

STATE OF MICHIGAN
IN THE SUPREME COURT

HOUDINI PROPERTIES, LLC,
a Michigan limited liability company,

Plaintiff-Appellant,

v

CITY OF ROMULUS,
a Michigan municipal corporation,

Defendant-Appellee.

Supreme Court Case No. 132018

Court of Appeals Case No. 266338

Wayne County Circuit Court

Case No. 05-504139-CZ

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**BRIEF OF *AMICUS CURIAE* THE STATE BAR OF MICHIGAN'S
APPELLATE PRACTICE SECTION**

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THE STATE BAR OF MICHIGAN'S
APPELLATE PRACTICE SECTION
respectfully submits the following position on:

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Houdini Properties, LLC v City of Romulus

*

The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Appellate Practice Section is 663.

The Appellate Practice Section Council adopted the position after discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor of this position was 21. the number who voted opposed to this position was 0. The number who abstained from vote was 2.



Report on Public Policy Position

Name of Section: Appellate Practice Section

Contact Person: Paul Bernard

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Other: *amicus curiae* brief in the matter of Houdini Properties, LLC v City of Romulus

Date position was adopted: October 23, 2007

Process used to take the ideological position: Discussion at regularly scheduled Council meeting; electronic vote

Number of members in the decision-making body: 23

Number who voted in favor and opposed to the position:

21 Voted for position

0 Voted against position

2 Abstained from vote

FOR SECTIONS ONLY:

- ✓ The subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position: The Section respectfully requests that the Court hold that a claim of appeal from a zoning decision is not subject to the compulsory joinder rule, MCR 2.203(A), because a claim of appeal is not a "pleading," as that word is defined in MCR 2.110, and does not "state a claim," the two necessary prerequisites before the mandatory joinder rule applies.

The text of the court rules that are the subject of this report:

MCR 2.110(A) Definition of “Pleading”.

The term “pleading” includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counter-claim, or third-party complaint, and (6) a reply to an answer. No other form of pleading is allowed.

MCR 2.203(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 7.101(C)(1) Claim of Appeal.

To appeal of right, within the time for taking an appeal, an appellant must file a claim of appeal with the circuit court clerk and pay the fee, if required by law. The parties are named in the same order as they appeared in the trial court, but with the added designation “appellant” or “appellee.” The claim must state:

“*[Name of aggrieved party]* claims an appeal from the *[judgment or order]* entered *[date]* in *[name of the trial court]*.”

The appellant or the appellant’s attorney must date and sign the claim of appeal and place his or her business address and telephone number under the signature.

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BASIS OF JURISDICTION

Plaintiff-Appellant Houdini Properties, LLC (“Houdini”), timely filed its application for leave to appeal from the June 13, 2006 judgment of the Court of Appeals. In an Order dated June 8, 2007, this Court (1) directed the Clerk to schedule oral argument on whether to grant the application or take other peremptory action; (2) requested the parties to file supplemental briefs; and (3) invited the Appellate Practice, Litigation, and Real Property Law Sections of the State Bar to file a brief or briefs *amicus curiae*. The Appellate Practice Section submits this *amicus curiae* brief in response to that invitation.

STATEMENT OF RELIEF SOUGHT

The State Bar of Michigan's Appellate Practice Section respectfully requests that this Court hold that a claim of appeal from a zoning decision is not subject to the compulsory joinder rule, MCR 2.203(A), because a claim of appeal is not a "pleading," as that word is defined in MCR 2.110, and does not "state a claim," the two necessary prerequisites before the mandatory joinder rule applies.

QUESTIONS PRESENTED FOR REVIEW

1. A “pleading” includes only a (1) complaint, (2) cross-claim, (3) counterclaim, (4) third-party complaint, (5) answer, and (6) reply to an answer. MCR 2.110. Does a claim of appeal to a circuit court from an adverse zoning decision constitute a “pleading” subject to the compulsory joinder rule, MCR 2.203(A)?

The Appellate Practice Section answers: No.

2. A claim of appeal from an adverse zoning decision includes only (1) the name of the aggrieved party, (2) the fact that an appeal is being taken, (3) the judgment(s) or order(s) being appealed and the date they were entered, and (4) the name of the trial court. MCR 7.101(C)(1). Does such a document “state a claim” such that it is subject to the compulsory joinder rule, MCR 2.203(A)?

The Appellate Practice Section answers: No.

The Appellate Practice Section does not take a position with respect to any of the other questions presented by the parties or framed by the Court in its June 8, 2007 Order.

BACKGROUND

The facts and proceedings most pertinent to the legal issues presented in this *amicus curiae* brief are summarized as follows:

1. In October 2004, Houdini applied for a building permit to construct a billboard on a vacant parcel it owns in the City of Romulus. After the City building department denied the application, Houdini applied for a use variance from the City's Board of Zoning Appeals (the "BZA"), which the BZA likewise denied.

