims in the prior case. The Court considered whether to use the narrower "same evidence" test or a broader "same transaction" test to determine if the matter in the second case was, or could have been, resolved in the first. "Because this Court has accepted the validity of the broader transactional test in Michigan, we need not consider as dispositive plaintiff's assertions that the evidence needed to prove this case is different than was needed in [the prior action]." ***Id.*, at 124-125**. The transactional approach is pragmatic and in applying it, "a claim is viewed in 'factual terms' and considered coterminus with the transaction, regardless of the number of substantive theories or variant forms of relief flowing from those theories that may be available to the Plaintiff ..., and regardless of the variations in the evidence needed to support the theories or rights." ***Adair v State, supra at 124, quoting River Park Inc v Highland Park, 184 Ill2d 290, 307-309; 703 NW2d 883 (1998)***.

The allegations in both the prior and current lawsuits involve the application of the City's zoning ordinance to Plaintiff's property. Plaintiff's assertions that the two cases rely on different evidence is not controlling in light of the Court's counsel in ***Adair*** that "we need not consider as dispositive Plaintiff's assertions that the evidence needed to prove this case is different than was needed in [the prior action]." ***Id.*** Both lawsuits asserted claims based on allegedly arbitrary and

unreasonable actions and the unconstitutionality of the City's zoning ordinance. The claims in this case therefore arise from the same general transaction as did the prior litigation and are barred by *res judicata*.

In ***Peterson Novelties v City of Berkley*, 259 Mich App 1; 672 NW2d 351 (2003)**, the Court of Appeals rejected plaintiff's argument that it could not have raised constitutional issues involving retaliation and deprivation of property claims in the first proceeding, which was an emergency motion for show cause and contempt. The case arose when Peterson attempted to obtain a seasonal sales license to sell fireworks in the City of Berkley in 1995. After the city denied its permit application, the circuit court issued a temporary restraining order for the 1995 season, ordering the city to grant the permit. In 1996, with the 1995 case still open, Peterson filed another motion to require the city to process a permit application for 1996. The circuit court again issued a temporary restraining order on May 9, 1996 permitting Peterson to sell legal fireworks.

Later, the city seized what it asserted were illegal fireworks, and ***Peterson*** filed for an emergency show cause order, seeking contempt and arguing the seizures were illegal. The show cause hearing was finally held, but the city was not found in contempt. The circuit court reaffirmed its earlier temporary restraining order and later granted permanent declaratory relief to ***Peterson***. ***Peterson*** subsequently filed lawsuits in both federal and state court raising constitutional issues. The federal court suit dismissed plaintiff's claims on the basis of the Rooker-Feldman doctrine. The United States Court of Appeals for the Sixth Circuit affirmed, but on an alternate basis, including *res judicata*. The Sixth Circuit determined that plaintiff's federal claims of First Amendment retaliation and Fifth Amendment deprivation of property rights arose out of the same transaction as plaintiff's earlier state court action – the emergency motion seeking contempt and damages – and that the claims could have been brought in the contempt proceeding. ***Peterson Novelties v City of Berkley*, 305 F3d 386, 394 (CA 6, 2002)**.

In the state lawsuit, the Oakland County Circuit Court dismissed plaintiff's state claims, and

the Court of Appeals affirmed, holding that those claims could have been decided in the initial case, because they involved the same transaction as plaintiff's emergency motion. **259 Mich App 1, 15; 672 NW2d 351 (2003).**

Neither the Court of Appeals nor the Sixth Circuit were persuaded by plaintiff's argument that it could not have conveniently raised these claims in the emergency motion hearing, or that the issues were different. The common factual basis was sufficient to require these claims to be brought at the same time in the same proceeding, even though the first proceeding was a show cause hearing.

The same reasoning supports application of the doctrine of *res judicata* to these facts. The same general transaction was involved, which was the constitutionality of the City's zoning ordinance and Plaintiff's claim that it was unconstitutional thus "requiring" the ZBA to grant a use variance. Plaintiff raised the same issue over and over again.

