GOVERNMENT LAW

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I. INTRODUCTION

The Michigan Supreme Court and the Michigan Court of Appeals issued only a few particularly noteworthy decisions in the *Government Law* area during this *Survey* period. None of the cases dealing with land use and zoning, for example, will have consequences as far reaching as the 2004 Supreme Court *Hathcock*[1] opinion on eminent domain discussed in last year's *Survey* article. However, both the court of appeals and the supreme court decided a near record-breaking number of cases involving governmental immunity and its exceptions during this *Survey* period. The cumulative effect of these decisions is a narrowing of the exceptions with further limitations on the recovery of damages for plaintiffs injured on public thoroughfares.

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1. County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004).

II. ZONING AND LAND USE

The Michigan Court of Appeals reported four noteworthy opinions on land use and zoning topics during this *Survey* period. In *Herman v. County of Berrien,*[2] plaintiff property owners in Coloma Charter Township objected to Berrien County's plans to construct four outdoor shooting ranges adjacent to a new county law enforcement training building.[3] Plaintiffs, all neighboring residents, argued that the operation of a shooting range would violate township zoning and anti-noise ordinances.[4] Berrien County argued that it did not have to comply with local ordinances because a state statute grants to every county the power and authority to purchase land and locate a county building in its sole discretion.[5] The statute permits a county board of commissioners to "purchase or lease for a term . . . real estate necessary for the site of a courthouse, jail, clerk's office, or other county building in that county."[6] The statute further provides that the commissioners may "determine the site of, remove, or designate a new site for a county building."[7]

The court of appeals concluded that the proposed building and adjacent outdoor shooting ranges were exempt from township ordinances.[8] The court cited an earlier Michigan Supreme Court opinion, *Pittsfield Charter Township v. Washtenaw County,*[9] which held that a county was exempt from township ordinances when it came to sitting county buildings.[10] The *Pittsfield* court held that the county has sole discretion on where to locate its buildings without regard to local use regulation.[11] The *Herman* court favorably cited the conclusion of the *Pittsfield* court that "when a county sites a county building or buildings on a particular parcel, the uses of the site where the building will be erected can be in total contravention to what is required by any township ordinance."[12]

The court of appeals noted that the county facility or "site" in question in the *Pittsfield* case was a building, not an outdoor "ancillary improvement" to a county building such as a shooting range.[13] Since the

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2. 275 Mich. App. 382, 739 N.W.2d 635 (2007), *appeal granted,* 480 Mich. 961, 741 N.W.2d 383 (2007).

3. *Id.* at 384, 739 N.W.2d at 636.

4. *Id.*

5. *Id.* at 384-85, 739 N.W.2d at 636-37 (citing MICH. COMP. LAWS ANN. §§ 46.11(b), (d) (West 2006)).

6. MICH. COMP. LAWS ANN. § 46.11(a) (West 2006).

7. MICH. COMP. LAWS ANN. § 46.11(b) (West 2006).

8. *Herman,* 275 Mich. App. at 389, 739 N.W.2d at 639

9. 468 Mich. 711, 664 N.W.2d 197 (2003).

10. *Herman,* 275 Mich. App. at 388, 739 N.W.2d at 639 (citing *Pittsfield,* 468 Mich. at 711, 664 N.W.2d at 197).

11. *Id.* at 384-85, 739 N.W.2d at 637.

12. *Id.* at 385, 739 N.W.2d at 637.

13. *Id.* at 386, 739 N.W.2d at 638.

word "site" is not defined in the statute, the court consulted two dictionary definitions to determine whether this outdoor facility was also exempt from local zoning regulation. One dictionary defined "site" as "the place where something was, or is, or is to be located."[14] The other defined the word as "the area or exact plot of ground on which anything is, has been, or is to be located."[15]

The court of appeals concluded that, in applying these definitions to the shooting range, "it is clear that when designating a new 'site' for county buildings, the 'site' includes the entire area of ground on which the building is to be located."[16] Since the county planned to locate the outdoor shooting ranges adjacent and connected to the law enforcement building, the entire "site," which included the building and all of the physical improvements to the building outside of the physical structure of the building, but which are related to the building's purpose, is "immune from the township ordinances."[17] The court concluded that the township's ordinances, "including the noise ordinance, do not apply to the county's sitting of the entire training facility."[18] The court proposed that any additional use or development of the property outside of a county building must be "necessary or incidental to normal and reasonable use of that building" as the only limitation to this permissive rule.[19] The court concluded that any use beyond what is necessary and incidental is subject to local zoning regulation.[20] The dissent argued that the term "site" in the statute should be limited to buildings, not ancillary facilities.[21] The dissent foresaw the need for bulletproof window coverings, livestock blankets, and play clothes once Berrien County installed its shooting range and began discharging 221,800 rounds of ammunition annually.[22]

The case of *Montessori Center v. Ann Arbor Charter Township (Shepherd II),*[23] which was a dispute between a religious primary grade school and Ann Arbor Charter Township, involved the interpretation and application of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA).[24] Plaintiff operated a Catholic Montessori day care program in the Domino's Farm Office Park in Ann Arbor Charter Township.[25] In 2000, plaintiff developed plans to open a primary school

14. *Id.* at 387, 739 N.W.2d at 638 (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1982)).
15. *Id.* at 387, 739 N.W.2d at 638 (citing WEBSTER'S DICTIONARY (1997)).
16. *Herman,* 275 Mich. App. at 387, 739 N.W.2d at 638.
17. *Id.* at 388, 739 N.W.2d at 639.
18. *Id.* at 388, 739 N.W.2d at 639.
19. *Id.*
20. *Id.* at 389, 739 N.W.2d at 639.
21. *Id.* at 396, 739 N.W.2d at 643.
22. *Herman,* 275 Mich. App. at 393, 739 N.W.2d at 640.
23. 275 Mich. App. 597, 739 N.W.2d 664 (2007).
24. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).
25. *Shepherd II,* 275 Mich. App. at 600, 739 N.W.2d at 667.

for twenty-five students in grades K-3 immediately adjacent to the day care facility in an area previously occupied by a non-religious pre-school day care program.[26] The property in question is zoned as an "Office Park" district.[27] Day care centers can operate in this district, but only for children of employees of the office park. In 1991, the township granted a variance to allow an expansion of the secular day care center to allow children of non-office park employees to attend.[28]

A zoning official for the township informed the plaintiff that its proposed "primary school" would not be a permitted use within the office park district.[29] Plaintiff appealed to the township zoning board of appeals (ZBA) for a variance, arguing that the proposed use was a "substitution" of the previous nonconforming use as a non-office park day care center.[30] The ZBA disagreed and ruled that the proposed primary school was not a permitted use within the district.[31] The ZBA also found that the plaintiff failed to demonstrate that without the variance there could be no viable economic use of the property.[32]

Plaintiff filed suit in 2000, alleging violations of RLUIPA, equal protection, and other claims which the trial court dismissed before appeal.[33] Under RLUIPA, a local government may not impose a substantial burden through land use regulation on a person or a religious entity's religious exercise unless the government has a compelling interest, and the regulation is the least restrictive means to achieve that interest.[34] The court of appeals initially held in *Shepherd I*[35] that the plaintiff satisfied the jurisdictional threshold for a RLUIPA claim and that the proposed use was a "religious exercise" within the meaning of RLUIPA.[36] In its first remand to the trial court, the court of appeals instructed the parties to address the following five factors: 1) whether there were alternative locations in the area that would allow the school consistent with zoning regulations; 2) the actual availability of suitable property by sale or lease; 3) the availability of property for a K-3 school; 4) the proximity of homes of parents who would send their children to the school; 5) the economic burdens of the alternative locations.[37] The trial court found in favor of the township on each of the five factors.[38] In

26. *Id.*
27 *Id.*
28. *Id.* at 600, 739 N.W.2d at 668.
29. *Id.* at 600, 739 N.W.2d at 667.
30. *Id.* at 600, 739 N.W.2d at 668.
31. *Shepherd II*, 275 Mich. App. at 600, 739 N.W.2d at 668.
32. *Id.*
33. *Id.* at 601-02, 739 N.W.2d at 668-69.
34. 42 U.S.C. §§ 2000cc(a)(1)(A)-(B) (2000).
35. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 259 Mich. App. 315, 675 N.W.2d 271 (2003).
36. *Id.* at 327-29, 675 N.W.2d at 278-80.
37. *Id.* at 332-33, 675 N.W.2d at 282.
38. *Shepherd II*, 275 Mich. App. at 599, 739 N.W.2d at 667.

a subsequent ruling, the trial court also found that the plaintiff failed to establish a genuine issue of material fact as to the equal protection claim.[39]

In *Shepherd II*, the court of appeals first concluded that plaintiffs presented sufficient evidence in the trial court that there were no other suitable properties in the area for a K-3 school (the second factor).[40] Plaintiff presented evidence that they had reviewed twenty-four properties in the Ann Arbor Township area, but they were "either too large, too expensive, or not available for sale or lease."[41] Defendants presented no documentary evidence in response.[42] The trial court nonetheless opined that the plaintiff's evidence was insufficient and the search for properties was not rigorous enough, issuing an affirmative finding that other properties were both available and suitable for the K-3 school.[43]

The court of appeals rejected the trial court finding on available properties as having no basis in law or fact.[44] The court of appeals further held that the trial court failed to apply the law of the case when it considered case law from other jurisdictions to conclude that "real estate costs or market conditions could not place a substantial burden on plaintiff's religious exercise."[45] The court characterized the trial court's approach and analysis of rulings in other jurisdictions as "disturbing" in light of the court of appeal's specific instruction to consider "the economic burden of alternate locations" in this specific township (the fifth factor).[46] The court concluded that since the defendant presented no evidence that the township had a compelling governmental interest to deny the variance, the trial court should have granted plaintiff's request for summary disposition on the RLUIPA claim.[47]

The court of appeals also held that the trial court erred in granting the township's motion for summary disposition on the equal protection claim.[48] The court stated that it was "not persuaded that plaintiff's request for a variance required any more of a deviation from the zoning ordinance than the variance granted to [the secular day care user who was the prior occupant of the space]."[49] The court further stated that "reasonable minds could differ with regard to whether plaintiff and [the secular day care] were similarly situated," and, therefore, "genuine issues

39. *Id.*
40. *Id.* at 603-06, 739 N.W.2d at 669-70.
41. *Id.* at 603, 739 N.W.2d at 669.
42. *Id.* at 604, 739 N.W.2d at 670.
43. *Id.* at 603-04, 739 N.W.2d at 669.
44. *Shepherd II*, 275 Mich. App. at 604, 739 N.W.2d at 669-70.
45. *Id.* at 608, 739 N.W.2d at 672.
46. *Id.* at 608-09, 739 N.W.2d at 672.
47. *Id.* at 609, 739 N.W.2d at 673.
48. *Id.* at 612, 739 N.W.2d at 674.
49. *Id.*

of material fact remain" as to the equal protection claim.[50] The court of appeals remanded the case back to the trial court to enter judgment in favor of plaintiff and to reverse the ZBA's denial of the variance request.[51]