2. On December 16, 2004, Houdini filed its claim of appeal with the Wayne County Circuit Court. In its appeal brief, Houdini purported to reserve "its damage claims for the taking of its property without just compensation, and its challenge to the Zoning Ordinance, as such claims are subject to the original jurisdiction of this Court in the form of a complaint." Houdini filed its civil action against the City on February 11, 2005, while the appeal was still pending.

3. On August 26, 2005, the Circuit Court affirmed the BZA's decision on appeal. Seven months later, the Michigan Court of Appeals denied Houdini's application for leave. Meanwhile, on October 3, 2005, the trial court granted the City summary disposition on the civil complaint, holding that the compulsory joinder rule, MCR 2.203, applied.

4. The Court of Appeals affirmed the trial court's decision on June 13, 2006, holding that because Houdini's "constitutional claims arise directly from defendant's denial of the use variance, the actions filed by plaintiff were required to be joined in accordance with MCR 2.203(A)." Houdini filed its application for leave to appeal, and this Court has now ordered oral argument on the application.

STANDARD OF REVIEW

This Court reviews the grant of summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

I. THE COMPULSORY JOINDER RULE DOES NOT APPLY TO A CLAIM OF APPEAL UNDER THE PLAIN LANGUAGE OF THE MICHIGAN COURT RULES.

By definition, the compulsory joinder rule applies only to a “pleading” “that states a claim”:

In a [1] pleading [2] 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 2.203(A) (emphasis added). A claim of appeal is not subject to the compulsory joinder rule, because a claim of appeal is neither a “pleading” nor a document “that states a claim.”

MCR 2.110 defines the term “pleading” to include a very narrow class of specific documents, to the exclusion of any other kind of document:

The term “pleading” includes only: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer.

No other form of pleading is allowed.

MCR 2.110(A) (emphasis added). Because this list of six document categories is exclusive and does not include a claim of appeal, a claim of appeal cannot be a pleading. Until the Court of Appeals’ decision in this case, Michigan courts have correctly refused to expand MCR 2.110’s definition of the term “pleading” based on considerations other than the rule’s plain language. *See, e.g., Village of Diamondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000) (a

motion for summary disposition is not a pleading); *Boodt v Borgess Med Ctr*, 272 Mich App 621, 627 n 2; 728 NW2d 471 (2006) (notice of intent is not a pleading). Absent an amendment to either MCR 2.110 or MCR 2.203, it was error for the Court of Appeals to hold that a claim of appeal is subject to the compulsory joinder rule.

A claim of appeal does not “state a claim,” either. The purpose of a complaint—indeed, the primary function of all pleadings—is to give notice of the nature of the claim sufficient for the opposing party to take a responsive position. *City of Auburn v Brown*, 60 Mich App 258, 263; 230 NW2d 385 (1975). In contrast, as its name suggests, a claim of appeal merely claims appellate review of a judgment entered by a lower adjudicative body. The claim of appeal does not frame a claim that demands a response, nor does it define the parameters of the appeal. Indeed, the court rules state that a claim of appeal filed with a circuit court includes nothing more than (1) the name of the aggrieved party, (2) the fact that an appeal is being taken, (3) the judgment(s) or order(s) being appealed and the date they were entered, and (4) the name of the trial court. MCR 7.101(C)(1). Again, because a claim of appeal does not “state a claim,” the compulsory joinder rule is inapplicable when a party files a claim of appeal to a circuit court from a zoning decision. This Court should reverse the erroneous Court of Appeals’ holding to the contrary.¹

¹ The Section notes, however, that it is common practice to file both an appeal and an original action at the same time, and the Section is in the process of proposing a court rule that would make clear joinder in such a situation is permissive rather than mandatory. *See* Section III, *infra*.

II. THIS COURT IN *MACENAS* DID NOT DECLARE A CLAIM OF APPEAL A “PLEADING” FOR PURPOSES OF THE COMPULSORY JOINDER RULE.

The Court of Appeals ignored MCR 2.110(A)’s plain language and instead relied on this Court’s decision in *Macenas v Village of Michiana*, 433 Mich 380, 387; 446 NW2d 102 (1989). Under the Court of Appeals’ reading of *Macenas*, “a claim of appeal from a zoning decision is a pleading.” (Slip Op at 2.) As an initial matter, the Court of Appeals’ reasoning does not explain how a claim of appeal can “state a claim,” which is the second mandatory prerequisite before the compulsory joinder rule applies. In any event, the Court of Appeals misinterpreted *Macenas*.