There is no question but that Plaintiff could have filed a single lawsuit, seeking review of the ZBA decision in one count, and asserting the unconstitutionality of the zoning ordinance in subsequent counts. The circuit court's jurisdiction was sufficiently broad to allow it to adjudicate the appeal, within its appellate jurisdiction, and to accommodate the different posture of Plaintiff's remaining constitutional claims in the exercise of its original jurisdiction.

ARGUMENT III

THE CIRCUIT COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT ON THE BASIS OF FUTILITY, BASED ON THE COURT'S CONCLUSION THAT PLAINTIFF'S CONSTITUTIONAL CLAIMS SHOULD HAVE BEEN RAISED IN PRIOR PROCEEDINGS AND WERE THUS BARRED BY RES JUDICATA

The Court of Appeals concluded that "[b]ecause the trial court's grant of summary disposition was based on the failure to join the actions and the doctrine of *res judicata*, amendment of the complaint was futile." (Ex. A, p. 3). In addition, the Court of Appeals found that Plaintiff's

proposed complaint did not “vary substantially” from its initial pleading, merely providing greater factual elaboration. (*Id.*). Thus, the proposed complaint was an “expansion upon the initial claims, not the provision of a new issue or legal theory.” (*Id.*).

Generally, leave to amend a complaint should be freely granted, but denial of such a motion is proper where the amendment would be futile. ***Sands Appliance Serv, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000)**. An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded. ***Dowork v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998)**. Although delay alone does not warrant denial of a motion to amend, if it was done in bad faith or the opposing party suffered actual prejudice as a result, amendment may be properly denied. ***Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997)**.

The circuit court specifically stated its reason for denying plaintiff’s motion to amend. It reasoned that such an amendment would be futile. The court was clearly aware that the court rules provide for liberal amendment, but based on the court’s ruling on the motion for summary disposition and the appeal, it concluded that it would be futile to allow an amendment which set forth a claim arising “out of the same set of facts, same transaction, same circumstances.” (**Ex. H, 10/03/05 tr., pp. 3-4**).

The ruling was based on the lower court’s conclusion that Plaintiff was required to have joined its claims with those of the prior proceeding and had failed to do so. Accordingly, summary disposition was granted on the basis that the prior proceeding was still pending (through Plaintiff’s Application for Leave to Appeal), and that the second lawsuit which contained substantially similar issues and was based on substantially the same cause of action must be abated. ***J.D. Candler Roofing Co, Inc, supra*, 149 Mich App at 598**. Finally, because the trial court concluded that *res judicata* barred issues which could have been brought in the prior lawsuit, but were not, amendment was again considered to be futile. Although the ***Sammut*** opinion may have been

issued after Plaintiff filed its first lawsuit, neither the concept of joinder nor that of claim preclusion was new or novel. Denial of Plaintiff's motion to amend on the basis of futility was proper.

CONCLUSION and RELIEF REQUESTED

In seeking a variance for the use of its property from the City's Zoning Board of Appeals, Plaintiff argued that the City's zoning ordinance was unconstitutional and that a use variance was required in order to provide Plaintiff with any reasonable use of its property. Plaintiff again raised these arguments in circuit court, seeking reversal of the board's denial of the variance. Finally, Plaintiff again raised the issue of the constitutionality of the City's ordinance a third time in this lawsuit. The allegations in both the present and prior lawsuit concerned the application of the City's ordinance to Plaintiff's property. Both lawsuits asserted claims based on allegedly arbitrary actions and the unconstitutionality of the ordinance. Plaintiff's claims must be viewed in factual terms, regardless of the number of substantive theories or variant forms of relief derived from those theories. Accordingly, the Court of Appeals correctly affirmed summary disposition pursuant to MCR 2.116(C)(6), to abate the current lawsuit. *Res judicata* barred Plaintiff's claims in the second suit where such claims could have been brought in the prior suit.

For the foregoing reasons, Defendant respectfully requests that this Court deny Plaintiff's Application for Leave to Appeal the decision of the Court of Appeals which was correct in all respects.

Respectfully submitted,

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