The court of appeals considered the application of the Michigan prohibition on exclusionary zoning in *Anspaugh v. Imlay Township (Anspaugh I)*.[52] The court noted initially that the former Township Rural Zoning Act (TRZA)[53] still controlled this case even though the Michigan Zoning Enabling Act[54] repealed the TRZA.[55] The court further noted that the prohibition against exclusionary zoning in the old statute was re-codified with "nearly identical language" in the new statute.[56]

In 2000, plaintiffs applied to rezone a parcel of property in Imlay Township from R-1 residential to I-2 heavy industrial.[57] During preliminary meetings, township officials acknowledged that the zoning ordinance permitted heavy industrial uses, but that the township's master land use plan did not specifically designate any land for such uses.[58] The township indicated, however, that I-2 uses were permitted in the township's I-1 light industrial zoning district.[59] Plaintiff secured a second parcel of land that was zoned I-1, and then applied to rezone the parcel from I-1 to I-2; the township board of trustees denied both requests to rezone the residential and the I-1 parcels as inconsistent with the township's land use plan.[60]

The plaintiff sued for declaratory and injunctive relief on the basis that the township's zoning scheme was exclusionary both on its face and as applied because it "prohibits . . . even the possibility of I-2 uses."[61] The trial court and the court of appeals both issued rulings on procedural issues which are not discussed here.[62] The trial court also held that the township's zoning scheme was not exclusionary because the township recently had amended its zoning ordinance and master land use plan to

50. *Shepherd II*, 275 Mich. App. at 612, 739 N.W.2d at 674.

51. *Id.* at 614, 739 N.W.2d at 675.

52. 273 Mich. App. 122, 729 N.W.2d 251 (2007). As this edition was going to press, the Michigan Supreme Court vacated the judgment of the court of appeals and remanded this case to the Lapeer Circuit Court. *See* Anspaugh v. Imlay Twp. (*Anspaugh II*), 480 Mich. 946, 741 N.W.2d 518 (2007).

53. MICH. COMP. LAWS ANN. §§ 125.271-.310 (West 2006), *superseded by*, MICH. COMP. LAWS ANN. §§ 125.3101-.3702 (West 2006).

54. MICH. COMP. LAWS ANN. §§ 125.3101-.3702 (West 2006).

55. *Anspaugh I*, 273 Mich. App. at 129 n.2, 729 N.W.2d at 255 n.2.

56. *Id.*

57. *Id.* at 124, 729 N.W.2d at 252.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Anspaugh I*, 273 Mich. App. at 124, 729 N.W.2d at 253.

62. *Id.* at 125-27, 729 N.W.2d at 253-54.

specifically provide for an I-2 zoning district within a designated area of the township.[63]

The court of appeals reversed the ruling of the trial court and held that at the time that the plaintiffs sought rezoning of the two parcels, the township zoning scheme "was clearly exclusionary" because no land was designated for I-2 uses.[64] "A zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face."[65] The township argued that the ordinance was not exclusionary because an industrial facility located near one of the parcels owned by the plaintiff was zoned for I-2 uses.[66] The court rejected reliance on this example, however, because the facility predated the enactment of the zoning ordinance and "does not wholly meet the requirements for designation as an I-2 use."[67]

The court further concluded that "the fact that the township later rectified this problem by amending its ordinance and land use plan to expressly provide for I-2 uses does not, by itself, defeat plaintiffs' claim of exclusionary zoning."[68] The court cited an earlier finding of exclusionary zoning in *English v. Augusta Twp.* to explain what additional factors should be applied to a specific parcel.[69] The Augusta Township master land use plan and zoning ordinance provided an area zoned for mobile home parks.[70] The plaintiff developer provided evidence that despite the land use designation, the area was totally unsuitable for mobile home park use.[71] The *English* court agreed that the land use scheme was exclusionary as applied under the two-prong test set forth in *Eveline Township v. H & D Trucking Co.*,[72] "which prohibits a zoning ordinance from excluding 'a lawful land use where 1) there is a demonstrated need for that land use in the township or surrounding area, and 2) the use is appropriate for the location.'"[73] In applying the *Eveline* test, the *English* court held that the township was engaged in exclusionary zoning even though it had designated an area for mobile home use because the designated area "was so undesirable that it was unlikely that the land would ever be developed."[74]

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63. *Id.* at 127, 729 N.W.2d at 254.
64. *Id.* at 128, 729 N.W.2d at 254.
65. *Id.* at 127-28, 729 N.W.2d at 254.
66. *Id.* at 128, n.1, 729 N.W.2d at 254, n.1.
67. *Anspaugh I*, 273 Mich. App. at 128 n.1, 729 N.W.2d at 254 n.1.
68. *Id.* at 128, 729 N.W.2d at 254.
69. *Id.* (citing English v. Augusta Twp., 204 Mich. App. 33, 514 N.W.2d 172 (1994)).
70. *Id.*
71. *Id.*
72. 181 Mich. App. 25, 448 N.W. d 727 (1989)
73. *Anspaugh I*, 273 Mich. App. at 129, 729 N.W.2d at 255 (citing *Eveline*, 181 Mich. App. at 32, 448 N.W. 2d at 730; *English*, 204 Mich. App. at 38-39, 514 N.W.2d at 175-76).
74. *Anspaugh I*, 273 Mich. App. at 129, 729 N.W.2d at 255 (citing *English*, 204 Mich. App. at 38-39, 514 N.W.2d at 174-75).

The *Anspaugh I* court, after applying the two-prong *Eveline* test, concluded that the Imlay Township ordinance was exclusionary even after it had been amended to add an I-2 heavy industrial district.[75] The court found persuasive plaintiff's evidence that "there is no direct route of travel from the new I-2 district from either of the major highways within the township" and that a proposed interchange to one of the major highways was unlikely to be approved.[76] The court noted that, in contrast, the two parcels proposed for rezoning by the plaintiff are "already serviced by thoroughfares suitable to sustain commercial development and are otherwise appropriately suited for the I-2 uses provided in the zoning ordinance."[77] The court concluded that the zoning ordinance effectively excluded "lawful and otherwise appropriate I-2 uses for which there is a demonstrated need," and that the township's ordinance was "exclusionary with respect to I-2 uses."[78]

The court of appeals issued one opinion this term on the issue of inverse condemnation by a governmental authority. In *Frenchtown Charter Township v. City of Monroe,*[79] the court decided whether a township's failure to rezone land adjacent to an airport landing area rendered the property economically worthless amounting to an inverse condemnation of the land.[80]

The parcel of land in question is a narrow strip of agricultural land owned by the Cousino family and related entities which lies adjacent and parallel to Monroe Custer Airport.[81] The City of Monroe owns the airport on city property within Frenchtown Township.[82] The Cousinos requested that the township rezone their parcel from agricultural to single-family residential.[83] The Frenchtown Planning Commission recommended approval of the request.[84] The Monroe County Planning Commission recommended denial because rezoning might not be permissible in light of an airport approach plan approved by the Michigan Aeronautics Commission in 2002.[85] The airport approach plan for this airport was adopted under Section 3 of the Airport Zoning Act.[86] Under the approach plan, almost all of the Cousino property is located in an "accident safety zone 5" which prohibits residential use.[87] Once the

75. *Id.* at 129, 729 N.W.2d at 255.
76. *Id.* at 130, 729 N.W.2d at 255.
77. *Id.*
78. *Id.* at 130, 729 N.W.2d at 255-56.
79. 275 Mich. App. 1, 737 N.W.2d 328 (2007).
80. *See generally id.*
81. *Id.* at 2, 737 N.W.2d at 329.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. MICH. COMP. LAWS ANN. §§ 259.431-.465 (West 2001).
87. *Frenchtown*, 275 Mich. App. at 2-3, 737 N.W.2d at 329.

township learned about the airport approach plan, it tabled the rezoning request and filed an action for declaratory judgment.[88]

The Cousinos filed a cross-claim against the city, the county, the Michigan Department of Transportation (MDOT), and the Michigan Aeronautics Commission, arguing that because of the agencies' actions, their land lies in an airport hazard area.[89] The Cousinos further argued that defendants' actions rendered the property economically worthless and amounted to inverse condemnation.[90] The Cousinos filed a counterclaim against the township, alleging that they had to cancel purchase agreements for the land valued at $1.75 million, then $2 million, because of the township's failure to rezone the land.[91]

The trial court ruled that the township is prohibited from rezoning the property in a manner that runs contrary to the airport approach plan.[92] The court further ruled that the defendants' actions did not constitute a regulatory taking or inverse condemnation and granted summary disposition to the defendant city, township, and county.[93]

The court of appeals affirmed the trial court ruling but on slightly different grounds.[94] The court agreed that the township, the county, and the city could not rezone the Cousino parcel because it lies within the airport's "accident safety zone 5."[95] The court noted that the airport zoning statute requires the issuance of an airport approach plan drafted by the Aeronautics Commission, and local units of government "are obligated to comply with the plan under state law and are bound not to alter zoning classifications designated by the airport approach plan."[96] The court further noted that in order to impose liability on the local units of government, the plaintiff must establish that the local units' regulations interfered with development backed expectations.[97] In this instance, two state agencies, MDOT and the Aeronautics Commission, promulgated the regulations in question, not the township or the county. However, plaintiffs inexplicably dismissed all of the state agencies from the case at the trial level and failed to pursue additional claims against any of them.[98] The court of appeals concluded that the Cousinos were not entitled to any relief from the city, the township, or the county because none of those entities can rezone under state law.[99]

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88. *Id.*
89. *Id.* at 3, 737 N.W.2d at 329-30.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Frenchtown*, 275 Mich. App. at 2-3, 737 N.W.2d at 329.
94. *Id.* at 3, 737 N.W.2d at 329.
95. *Id.* at 5-6, 737 N.W.2d at 331.
96. *Id.* at 5, 737 N.W.2d at 331.
97. *Id.* at 6, 737 N.W.2d at 331.
98. *Id.* at 3, 737 N.W.2d at 330.
99. *Frenchtown*, 275 Mich. App. at 4, 737 N.W.2d at 330.

The court of appeals further held that even if it was appropriate to consider the claim against Frenchtown Township for failure to rezone, the claim would not be ripe for judicial review.[100] The court noted that the township tabled the request to rezone in order to file its declaratory judgment action and did not officially deny the request.[101] The court cited an earlier Michigan Supreme Court opinion which held that in order to avail itself of appellate review of an agency's decision, the landowner must "satisfy the rule of finality."[102] The rule mandates that the landowner demonstrate that "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[103] Because the Cousinos "did not make even a minimal showing under the rule of finality," the court would hold that the claim is not ripe for judicial review.[104]

III. FREEDOM OF INFORMATION ACT

The Michigan Court of Appeals reported two cases this term concerning the Michigan Freedom of Information Act (FOIA).[105] The first case is another example of a Michigan court's attempt to define and explain the scope of the statutory exceptions to the disclosure of certain documents. The second case explains the limits of the section in the statute which permits prevailing parties to recover attorney fees and costs. Neither of these cases signaled a departure from past judicial approaches to these issues.