Macenas involved a zoning board’s refusal to grant a landowner’s request for a building permit. The landowner filed a complaint in the circuit court, which the circuit court treated as a claim of appeal, a decision that no party challenged. The circuit court eventually affirmed, the Court of Appeals reversed, and this Court granted leave for the limited purpose of determining “whether the Court of Appeals applied the proper standard of review when it reversed the decision of the circuit court.” 433 Mich at 382; 446 NW2d 102. In this unique context, the Court held that a claim of appeal (1) is a “cause of action” for purposes of obtaining appellate review, but (2) is not an ordinary “pleading” subject to, for example, an MCR 2.116(C)(8) challenge:

Under such circumstances, and particularly where as in this case no challenge is made to the circuit court’s determination that a claim of appeal has been filed, a motion for summary disposition pursuant to MCR 2.116(C)(8), which tests only the pleadings, is not appropriate. If a proper appeal to circuit court is filed, a “cause of action” is stated, at least for purposes of obtaining appellate review of the board’s decision in accordance with the statute.

433 Mich at 387-388; 446 NW2d 102 (emphasis added).

There is nothing in the *Macenas* holding that suggests a claim of appeal is a “pleading” for purposes of the compulsory joinder rule, and such a conclusion would have been inconsistent with the plain language of the court rule, which is controlling. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005) (statute should be read in accord with its plain language); *Goodwin v Schulte*, 115 Mich App 402, 407; 320 NW2d 391 (1982) (rules for statutory construction also apply when interpreting the Michigan Court Rules). Accordingly, this Court should clarify that MCR 2.110’s definition of “pleading” excludes a claim of appeal.

III. SOUND POLICY REASONS SUPPORT THE CONCLUSION THAT JOINDER SHOULD BE AT MOST PERMISSIVE WHEN A PLAINTIFF SEEKS TO FILE BOTH A CLAIM OF APPEAL AND AN ORIGINAL ACTION IN RESPONSE TO AN ADVERSE ZONING DECISION.

The Appellate Practice Section’s Subcommittee on Administrative Appeals is nearly ready to promulgate proposed revisions to the Court Rules that comprise Subchapter 7.100—Appeals to Circuit Court. Proposed Rule 7.122 addresses the situation where a party chooses to file both an appeal and an original civil action in response to an adverse zoning decision, and the proposed rule contemplates joinder that is permissive, not compulsory:

(A) Scope.

- (1) This rule governs appeals to the circuit court from a final determination by a city, township or county zoning board of appeals or board of zoning appeals. It also governs appeals from final land use permit decisions by local boards or commissions where no right of appeal to a zoning board of appeals exists. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.
- (2) This rule does not restrict the right of a party to bring a complaint for relief against a city, village or township. An appeal under this section may be joined with a complaint for declaratory relief, injunctive relief, equitable relief and/or money damages.

(3) An appeal under this section is an appeal of right.

(Proposed Rule 7.122(A) (emphasis added).)

There are a number of distinct differences between a zoning appeal and an original action that militate in favor of this rule:

<u>Claim of Appeal</u>	<u>Original Action</u>
-The circuit court's review is limited to the record below. <i>Coburn v Coburn</i> , 230 Mich App 118, 121-123; 583 NW2d 490 (1998).	-A party will create a record by presenting witnesses and testimony, limited only by the Michigan Rules of Evidence.
-Discovery is not permitted. MCR 7.101(F).	-Discovery is limited only by the applicable Court Rules. <i>See</i> MCR 2.302 <i>et seq.</i>
-Motions cannot be brought under MCR 2.116(C)(8) or (10). <i>Macenas</i> , 433 Mich at 387; 446 NW2d 102; <i>Carleton Sportsman's Club v Exeter Twp</i> , 217 Mich App 195, 202-203; 550 NW2d 867 (1996).	-Any motion can be filed under MCR 2.116.
-The circuit court's review is limited by MCL 125.3606.	-The usual appellate standards of review (e.g., <i>de novo</i> for summary disposition rulings, abuse of discretion for admission or exclusion of evidence, etc.) will apply if the circuit court's decision is appealed.
-The plaintiff has no ability to claim damages. MCL 125.3606.	-The plaintiff may claim damages under a takings theory.
-The plaintiff has no right to a jury trial on appeal.	-The plaintiff has a right to trial by jury.
-The appellant must file an appeal brief within 21 days after the record has been sent to the circuit court. MCR 7.101(I)(1).	-The Circuit Court and the parties will establish a schedule that governs pleading, discovery, motions, and trial.

Thus, while the parties and the trial court may choose to litigate simultaneously both a zoning appeal and an original action to promote an "economical determination" of the matter, MCR 1.105, the distinct differences enumerated above counsel strongly in favor of a permissive, not mandatory, joinder rule.

CONCLUSION

A claim of appeal to a circuit court from an adverse zoning decision is not a “pleading,” as defined by MCR 2.110, nor does it “state a claim,” the two necessary prerequisites before MCR 2.203(A)’s mandatory joinder rule applies. The State Bar of Michigan’s Appellate Practice Section therefore respectfully requests that this Court hold that a claim of appeal is not subject to the compulsory joinder rule, MCR 2.203(A).

Dated: November 1, 2007

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