In *Taylor v. Lansing Board of Water and Light*,[106] nonparty Virginia Cluley had filed an earlier lawsuit against her former employer, Lansing Board of Power & Light (LPL). LPL is a municipally-owned and managed public utility. Plaintiff Joy Taylor and Ms. Cluley were best friends and had discussed Ms. Cluley's lawsuit against the utility. On behalf of her friend, Ms. Taylor filed a FOIA request for certain documents from the Board, including personnel files, emails, correspondence, and approval and expense reimbursement information.[107] The Board denied the request in a letter, stating that it was obvious that Ms. Taylor was acting on behalf of and as an agent of Ms. Cluley, and that the intended use of the documents was Ms. Cluley's

100. *Id.* at 6, 737 N.W.2d at 331.
101. *Id.* at 6, 737 N.W.2d at 331.
102. *Id.* (citing Paragon Properties Co. v. City of Novi, 452 Mich. 568, 579, 550 N.W.2d 772, 776 (1996)).
103. *Id.*
104. *Id.* at 7, 737 N.W.2d at 332.
105. MICH. COMP. LAWS ANN. §§ 15.231-.246 (West 2004).
106. 272 Mich. App. 200, 725 N.W.2d 84 (2006).
107. *Id.* at 202, 725 N.W.2d at 86.

lawsuit against the utility.[108] Ms. Taylor sued, claiming that the Board improperly denied the FOIA request.

The defendant utility argued that it had properly denied the request under the statutory exemption which permits a public body to exempt "records or information relating to a civil action in which the requesting party and the public body are parties."[109] Defendant pointed out that not only are Ms. Cluley and Ms. Taylor best friends, but that the attorney who prepared the FOIA request was the same attorney who was representing Ms. Cluley in her lawsuit against her former employer.[110] Defendant further alleged that the FOIA request was merely an attempt to circumvent the discovery rules in the Cluley lawsuit.[111] The trial court denied defendant's motion for summary disposition and ruled that most of the documents in question should be disclosed; however, the trial court also held that the personnel records were exempt from disclosure.[112]

The court of appeals affirmed the ruling of the trial court that the records in question were not exempt from disclosure under the litigation exemption.[113] The court first reasoned that the ultimate use of the requested documents "is irrelevant in determining whether the information falls within the exemption, as is the identity of the person seeking the information."[114] Unless the Board proves that it is a party in a civil litigation involving the person submitting the FOIA request, the exemption does not apply.[115] The court cited a prior holding that FOIA does not conflict with, supplant, or displace court rules regarding discovery.[116] Other exemptions may apply, but the utility is not entitled to an exemption solely because the party requesting the documents is a litigant.[117]

The court then held that the plain language of the statute requires disclosure of documents except when *both* the requesting party and the public body are parties.[118] In this case, Ms. Taylor was not and is not a party to the Cluley lawsuit against the utility. The court admitted that "a literal application of the statute . . . would allow a party to obtain information by proxy that he or she would not otherwise be entitled to

108. *Id.*

109. *Id.* at 204, 724 N.W.2d at 87 (citing MICH. COMP. LAWS ANN. § 15.243(1)(v) (West 2004 & Supp. 2007)).

110. *Id.* at 202, 725 N.W.2d at 86.

111. *Id.* at 202-03, 725 N.W.2d at 86.

112. *Taylor*, 272 Mich. App. at 203, 725 N.W.2d at 86.

113. *Id.* at 205-06, 725 N.W.2d at 87-88.

114. *Id.* at 205, 725 N.W.2d at 87.

115. *Id.*

116. *Id.* at 205, 725 N.W.2d at 87 (citing Clerical-Technical Union of Michigan State Univ. v. Michigan State Univ. Bd. of Trustees, 190 Mich. App. 300, 475 N.W.2d 373 (1991)).

117. *Id.*

118. *Taylor*, 272 Mich. App. at 205-06, 725 N.W.2d at 87.

receive through FOIA" through the exemption.[119] The court further lamented that it was "well aware that a literal interpretation of statutory language is disfavored when the interpretation would lead to an absurd result."[120] The court noted, however, that the supreme court has held that the "absurd result" rule only applies when statutes are ambiguous.[121] The court found no ambiguity in the language of the exemption.[122] Because the Legislature has "elected to make it so," and despite the "distasteful" result, the court ruled that it had no "license to avoid applying the unambiguous language of the statute."[123] The court ordered the records disclosed.[124]

The court further held that the trial court's reliance on another exemption in the statute to deny disclosure of the personnel records was misplaced.[125] The trial judge merely stated in denying the disclosure request that "I think there are separate [FOIA] rules on personnel files."[126] The court of appeals noted that only records with information of a "personal nature" are exempt from disclosure.[127] The court further noted that prior cases held that personnel records for public school employees and administrators, including performance appraisals, disciplinary actions and complaints, were not of a "personal nature" and thus not exempt from disclosure.[128] The court saw no difference between those records and the records requested from the utility, so it ordered the Board to produce the requested personnel records.[129]

In *Detroit Free Press v. Department of Attorney General*,[130] the newspaper submitted a FOIA request to the Michigan Attorney General's office for documents pertaining to direct wine shipments into Michigan.[131] The Attorney General's office sent a letter to the newspaper granting the request for nonexempt documents, adding that it was charging $20 per hour for three hours of labor to search, review and separate the documents, and $0.25 per page for copying.[132] The newspaper sent a letter back requesting that the fees be reconsidered.[133] The Attorney General's office declined to alter the fees.[134]

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119. *Id.* at 206-07, 725 N.W.2d at 88.
120. *Id.* at 206, 725 N.W.2d at 88.
121. *Id.* at 207, 725 N.W.2d at 88.
122. *Id.* at 206, 725 N.W.2d at 88.
123. *Id.* at 207, 725 N.W.2d at 88.
124. *Taylor*, 272 Mich. App. at 208, 725 N.W.2d at 89.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. 271 Mich. App. 418, 722 N.W.2d 277 (2006).
131. *Id.* at 419, 722 N.W.2d 278.
132. *Id.*
133. *Id.*
134. *Id.*

The newspaper filed suit in circuit court, arguing that the Attorney General's office had constructively denied the request by imposing excessive labor and copying charges.[135] The trial court granted the newspaper summary disposition on the labor charge, ruling that under the fee provisions of FOIA, a government agency may not charge a fee for the labor costs unless the agency demonstrates that failure to charge labor fees would result in an unreasonably high cost to the agency.[136] According to the trial court, the Attorney General's office failed to show that not charging the $60 labor fees for the documents would result in unreasonably high labor costs to the office.[137] The trial court upheld the per-page copying fee as within the appropriate parameters of FOIA.[138] The trial court then held that since the newspaper prevailed in part under the section 10 appeal provisions of FOIA, the newspaper was entitled to an award of $15,989.75 in attorney fees and costs.[139]

The court of appeals held that the trial court erred when it awarded attorney fees and costs to the newspaper.[140] The court reasoned that section 10 of FOIA provides for the recovery of attorney fees if a public body denies an information request and a court subsequently orders production of the documents.[141] In this case, the Attorney General granted the information request and, in the court's view, "made special efforts to accommodate the newspaper's request at a minimal cost."[142] The court noted that the newspaper brought this action "not to challenge the failure to produce requested documents, but to challenge the labor and copying fees" that are permitted under section 4 of the statute.[143] The court further noted that the trial court did not order production of the documents, as contemplated by an action falling under section 10, but merely ruled that the "labor charge was not supported under § 4."[144] Since attorney fees and costs are only available to a party when it commences an action to compel production under section 10, the court held that the newspaper was not entitled to attorney fees in this matter.[145]

The court did not find persuasive the newspaper's argument that the Attorney General "constructively denied" the request by charging the labor costs.[146] The court noted that the "unequivocal language" of the statute does not support the award of attorney fees except for those

135. *Id.* at 419, 722 N.W.2d at 278-79.
136. *Detroit Free Press*, 271 Mich. App. at 420, 722 N.W.2d at 279.
137. *Id.* at 420, 722 N.W.2d at 279.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Detroit Free Press*, 271 Mich. App. at 420, 722 N.W.2d at 279.
143. *Id.* at 422, 722 N.W.2d at 280.
144. *Id.* at 423, 722 N.W.2d at 280.
145. *Id.*
146. *Id.* at 423 n.1, 722 N.W.2d at 281 n.1.

claims brought under section 10.[147] Since the "courts may not speculate about the probably intent of the Legislature beyond the language expressed in the statute," the newspaper could not argue that the Legislature intended that attorney fees and costs would be appropriate for an action brought under a challenge to an award of attorney fees under section 4.[148]

IV. OPEN MEETINGS ACT

The court of appeals issued another opinion on the issue of attorney fees for a prevailing party, this time concerning the Michigan Open Meetings Act (OMA).[149] In *Leemreis v. Sherman Township*,[150] the Leemreises applied to the township for setback and side yard variances to build a pole barn. By the time the issue appeared on the agenda of the Zoning Board of Appeals (ZBA), the Leemreises had already constructed the pole barn; as constructed, the barn exceeded the height limitation later imposed by the ZBA.[151] Approximately 35 or 40 members of the public attended the ZBA meeting and voiced strong opposition to the proposed variances.[152] A police officer videotaped the ZBA meeting.[153] Following a lengthy public comment period, the ZBA chairman stated either that the public comment period was closed or that the meeting was closed to the public.[154] Regardless of the chairman's intent, the room was cleared of members of the public. After the room was cleared, the ZBA voted to approve the two variances as well as a height limitation on the pole barn.[155]

Both the township and the Leemreises filed complaints alleging various violations of the zoning ordinance, the building code, and township procedures.[156] The first count of the Leemreis' complaint appealed the decision of the ZBA action concerning the pole barn height.[157] The second count alleged violations of the OMA by ZBA members and the township for closing the ZBA meeting to the public, and asked that the first ZBA meeting be invalidated under section 10(2) of the OMA.[158] After the litigation began, the ZBA reenacted its decision

147. *Id.* at 423, 722 N.W.2d at 280.

148. *Detroit Free Press*, 271 Mich. App. at 423 n.1, 722 N.W.2d at 281 n.1 (citing Cherry Growers, Inc. v. Agricultural Marketing and Bargaining Bd., 240 Mich. App. 153, 173, 610 N.W.2d 613, 623 (2000)).

149. MICH. COMP. LAWS ANN. §§ 15.261-.275 (West 2004).

150. 273 Mich. App. 691, 731 N.W.2d 787 (2007).

151. *Id.*

152. *Id.* at 693, 731 N.W.2d at 789.

153. *Id.*

154. *Id.*

155. *Id.* at 694, 731 N.W.2d at 789.

156. *Leemreis*, 273 Mich. App. at 694, 731 N.W.2d at 789.

157. *Id.*

158. *Id.*

as authorized by the OMA[159] and affirmed its actions from the prior meeting.[160]

The original trial judge ruled that the township violated the OMA and awarded attorney fees and costs to the Leemreises.[161] A successor judge assigned to a subsequent dispute over the accounting awarded fees and costs up to the date of the reenactment.[162] The successor judge based his ruling on his finding that the reenactment "corrected any claimed violation of the OMA" as provided in section 11(4).[163] The parties and the trial court eventually resolved all of the issues except for the award of costs and attorney fees pursuant to the OMA.[164] Sherman Township appealed the trial court's award of any fees and costs to the Leemreises. The Leemreises also appealed, contending that they should have been awarded fees and costs for the entire action, not just up to the reenactment.[165]

The court of appeals held that the trial court erred in awarding any fees and costs to the Leemreises pursuant to section 11(4), which requires attorney fees and costs to be awarded when a court orders injunctive relief.[166] The court first noted that in order to obtain costs and fees under this section of the statute, a person must satisfy three requirements: "1) a public body must not be complying with the act, 2) a person must commence a civil action against the public body 'for injunctive relief to compel compliance or to enjoin further noncompliance with the act,' and 3) the person must succeed in 'obtaining relief in the action.'"[167] The court noted that the Leemreises never commenced a civil action (the second requirement), but only asked that the original ZBA decision be invalidated under section 10.[168] The court concluded that "even if the trial court properly entered declaratory relief, it erred in awarding . . . costs and attorney fees" because section 10 does not provide for costs and attorney fees.[169]

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159. MCL section 15.270(10) provides that:

> [I]n any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this act, the public body may, without being deemed to make an admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of the reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its original enactment.

MICH. COMP. LAWS ANN. § 15.270(10) (West 2004).

160. *Leemreis*, 273 Mich. App. at 694, 731 N.W.2d at 790.

161. *Id.* at 696, 731 N.W.2d at 790.

162. *Id.* at 695, 731 N.W.2d at 790.

163. *Id.* at 697-98, 731 N.W.2d at 790-91.

164. *Id.* at 697, 731 N.W.2d at 790.

165. *Id.* at 697, 731 N.W.2d at 791.

166. *Leemreis*, 273 Mich. App. at 704, 731 N.W.2d at 794.

167. *Id.*

168. *Id.* at 695, 731 N.W.2d at 789.

169. *Id.* at 704, 731 N.W.2d at 794.

The Leemreises responded that there are a line of court of appeals cases which upheld the award of costs and fees on similar facts. The court of appeals held that none of these cases supported the award of costs and fees in this matter, noting that in each of the cases cited by the Leemreises, the plaintiff filed a claim seeking either an injunction alone or along with other OMA claims.[170] Each of the cited cases held that in spite of finding a violation of the OMA, an injunction was unnecessary.[171] The court of appeals concluded that in this case "the Leemreises never requested an injunction. Therefore, even if the trial court properly granted declaratory relief, it was not declaratory relief that was the 'equivalent' of an injunction or in lieu of an injunction."[172] The court also noted that in the cases cited, "declaratory relief was granted while there was still a case in controversy," and the trial court only later decided whether attorney fees and costs should be awarded under MCL section 15.271(4).[173] The court of appeals concluded that "once Sherman Township reenacted" the earlier decision of the ZBA, "there was no longer any case in controversy" in the Leemreises claim for invalidation, and costs and fees were no longer available.[174]

The Leemreises finally argued that public policy supports awarding costs and fees when a plaintiff seeks invalidation and the public body cures the defect by reenacting the decision.[175] The court of appeals disagreed, citing an earlier decision which held that when a plaintiff fails in its attempt to have a court invalidate a decision, but the public body nonetheless reenacts its original decision thus curing the defective decision, the plaintiff is not entitled to fees and costs "because the plaintiff did not obtain relief in the action."[176] Relying on the holding in *Willis*, the court concluded that "despite the fact that the [original ZBA] September 8, 2003 decision was reenacted, the Leemreises were not entitled to costs and attorney fees under MCL 15.271(4)."[177]

V. SEPARATION OF POWERS

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA).[178] Under IGRA, an Indian tribe may conduct gaming activities in a casino facility if the U.S. Secretary of the Interior approves a tribal-

170. *Id.* at 704-05, 731 N.W.2d at 794-95.
171. *Leemreis*, 273 Mich. App. at 707, 731 N.W.2d at 796.
172. *Id.*
173. *Id.* at 707-08, 731 N.W.2d at 796.
174. *Id.* at 708, 731 N.W.2d at 796.
175. *Id.*
176. *Id.* at 708-09, 731 N.W.2d at 796-97 (citing Willis v. Deerfield Twp., 257 Mich. App. 541, 554, 669 N.W.2d 279, 288 (2003)).
177. *Leemreis*, 273 Mich. App. at 709, 731 N.W.2d at 797.
178. 25 U.S.C. §§ 2701-2721 (1988).

state compact that is negotiated between the state and the tribe.[179] In January, 1997, Governor John Engler and four Indian tribes[180] signed tribal gaming compacts.[181] In *Taxpayers of Michigan Against Casinos v. State of Michigan (TOMAC I),*[182] a citizens group, Taxpayers of Michigan against Casinos (Taxpayers), filed suit arguing that the approval of the compacts by legislative resolution violated the Michigan Constitution.[183] In 2002, the Court of Appeals reversed the holding of the circuit court and held that the compacts were properly approved by the Legislature; the compacts did not violate article 4, section 22 of the Constitution requiring "legislation" and the resolution was not a "local act" prohibited by article 4, section 29 of the Constitution.[184] The court granted a motion by an intervening defendant to strike that portion of the Taxpayers' brief that argued that the tribal payments of funds into the Michigan Strategic Fund without legislative appropriation violated the appropriations clause of the constitution.[185] Taxpayers appealed to the supreme court.[186]

In 2003, while the appeal was pending, Governor Jennifer Granholm consented to an amendment of the compact with the Little Traverse Bay Bands of Odawa Indians.[187] The amendment permitted a second casino on eligible Indian lands, changed the legal gambling age at that casino from 18 to 21, mandated that the payments under the compact be sent to the state at the direction of the governor rather than the Strategic Fund, and mandated that the compact was binding for twenty-five years rather than twenty.[188] Taxpayers argued before the supreme court not only that the court of appeals decision should be reversed on the prior constitutional grounds that they raised, but also because the amendatory provision in the compact, which allows the governor to sign the amendment without legislative approval, violated the separation of

179. 25 U.S.C. § 2710(d).

180. The Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi Indians.

181. Taxpayers of Michigan Against Casinos v. State of Michigan, 254 Mich. App. 23, 25-26, 657 N.W.2d 503, 505 (2002), *aff'g in part, rev'g in part*, 471 Mich. 306, 685 N.W.2d 221 (2004).

182. *Id.*

183. *See generally id.*

184. *See generally id.*

185. *Id.* at 37, 657 N.W.2d at 511.

186. Taxpayers of Michigan Against Casinos v. State of Michigan *(TOMAC II)*, 471 Mich. 306, 685 N.W.2d 221 (2004), *aff'g in part, rev'g in part*, 254 Mich. App. 23, 657 N.W.2d 503 (2002).

187. Taxpayers of Michigan Against Casinos v. State of Michigan *(TOMAC III)*, 478 Mich. 99, 107, 732 N.W.2d 487, 492 (2007), *aff'g in part, rev'g in part*, 268 Mich. App. 226, 708 N.W.2d 115 (2005)).

188. *Id.*

powers clause in article 3, section 2.[189] The amendatory provision in the compact states in part:

> Section 16. *Amendment*
> This Compact may be amended by mutual agreement between the Tribe and the State as follows:
> . . . .
> (A)(i) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments *to the Governor who shall act for the State.*
> (A)(ii) *The State, acting through the Governor*, shall propose amendments to the tribe pursuant to the notice provisions of this Compact.[190]

The compact further provides that upon agreement by the parties, the proposed amendment is submitted to the Secretary of the Interior for approval under IGRA.[191] Once effective, the amendment must be filed by the Governor with the Michigan Secretary of State, each house of the Michigan Legislature, and the Michigan Attorney General.[192]

The supreme court upheld the court of appeals decision on the constitutional issues which Taxpayers initially raised, but remanded the separation of powers issue back to the court of appeals for consideration.[193] A divided court of appeals panel held that the amendment to the compact violated the separation of powers provision in the constitution.[194]

A majority of the supreme court reversed the court of appeals and held that the amendatory provision in the compacts does not violate the separation of powers clause.[195] The court did not engage in an extensive legal analysis to support its position. The court argued that the Legislature "chose to approve an amendment procedure that gives the Governor broad power to amend the compacts and the Legislature is well within its authority to make such a decision."[196] The court then cited, with no analysis, two century-old cases to support its conclusions that "the court has long recognized the ability of the Legislature to confer authority on the Governor,"[197] and that the "court has further recognized

189. *Id.* at 104, 732 N.W.2d at 490.
190. *Id.* at 106, 732 N.W.2d at 491 (emphasis in original).
191. *Id.* at 106, 732 N.W.2d at 491-92.
192. *Id.* at 107, 732 N.W.2d at 492.
193. *TOMAC III*, 478 Mich. at 111, 732 N.W.2d at 494.
194. Taxpayers of Michigan against Casinos v. State of Michigan *(TOMAC IV)*, 268 Mich. App. 226, 228, 708 N.W.2d 115, 117 (2005).
195. *TOMAC III*, 478 Mich. at 103, 732 N.W.2d at 489-90.
196. *Id.* at 108, 732 N.W.2d at 492.
197. *Id.* at 108, 732 N.W.2d at 492, (citing People *ex rel.* Sutherland v. Governor, 29 Mich. 320, 329 (1874)).

that discretionary decisions made by the Governor are not within this Court's purview to modify."[198] Citing its ruling in *TOMAC II*, the court stated that the amendments "do not impose new obligations on the citizens of the state subject to the Legislature's power; they simply reflect the contractual terms agreed to by two sovereign entities."[199] Since the court had concluded in *TOMAC II* that the compacts were contracts between two entities, not legislation, the Legislature could delegate the authority to amend the contract to the governor without violating the separation of powers clause.[200]

The court also agreed that the appropriations issue was not properly before the court of appeals on remand.[201] Since the plaintiff was barred from raising the issue before the court of appeals, Taxpayers could not raise the issue before the supreme court in the final appeal.[202]

VI. STATE AGENCY AUTHORITY

The same three-judge panel of the court of appeals issued two published opinions in 2007 concerning matters regulated by the Michigan Public Service Commission (PSC). Michigan established the PSC in 1939 to regulate public and private utility companies and utility rates.[203] In *In re Application of Indiana Michigan Power Co. (Indiana Michigan Power),*[204] plaintiffs appealed PSC orders that approved the 2004 power supply cost recovery (PSCR) plan filed by Indiana Michigan Power Company (IMPCo).[205] IMPCo owns and operates a nuclear generating plant in Indiana that supplies electricity to customers in Michigan. The PSC regulates the electric rates that IMPCo charges to those Michigan customers.

The PSC enabling statute authorizes a utility to include a "power supply cost recovery" (PSCR) charge in its rate schedule.[206] A PSCR clause in the rate schedule allows the utility to adjust rates monthly to recover the booked costs of disposal and reprocessing of fuel burned by the utility for electric generation, among other things.[207] The utility can recover these costs through the rates that it charges as long as it incurs those costs "under reasonable and prudent policies and practices."[208]

198. *Id.* at 108, 732 N.W.2d at 492-93 (citing People *ex rel.* Ayres v. Bd. of State Auditors, 42 Mich. 422, 426, 4 N.W. 274, 276 (1880)).

199. *Id.* at 109-10, 732 N.W.2d at 493 (citing *TOMAC II*, 471 Mich. 306, 327, 685 N.W.2d 221, 231 (2002)).

200. *Id.* at 110-11, 732 N.W.2d at 494.

201. *TOMAC II*, 478 Mich. at 111-12, 732 N.W.2d at 494.

202. *Id.* at 112, 732 N.W.2d at 494.

203. MICH. COMP. LAWS ANN. §§ 460.1-.10cc (West 2002).

204. 275 Mich. App. 369, 738 N.W.2d 289 (2007).

205. *Id.* at 370, 738 N.W.2d at 291.

206. MICH. COMP. LAWS ANN. § 460.6j (West 2002).

207. MICH. COMP. LAWS ANN. § 460.6j(1)(a) (West 2002).

208. *Id.*

Each year, a utility with a PSCR plan in its rate schedule must file a PSCR plan for the upcoming year with the PSC.[209] The PSC conducts an administrative hearing as a part of its review, and then approves, disapproves, or modifies the PSCR.[210] Parties can appeal of a PSC order on a PSCR plan to the court of appeals.

The federal Nuclear Waste Policy Act (NWPA)[211] requires that each utility with a nuclear power plant enter into a Standard Contract with the U.S. Department of Energy (DOE) for disposal of spent nuclear fuel (SNF).[212] Operators of nuclear generating facilities pay a fee to DOE for the federal SNF disposal program under the terms of the contract. Utilities include the cost of the SNF fee in their PSCR plans.[213]

DOE originally scheduled the SNF program to begin in 1998.[214] Private, state, and local opposition to the proposed location of the SNF disposal facility significantly slowed the development of such a facility anywhere in the United States. At the time the parties to this case filed briefs with the court of appeals, DOE projected that the program at the new federal facility would begin in 2010.[215] Current DOE estimates for construction of the SNF repository indicate that the facility will begin accepting SNF in 2017.[216]

IMPCo stores its SNF from the Indiana plant that supplies electricity to Michigan customers in an on-site facility.[217] IMPCo entered into a Standard Contract with DOE, and then filed a PSCR plan with the PSC in 2004.[218] In the administrative hearing on the PSCR plan conducted by the PSC, appellants presented testimony by a nuclear energy consultant who asserted that IMPCo had charged rate payers excessive costs, including the SNF fee paid to DOE.[219] The consultant further asserted that IMPCo had not acted "reasonably and prudently" as required by the statute by failing to take necessary action to mitigate or minimize the disposal costs, or to protect ratepayers from the risk of loss of the fees paid to DOE.[220] Appellants alleged that IMPCo failed to enforce its contract with the DOE and failed to undertake self-help remedies.[221] The appellants' consultant also opined that the PSC should disallow the inclusion of the SNF fees in the PSCR clause.[222]

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209. MICH. COMP. LAWS ANN. §§ 460.6j(3)-.6j(4) (West 2002).
210. MICH. COMP. LAWS ANN. § 460.6j(6) (West 2002).
211. 42 U.S.C. §§ 10101-10154 (2006).
212. *Id.*
213. MICH. COMP. LAWS ANN. §§ 460.6(j)(3)-.6(j)(4) (West 2002).
214. *Indiana Michigan Power*, 275 Mich. App. at 371, 738 N.W.2d at 292.
215. *Id.*
216. *Id.* at 371 n.2, 738 N.W.2d at 292 n.2.
217. *Id.* at 371, 738 N.W.2d at 291-92.
218. *Id.*
219. *Id.* at 372, 738 N.W.2d at 292.
220. *Indiana Michigan Power*, 275 Mich. App. at 372, 738 N.W.2d at 292.
221. *Id.*
222. *Id.*

The expert witness for IMPCo argued that the utility had acted reasonably and prudently as to the payment of the SNF fees, noting that if IMPCo refused to pay the fee, the Nuclear Regulatory Commission could refuse to license the nuclear plant.[223] The consultant also argued that IMPCo had engaged in self-help by participating in litigation to force DOE to adhere to its responsibilities under the Standard Contract to construct a disposal facility.[224]

The PSC approved the PSCR plan; the PSC noted that a utility is entitled to recover the costs of disposal of spent nuclear fuel rods through its PSCR clause, and that IMPCo had not acted unreasonably or imprudently with respect to the SNF issues.[225] The PSC also accepted the assertion that failure to pay the SNF fees could result in license suspension, and disagreed with appellants' contention that the utility itself, not rate payers, were responsible for payment of SNF fees.[226] When the PSC denied appellants' motion for rehearing, appellants sought review by the court of appeals.

The court of appeals first noted that the "standard of review for PSC orders is narrow and well defined."[227] The court cited a prior Michigan Supreme Court opinion which stated that "all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable."[228] The court of appeals cited language in the PSC enabling statute that a party challenging a PSC order must prove by "clear and convincing evidence that the order is unlawful and unreasonable."[229] The court cited favorably decisions that have held that an order is unlawful if the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment, and that an order is unreasonable if it is not supported by the evidence.[230]

The court of appeals concluded that the PSC decision was reasonable and supported by the evidence presented by IMPCo, arguing that it must "give due deference to the PSC's administrative expertise, and we will not substitute our judgment for the PSC."[231] The court maintained, however, that statutory review of whether the PSC exceeded its authority

223. *Id.*
224. *Id.*
225. *Id.* at 372-73, 738 N.W.2d at 292.
226. *Indiana Michigan Power*, 275 Mich. App. at 373, 738 N.W.2d at 292.
227. *Id.*
228. *Id.* (citing Michigan Consolidated Gas Co. v. Public Service Comm., 389 Mich. 624, 635-36, 209 N.W.2d 210, 213-14 (1973)).
229. *Id.* at 373, 738 N.W.2d at 293 (citing MICH. COMP. LAWS ANN. § 462.26(8) (West 2002)).
230. *Id.* (citing *In re* MCI Telecom Complaint, 460 Mich. 396, 427, 596 N.W.2d 164 (1999); Associated Truck Lines, Inc. v. Public Service Comm., 377 Mich. 259, 279, 140 N.W.2d 515, 522 (1966)).
231. *Id.* at 373, 738 N.W.2d at 293.

under the enabling statute is a question of law that it reviews de novo.[232] In holding that the PSC did not exceed its authority, the court argued that the PSC was entitled to rely upon evidence presented by IMPCo that failure to pay the fees to DOE could lead to imposition of interest charges and possible loss of its license to operate.[233] The court held that IMPCo had acted reasonably and prudently with regard to the collection of SNF costs, and did not have the authority under the statute to impose additional remedies suggested by appellants.[234]

Appellants also contended that the utility's duty to pay SNF fees is "reciprocal to the DOE's duty to commence disposing of SNF in a timely manner, and that because DOE did not fulfill its duty, a utility such as IMPCo has no duty to continue paying SNF fees to the DOE."[235] Appellants then asserted that the PSC "had the duty to protect ratepayers by denying IMPCo's request to recover the SNF costs via its PSCR clause, or by requiring IMPCo to take other steps to protect ratepayers."[236] Appellants cited a 1996 opinion issued by the U.S. Court of Appeals for the District of Columbia Circuit which held that the same utility's obligation to pay SNF costs was reciprocal to the DOE commencing SNF disposal by 1988.[237]

The court of appeals affirmed the PSC's orders approving IMPCo's PSCR plan and denied the request for rehearing.[238] The court stated that the appellant's reliance on the earlier *Indiana Power* case was "misplaced."[239] The court argued that the case "does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility no later than January 31, 1998. The payment of fees by a utility is mandated by 42 USC 10222."[240] The court noted that "[N]othing in the statute indicated that the duty to dispose of SNF was tied to the commencement of operation of a disposal facility."[241] The IMPCo expert testified that IMPCo's decision to pay the fees notwithstanding DOE's delay in commencing a disposal facility was consistent with actions taken by other utilities, and IMPCo risked losing its license if it did not pay the fees.[242] Since a "state utility must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute," the court concluded that IMPCo could recover the cost of the

232. *Indiana Michigan Power*, 275 Mich. App. at 373-74, 738 N.W.2d at 293.
233. *Id.* at 375, 738 N.W.2d at 293-94.
234. *Id.* at 375, 738 N.W.2d at 294.
235. *Id.* at 377, 738 N.W.2d at 294.
236. *Id.*
237. *Id.* (citing Indiana Michigan Power Co. v. Dept. of Energy, 88 F.3d 1272 (D.C. Cir. 1996)).
238. *Indiana Michigan Power*, 275 Mich. App. at 381, 738 N.W.2d at 296.
239. *Id.* at 377, 738 N.W.2d at 294-95.
240. *Id.* at 377, 738 N.W.2d at 295.
241. *Id.*
242. *Id.* at 378, 738 N.W.2d at 295.

SNF fees in its PSCR plan.[243] The court further noted that the "PSC has the discretion to consider a variety of factors when setting just and reasonable rates," but that it "lacks the authority to impose the remedies suggested by appellants, including the placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers." [244] Because appellants did not show by clear and convincing evidence that the PSC decision is unlawful or unreasonable, the court denied the request for rehearing of the PSC decision.[245]

In the second case, *City of Lansing v. State of Michigan*,[246] the same court of appeals panel affirmed a trial court order in favor of a liquid-petroleum pipeline company and against the City of Lansing regarding the relocation of a pipeline.[247] In 2000, Wolverine Pipe Line Company filed an application with the PSC to replace an existing liquid-petroleum pipeline with a larger pipeline in Meridian Township.[248] After encountering opposition to the new pipeline, Wolverine proposed to reroute the pipeline in the right-of-way of I-96, including a portion of I-96 that runs through the neighboring City of Lansing.[249] In 2002, Wolverine requested the city's consent to construct the pipeline within the city boundaries.[250] The city denied the request by enacting Resolution #423, which found that the pipeline would disparately impact minority populations, would constitute an unreasonable risk to ground and surface water, persons, and property, and that the city lacked the resources to adequately mitigate a catastrophic pipeline failure.[251]

Despite the enactment of the resolution, Wolverine applied to the PSC for approval of the new pipeline section. The PSC approved the plan over the city's objections in 2002.[252] The city appealed the PSC approval and argued that under Article 7, Section 29 of the Michigan Constitution and under the state statute that regulates highway obstructions and encroachments and the use of state highways by public utilities,[253] Wolverine was required to obtain the city's consent before it could submit an application to the PSC.[254] The court of appeals and the supreme court both held that Wolverine was required to obtain the city's consent, but that it did not need to obtain the consent prior to filing its application with the PSC.[255]

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243. *Id.* at 378 n. 5, 738 N.W.2d at 295 n. 5.
244. *Indiana Michigan Power*, 275 Mich. App. at 378, 738 N.W.2d at 295.
245. *Id.* at 381, 738 N.W.2d at 296.
246. 275 Mich. App. 423, 737 N.W.2d 818 (2007).
247. *See generally id.*
248. *Id.* at 425, 737 N.W.2d at 819-20.
249. *Id.* at 425, 737 N.W.2d at 820.
250. *Id.*
251. *Id.*
252. *City of Lansing*, 275 Mich. App. at 426, 737 N.W.2d at 820.
253. MICH. COMP. LAWS ANN. § 247.183 (West 2001).
254. *City of Lansing*, 275 Mich. App. at 426, 737 N.W.2d at 820.
255. *Id.*

After these decisions, the Legislature amended the state statute to eliminate the consent requirement for certain utilities and "pipelines, longitudinally within any limited access highway rights-of-way . . . in accordance with standards approved by the state transportation commission and the Michigan public service commission . . ."[256] In 2005, the city initiated a lawsuit for declaratory judgment that the amended statute was unconstitutional.[257]

The city argued that the section of Article 7, Section 29 of the Michigan Constitution mandates that no "person . . . operating a public utility shall have the right to the use of the highways, streets, alleys, or other public places of any county, township, city or village for . . . pipes . . . or other utility facilities . . . without the consent of the duly constituted authority of the county, township, city or village."[258] The city argued that since the amended statute appeared to directly conflict with the apparent constitutional requirement for consent, the statute was unconstitutional.[259] The trial court disagreed and held that the amended statute did not unconstitutionally limit the authority to grant or withhold consent under the constitution.[260]

The court of appeals affirmed the trial court holding. The court held that the "grant of authority" in Section 29 is not absolute since the supreme court held that consent cannot be refused "arbitrarily and unreasonably."[261] The court further argued that in order to "exercise its authority to grant or withhold consent," a city must do so "through its general power to adopt resolutions and ordinances."[262] Cities are granted the power to adopt such resolutions and ordinances under Article 7, Section 22 of the constitution.[263] The court argued that Section 22 provides that this power to adopt resolutions is also not absolute, but is "subject to the constitution and law."[264] The court interpreted the interrelationship of section 22 and 29 by concluding:

> Because a city's general authority to adopt resolutions and ordinances is subject to the constitution and law, and a city's authority to grant or withhold consent to use its highways, streets, alleys and other public places can only be exercised through an ordinance or resolution, it follows that a city's ability

256. *Id.* at 426-27, 737 N.W.2d at 820-21 (citing MICH. COMP. LAWS ANN. § 247.183 (West 2001).
257. *Id.* at 427, 737 N.W.2d at 821.
258. MICH. CONST. of 1963 art. VII, § 29.
259. *City of Lansing,* 275 Mich. App. at 427, 737 N.W.2d at 821.
260. *Id.* at 428, 737 N.W.2d at 821.
261. *Id.* at 432, 737 N.W.2d at 823.
262. *Id.* at 433, 737 N.W.2d at 824.
263. *Id.*
264. *Id.*

to grant or withhold consent is also subject to the constitution and laws.[265]

The court concluded that because the statute "merely limits a local government's authority to grant or withhold consent to the narrow class of public property by a specific type of utility," the amendment was a "proper exercise of the Legislature's authority to limit the manner and circumstances under which a city may grant or withhold consent under section 29."[266] The court of appeals held that the trial court did not err when it concluded that the statute was not unconstitutional.[267]

VII. PROPERTY TAXATION

Toll Northville, Limited v. Northville Township,[268] was a case that arose during the *Survey* period regarding the property tax value of public service improvements made to residential parcels of property.[269] In 2001 and 2002, two developers converted large real estate parcels in Northville Township into platted subdivisions for single-family residential and condominium homes.[270] The developers also installed a primary access road, streetlights, sewer and water services, electric, telephone, natural gas services, and sidewalks during these years.[271] By 2002, approximately half of the lots had been sold to private homeowners.[272]

The township increased the taxable value of the parcels still held by the developers for the 2001 and 2002 tax years when the parcels were under development.[273] The increased taxable value included the township's estimate of the increased value to the parcels due to the construction of the access road, sidewalks, and utility services.[274] The township based the increased assessments on a provision in the Michigan constitution, as amended by the 1994 Headlee amendment, which provides that the "taxable value" of each parcel "adjusted for additions and losses" shall not increase above the rate of inflation or five percent, whichever is less.[275] Companion legislation approved in 1994 provides that the word "additions" means, among other things, "public services."[276] "Public services" are further defined in Section d(1)(b)(viii)

265. *City of Lansing*, 275 Mich. App. at 433, 737 N.W.2d at 824.
266. *Id.* at 433-34, 737 N.W.2d at 824.
267. *Id.*
268. 272 Mich. App. 352, 726 N.W.2d 57 (2007).
269. *See generally id.*
270. *Id.*
271. *Id.* at 355, 726 N.W.2d at 61.
272. *Id.*
273. *Id.*
274. *Toll Northville*, 272 Mich. App. at 355, 726 N.W.2d at 61.
275. MICH. CONST. 1963 art. IX, § 3.
276. MICH. COMP. LAWS ANN. § 211.34d(1)(b)(viii) (West 2005 & Supp. 2007).

as "water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks or street lighting."[277] The developers appealed the assessments to the Michigan Tax Tribunal arguing that Section d(1)(b)(viii) was unconstitutional.[278] The Tax Tribunal held its hearing on the matter in abeyance to allow the developers to seek a declaratory judgment on the constitutional issue from the circuit court.[279]

In arguments before the circuit court, the developers cited *WPW Acquisition Co. v. City of Troy,*[280] a recent supreme court decision which held that increasing the taxable value based upon increases in the occupancy rate of rental property was unconstitutional light of the Headlee amendment.[281] The *WPW Acquisition Co.* court explained that when the Legislature submitted the Headlee amendment to the voters in 1994, the "General Property Tax Act established 'additions' as a technical legal term" and that the "statutory definition of 'additions' did not encompass any increase in the value of property due to increased occupancy by tenants."[282] The court further explained that the property tax capping function of the amendment would be "thwarted" if the Legislature had authority "at its will, to define an increase in the value of property (such as an increase due to increased occupancy)" as an addition.[283]

The circuit court agreed that the township's classification of public service improvements to the land under Section d(1)(b)(viii) was unconstitutional as a matter of law based upon the decision in *WPW Acquisition Co.*, and granted summary disposition to the developers.[284] The township appealed.

The court of appeals affirmed the opinion of the circuit court. The court concluded that Section d(1)(b)(viii) was unconstitutional "because it is inconsistent with the meaning of the term 'additions' as established by Proposal A."[285] To the extent that the township relied upon this provision to increase the taxable value of the individual parcels in the subdivision, the court concluded that the township violated the cap on annual increases in taxable value imposed by the Headlee amendment.[286] The court rejected the township's argument that the installation of these items falls within the scope of "new construction and the physical addition of equipment or furnishings" which are permitted additions

277. *Id.*
278. *Toll Northville*, 272 Mich. App. at 365, 726 N.W.2d at 67.
279. *Id.* at 355, 726 N.W.2d at 61.
280. 466 Mich. 117, 643 N.W.2d 564 (2002).
281. *Toll Northville*, 272 Mich. App. at 365, 726 N.W.2d at 67.
282. *Id.*
283. *Id.* at 366, 726 N.W.2d at 67.
284. *Id.* at 358, 643 N.W.2d at 63.
285. *Id.* at 376, 643 N.W.2d at 72.
286. *Id.*

under Section d(1)(b)(iii).[287] The court reasoned that if this was a valid argument, the Legislature would not have added "public services" in section d(1)(b)(viii) as a separate category of taxable additions.[288] The court concluded that on the basis of the General Property Tax Act taken as a whole, "additions" to real property "should only take into account improvements that the landowner makes on the land itself."[289]

The court of appeals further held that assessing the developers of the land for the taxable value of the improvements would be inconsistent with the Headlee amendment, the General Property Tax Act, and the Northville Code of Ordinances.[290] The court found persuasive the fact pointed out by the developers that a developer "will often rezone, plat, and install public services all in the same tax year."[291] Since the General Property Tax Act specifically excludes the any increase in taxable value due to platting and rezoning as an "addition,"[292] the court reasoned that holding Section d(1)(b)(viii) constitutional "would create problems when trying to determine how much of a particular tax year's increased value is due to the public service improvements, or to the platting and zoning."[293] The court offered no evidence or analysis for the conclusion that despite the experience and expertise on complex valuation matters within local assessing departments, county equalization departments, and the state treasury, these professionals would find it impossible to separate these factors in determining an appropriate taxable value. But the court concluded that local governments would not be harmed by this ruling by stating its version of a "no harm, no foul" rule: since the taxable value of each of the lots benefited by these improvements will eventually be bumped up upon sale under the Headlee amendment, the "tax revenue for that increased value will be realized when the lots are transferred to the private owners."[294] Given the strong precedent set by the *WPW Acquisition Co.* decision, the supreme court will probably affirm.

VIII. GOVERNMENTAL IMMUNITY

The court of appeals and the supreme court decided an unusually large number of cases involving governmental immunity during this *Survey* period. The thirteen decisions involved not only the scope of the authority of governmental officials to act under immunity protection, but also the elements of the various exceptions to immunity. In *Rowland v.*

287. *Toll Northville*, 272 Mich. App. at 358, 643 N.W.2d at 63.
288. *Id.* at 368-69, 643 N.W.2d at 68-69.
289. *Id.* at 369-70, 643 N.W.2d at 69.
290. *Id.* at 372, 643 N.W.2d at 70.
291. *Id.* at 373, 643 N.W.2d at 70.
292. MICH. COMP. LAWS ANN. § 211.34d(1)(c) (West 2005 & Supp. 2007).
293. *Toll Northville*, 272 Mich. App. at 373, 726 N.W.2d at 70.
294. *Id.* at 375, 726 N.W.2d at 72.

Wayne County Board of Commissioners,[295] the supreme court issued a monumental decision concerning the defective highway exception to governmental immunity.[296] The *Rowland* decision expressly overruled two earlier supreme court decisions and expressly abrogated three others.[297] This decision continued the trend of supreme court decisions which further narrow the legal and factual playing field upon which injured plaintiffs can successfully claim damages.

A. Scope of Immunity Protection/Governmental Function

In *Bennett v. Detroit Police Chief*[298] the court of appeals considered governmental immunity in the context of police department administration.[299] In 2002, a City of Detroit police officer created and registered a website highly critical of the police chief, the Mayor, and the City of Detroit.[300] In 2003, the Detroit Board of Police Commissioners agreed with the police chief's recommendation to suspend the officer without pay, and a grievance arbitrator upheld the decision.[301] The officer sued the city, the police chief, and the mayor for wrongful discharge for the "exercise of his constitutionally guaranteed right of free speech in violation of Michigan public policy."[302] The circuit court granted the mayor's motion for summary disposition, but denied similar motions filed by the police chief and the city.[303] The police chief and the city appealed.

Plaintiff argued that the police chief acted outside the scope of his authority when he suspended the officer.[304] The officer cited *Marrocco v. Randlett,*[305] an earlier Michigan Supreme Court decision which held that local government officials who allegedly harassed another public official in an attempt to force him to resign "are not immune from tort liability for acts not within their executive authority."[306] The *Marrocco* court stated that "the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not a governmental

295. 477 Mich. 197, 731 N.W.2d 41 (2007).
296. *See generally id.*
297. *See generally id.* (overruling Hobbs v. Dep't of State Highways, 398 Mich. 90, 247 N.W.2d 754 (1976); Brown v. Manistee County Rd. Comm'n, 452 Mich. 354, 550 N.W.2d 215 (1996); abrogating Grubaugh v. City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970); Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972); Carver v. McKernan, 390 Mich. 96, 211 N.W.2d 24(1973)).
298. 274 Mich. App. 307, 732 N.W.2d 164 (2007).
299. *See generally id.*
300. *Id.* at 308-09, 732 N.W.2d 164, 166.
301. *Id.* at 309, 732 N.W.2d at 166.
302. *Id.*
303. *Id.* at 310, 732 N.W.2d at 166-67.
304. *Bennet,* 274 Mich. App. at 311, 732 N.W.2d at 167.
305. 431 Mich. 700, 433 N.W.2d 68 (1988).
306. *Id.* at 710-11, 433 N.W.2d at 73.

function."[307] Plaintiff alleged that the Detroit police chief was not entitled to governmental immunity because his actions were analogous to the misconduct of the public officials in *Marrocco*.[308] The officer further alleged that based upon *Cranford v. Wayne County Sheriff*,[309] an unpublished per curiam court of appeals opinion, a government entity such as the city of Detroit is not entitled to immunity if its employee acted outside the scope of his authority.[310]

The court of appeals disagreed and reversed the circuit court ruling as to the chief of police and the city.[311] The court reasoned that there are three sources of local law that expressly grant to the chief of police very broad authority to suspend the officer: the Detroit City Charter, the Detroit Police Department rules and regulations, and the collective bargaining agreement between the city and the police officers' union.[312] "All three contain provisions expressly stating that the chief of police has the authority to suspend officers from duty."[313] The court concluded that on the basis of these grants of authority, the police chief was entitled to government immunity.[314] The court further concluded that since the operation of a police department is a governmental function, and since the police chief acted within his scope of authority as a government official, the city was entitled to the same immunity.[315]

In another case involving police department administration, the court of appeals held in *Mercer v. City of Lansing*[316] that the City of Lansing was not entitled to governmental immunity in a mandamus action.[317] The plaintiff operated a Lansing towing and recycling business and had a contract with the city to tow unwanted vehicles from private business property.[318] Plaintiff alleged in his writ of mandamus that the city failed to comply with the provision in the Michigan Vehicle Code[319] which requires a municipality to immediately file a report through the Law Enforcement Information Network [LEIN] upon receiving reliable information that any vehicle registered under the Code has been stolen.[320] The municipality must also report through LEIN that a vehicle previously reported stolen has been recovered.[321] Plaintiff alleged that

307. *Id.* at 707-08, 433 N.W.2d at 68.
308. *Bennett*, 274 Mich. App. at 313, 732 N.W.2d at 168.
309. No. 218859, 2001 WL 637408 (Mich. Ct. App. May 25, 2001).
310. *Bennett*, 274 Mich. App. at 315, 732 N.W.2d at 170.
311. *Id.*
312. *Id.* at 313, 732 N.W.2d at 168.
313. *Id.*
314. *Id.* at 315, 732 N.W.2d at 169.
315. *Id.* at 315-16, 732 N.W.2d at 169-70.
316. 274 Mich. App. 329, 733 N.W.2d 89 (2007).
317. *Id.* at 334, 733 N.W.2d at 92.
318. *Id.* at 330, 732 N.W.2d at 90.
319. MICH. COMP. LAWS ANN. §§ 257.252-.259 (West 2001).
320. MICH. COMP. LAWS ANN. § 257.252 (West 2001).
321. *Id.*

since the city routinely failed to comply with these reporting requirements, he was unable to dispose of the unclaimed vehicles which accumulated on his property.[322] Plaintiff filed the mandamus action to require the city to comply with the statute and to pay damages for their past failure to comply.[323] The city argued in response that it was entitled to governmental immunity because any claim for damages is really a tort claim, and the city is immune from tort liability.[324]

The court of appeals agreed with the plaintiff that the city is not immune from liability.[325] The court acknowledged that the Revised Judicature Act specifically permits damages in a mandamus action except when a public officer acts erroneously but in good faith.[326] The court also reasoned that based upon an earlier decision, the statutory grant of damages in a mandamus action "is not subject to the government tort liability act (GLTA)."[327]

The court further argued that a mandamus action "would be excluded from the coverage of the GTLA by the express terms of the GLTA."[328] The court said that "MCL 691.1407(1) provides for immunity when a governmental agency is 'engaged' in exercising or discharging a governmental function. That is to say, when it is acting."[329] The court concluded that since the essence of a mandamus action is claim that the governmental agency *failed* to act, the "decision not to act is outside the scope of authority granted by statute."[330] The court noted that a decision not to act could be interpreted as an exercise of authority, but that is true "only if discretion is vested in the governmental body or employee to decide whether action is appropriate. The essence of mandamus is that there is a legal duty to act. Therefore, the decision not to act is outside the scope of authority granted by statute."[331] The court finally noted that since an earlier opinion held that an action for mandamus is an equitable action, not a tort action, the plaintiff's case fell outside the scope of governmental immunity.[332] The court concluded that the city was not

322. *Mercer*, 274 Mich. App. at 330, 733 N.W.2d at 90.
323. *Id.*
324. *Id.*
325. *Id.* at 334, 733 N.W.2d at 92.
326. *Id.* at 331, 733 N.W.2d at 91 (citing MICH. COMP. LAWS ANN. § 600.4431 (West 2000)).
327. *Id.* at 331-32, 733 N.W.2d at 91 (citing Lee v. Macomb County Bd. of Comm'rs., 235 Mich. App. 323, 597 N.W.2d 545 (1999), *rev'd. on other grounds*, 464 Mich. 726, 629 N.W.2d 900 (2001)).
328. *Mercer*, 274 Mich. App. at 332, 733 N.W.2d at 91.
329. *Id.* at 333, 733 N.W.2d at 92.
330. *Id.*
331. *Id.*
332. *Id.* at 334, 733 N.W.2d at 92 (citing Wayne County Sheriff v. Wayne County Bd. of Comm'rs., 196 Mich. App. 498, 510, 494 N.W.2d 14,19 (1992)).

immune from an award of damages if the plaintiff ultimately prevails on the damages claim.[333]

In *Frohriep v. Flanagan,*[334] a certified teacher and member of the Michigan Education Association (MEA) alleged that the Michigan Superintendent of Public Instruction and two other administrators in the Michigan Department of Education (MDE) falsely identified the teacher as having criminal convictions.[335] The dispute arose from the MDE's efforts to comply with amendments to the Revised School Code which took effect on January 1, 2006.[336] The new school safety legislation requires that the MDE identify persons with certain criminal convictions and transmit the list of names to local school districts to preclude those persons from being employed by the district.[337] In order to generate the suspect names, the statute requires the Michigan Department of Information Technology to work with the MDE and the Michigan State Police "to develop and implement an automated program that does a comparison of the department's registered educational personnel with the conviction information received by the department of state police."[338] If the comparison discloses that an employee of a school district has a criminal conviction, the MDE must notify the district.[339] Both the MDE and the state police have a statutory duty to "take all reasonable and necessary measures using the available technology to ensure the accuracy of the comparison" before transmitting any information.[340]

General Counsel for the Michigan Education Association (MEA) wrote to the superintendent in 2005 requesting that the data comparison not be publicly released until those named had an opportunity to demonstrate that they had been erroneously listed.[341] The superintendent replied that the legislation specifically requires that the MDE notify the school district but does not require prior notification to the employee.[342] The MEA filed a lawsuit in circuit court against both the MDE and the superintendent seeking injunctive relief to prevent the disclosure of the names.[343]

The day after the circuit court issued a preliminary injunction to prevent disclosure, the superintendent distributed a letter to the various school districts, both public and nonpublic, with lists of the employees in the pertinent school system with alleged criminal convictions.[344] The

333. *Id.* at 333-34, 733 N.W.2d at 92.
334. 275 Mich. App. 456, 739 N.W.2d 645 (2007).
335. *See generally id.*
336. MICH. COMP. LAWS ANN. §§ 380.1-.1853 (West 2005).
337. MICH. COMP. LAWS ANN. § 380.1230d(7) (West 2005).
338. MICH. COMP. LAWS ANN. § 380.1535a(15) (West 2005).
339. *Id.*
340. *Frohriep*, 275 Mich. App. at 458 n.2, 739 N.W.2d at 647 n.2.
341. *Id.* at 460, 739 N.W.2d at 649.
342. *Id.* at 460-61, 739 N.W.2d at 649.
343. *Id.*
344. *Id.*

letter also enclosed instructions from the Michigan State Police for correcting mistaken or inaccurate conviction records.[345] MDE erroneously notified the plaintiff's school district that plaintiff had a criminal conviction.[346]

Plaintiff filed a lawsuit in the same circuit court alleging that by erroneously submitting his name, the MDE administrators were liable for libel per se, interference with plaintiff's business expectance, intentional infliction of emotional distress, and invasion of privacy.[347] Plaintiff attached to his complaint an affidavit from one of the administrators which states that the MDE undertook an initial attempt before the legislation went into effect to complete a database comparison.[348] The administrator acknowledges in the affidavit that the MDE expected to find some "false hits" in the comparison.[349] The administrator averred that the MDE expected that each local district would resolve the final confirmation of the disclosed information disclosed because "this would be the most expeditious way to verify the conviction information."[350]

Plaintiff's case was assigned to a different judge than the MEA case, and requests for reassignment to the same judge were denied.[351] The judge in the plaintiff's case granted defendant's motion for summary disposition under MCR 2.116(C)(6) based upon the pending MEA case before a different judge in the same circuit court.[352] Plaintiff appealed.

The court of appeals held that the circuit court "reached the correct result because the defendants were entitled to summary disposition" even though it was for an "erroneous reason."[353] The court reasoned that although the two lawsuits arose out of the same operative facts, the lawsuits were not "between the same parties" as required by MCR 2.116(C)(6).[354] The court concluded, however, that the case should have been dismissed anyway because governmental immunity barred the tort claims.[355]

The court cited the GTLA section which provides that the highest appointive executive official of all levels of government is immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his authority.[356] The court stated that when "defendants as officers and employees of the MDE are carrying out the statutorily authorized and mandated duties of the MDE, plaintiffs must

345. *Id.* at 461-62, 739 N.W.2d at 649.
346. *Frohieip*, 275 Mich. App. at 462, 739 N.W.2d at 649.
347. *Id.* at 463, 739 N.W.2d at 650.
348. *Id.* at 460, 739 N.W.2d at 648.
349. *Id.* at 460, 739 N.W.2d at 649.
350. *Id.*
351. *Id.* at 463, 739 N.W.2d at 650.
352. *Frohriep*, 275 Mich. App. at 463, 739 N.W.2d at 650.
353. *Id.* at 473, 739 N.W.2d at 655.
354. *Id.* at 465, 739 N.W.2d at 651.
355. *Id.* at 467, 739 N.W.2d at 652.
356. MICH. COMP. LAWS ANN. § 691.1407(5) (West 2005).

plead facts to establish that defendants were acting outside the scope of their authority" or that governmental immunity did not otherwise apply.[357] The court held that plaintiff failed to "allege any facts from which it could be inferred that any of the defendants had prior knowledge that any specific match was, in fact, a 'false hit.'"[358] The court concluded that even if the defendants had knowledge of "false hits," their conduct "would still not be outside the scope of their employment with the MDE as they were acting to comply with the school safety legislation."[359] The court concluded that since the plaintiff failed to plead facts in avoidance of governmental immunity, the circuit court correctly granted summary disposition to defendants, "albeit for the wrong reason."[360]

A different court of appeals panel issued another decision on the scope of governmental immunity and the exceptions within the GTLA. In *State Farm Fire & Casualty Co. v. Colby Energy Services, Inc.*, the insurer/subrogee of a property owner in Southfield filed suit against the City of Detroit and utility contractors for damage to a private home.[361] In 1999, a private utility company began constructing a fiber optic network in Southfield and Farmington Hills.[362] The utility company hired defendant Colby Energy Services, Inc. to complete the actual underground installation.[363] During the installation, Colby allegedly damaged an unmarked water main owned by the City of Detroit. The water main eventually failed, resulting in flooding of the plaintiff's home.[364]

Plaintiff sued all of the utility contractors for damages. The lawsuit also named the city as a defendant based upon the city's failure to mark the water main location pursuant to the MISS-DIG act (Act).[365] The city filed a motion to dismiss on the basis that the claim against the city was barred by GLTA.[366] The trial court denied the motion, explaining that there was:

> [O]bviously a question of fact as [to] whether the lines were actually marked. And I do feel that the Miss Dig Statute does

357. *Frohriep*, 275 Mich. App. at 470, 739 N.W.2d at 653.

358. *Id.* at 471, 739 N.W.2d at 654.

359. *Id.*

360. *Id.* at 473, 739 N.W.2d at 655. As this edition was going to press, the Michigan Supreme Court reversed that part of the judgment which applied to two defendants, holding that MCL section 691.1407(2) does not apply to these defendants because they are individual government employees with no immunity under MCL section 691.1407(5), and because plaintiffs alleged intentional torts for which liability was imposed prior to July 7, 1986. *See* Frohriep v. Flanagan, 480 Mich. 962, 741 N.W.2d 516 (2007).

361. 271 Mich. App. 480, 722 N.W.2d 906 (2006).

362. *Id.* at 482-83, 722 N.W.2d at 908-09.

363. *Id.*

364. *Id.*

365. MICH. COMP. LAWS ANN. §§ 460.701-.718 (West 2002).

366. *State Farm*, 271 Mich. App. at 482, 722 N.W.2d at 909.

> create a duty of the City to mark the lines when requested and it does allow for civil damages against the city which acts as a public utility.[367]

The city appealed.

The court of appeals reasoned that on the basis of the above statement, the trial court had concluded that the MISS-DIG act creates an exception to the general immunity provided by the GLTA.[368] The court of appeals disagreed. The court stated that although the "GLTA proclaims that it contains the exceptions to governmental immunity, the Legislature remains free to create additional exceptions, either within the GLTA or another statute."[369] The court cited an earlier supreme court decision which stated that any waiver or abrogation of governmental immunity can only occur "by an express statutory enactment or by necessary inference from a statute."[370]

The court examined the Act to determine if such an exception was created by the language in the statute. The court reviewed the definitions in the Act and concluded initially that the city has duties under the statute as both a "public agency" and a "public utility."[371] The court also cited the definition of "person" in the Act as "an individual, partnership, corporation, association, or any other legal entity. Person does not mean a public agency."[372] The court noted that "at no point does the Act specifically address governmental immunity," nor does the Act establish a general cause of action for breaches of the duties it imposes.[373] The only liability imposed by the Act is for harms caused by "persons" who damage underground facilities and "persons" responsible for giving notice of an intent to excavate, for not employing hand-digging where appropriate, and for failure to provide support.[374] The court noted that the only penalty imposed on a public utility for failing to give notice "is a limitation on its ability to recover damages to its underground facilities."[375] The court concluded that the only section that imposes direct liability on any party for failing to meet the duties imposed by the Act "conspicuously omits public agencies from its coverage."[376] The court concluded that this omission indicates that there is no "clear

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367. *Id.* at 484, 722 N.W.2d at 909-10.

368. *Id.* at 484, 722 N.W.2d at 910.

369. *Id.* at 485, 722 N.W.2d at 910.

370. *Id.* (citing Ballard v. Ypsilanti Twp., 457 Mich. 564, 574, 577 N.W.2d 890, 895 (1998)).

371. *Id.* at 486, 722 N.W.2d at 911.

372. *State Farm*, 271 Mich. App. at 486, 722 N.W.2d at 911 (citing MICH. COMP. LAWS ANN. § 460.701 (West 2002)).

373. *Id.* at 486, 722 N.W.2d at 911.

374. *Id.*

375. *Id.* (citing MICH. COMP. LAWS ANN. § 460.714 (West 2002).

376. *Id.* at 488, 722 N.W.2d at 911-12.

legislative intent to waive or abrogate the immunity provided by the GLTA."[377]

Plaintiffs contended that the Act permits common-law remedies against a "public agency" for negligence in staking its underground utilities.[378] The court disagreed. The court cited the section of the Act that preserves civil remedies that a person "may have" for damage caused by a public utility's negligence in staking.[379] The court argued that this phrase doesn't create an absolute right to damages separate from any other explicit exception to immunity.[380] Since none of the existing exceptions to immunity set forth in the GLTA apply to this case, and since the MISS-DIG act does not create another exception, the court concluded that the city was entitled to governmental immunity.[381]

B. Medical Malpractice—Meritorious Defense

In *Costa v. Community Emergency Medical Services, Inc.*[382] the supreme court held that as a matter of first impression, the statute requiring the filing of an affidavit of meritorious defense in a medical malpractice lawsuit does not apply to city emergency personnel entitled to governmental immunity.[383] The plaintiff in the case suffered injuries in a fight, and EMS employees from both the City of Taylor and a private ambulance company responded, treated the plaintiff at the scene, and concluded that plaintiff was competent to sign a form refusing further medical treatment.[384] Plaintiff's condition deteriorated overnight resulting in permanent damage.[385] Plaintiff sued the EMS service providers and the employees individually for medical malpractice for inadequate treatment at the scene.[386]

Plaintiff filed a motion for summary disposition or a default judgment against the city EMS employees, based on their failure to file timely affidavits of meritorious defense.[387] The Revised Judicature Code[388] provides that in an action alleging malpractice, "the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files an affidavit [of merit], an affidavit of meritorious

377. *Id.* at 488, 722 N.W.2d at 912.
378. *State Farm*, 271 Mich. App. at 489, 722 N.W.2d at 912.
379. *Id.*
380. *Id.*
381. *Id.* at 491, 722 N.W.2d at 913.
382. 475 Mich. 403, 716 N.W.2d 236 (2006).
383. *Id.* at 406, 716 N.W.2d at 238.
384. *Id.*
385. *Id.*
386. *Id.* at 407, 716 N.W.2d at 238.
387. *Id.*
388. MICH. COMP. LAWS ANN. §§ 600.101-.9948 (West 1996).

defense signed by a health professional."[389] Defendants filed a motion for summary disposition, arguing that under the GTLA, they were immune because they were not grossly negligent and their conduct was not the "proximate cause" of plaintiff's injuries.[390]

The supreme court held that where a defendant asserts an immunity defense, the defendant is not obligated to comply with the affidavit of meritorious defense requirement unless an order has been entered denying governmental immunity to the defendant.[391] Where such an order has been entered, the defendant's obligation to comply with the requirements of MCL section 600.2912e will be stayed during the pendency of the appeal of that order.[392] The court noted that it has "repeatedly observed that governmental immunity legislation 'evidences a clear legislative judgment that public and private tortfeasors should be treated differently.'"[393] The court also cited an earlier decision which noted that a "central purpose" of governmental immunity is "to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity."[394] The court said that it believed that the "expense and burden to obtain an expert to prepare an affidavit of meritorious defense falls squarely within this purpose."[395]

Justice Marilyn Kelly filed a dissent with which Justice Michael Cavanaugh agreed. The dissent argued that governmental immunity "did not adhere as a matter of course" in a medical malpractice case just because the defendant is a government employee.[396] The dissent further argued that notwithstanding the affidavit requirement, defendants must still expend resources on preparing an immunity defense; such a defense would include many of the same proofs as would be necessary for the filing of the affidavit.[397] The dissent further noted that nothing in the statute "leads to the conclusion that the Legislature intended the language of MCL section 600.2912e be applied differently to different defendants or in different types of claims" and provides no exception to the mandatory affidavit requirement.[398] The dissent would have granted the plaintiff's motion for default judgment against the defendants.[399]

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389. MICH. COMP. LAWS ANN. § 600.2912e (West 2000).
390. *Costa,* 475 Mich. at 407, 716 N.W.2d at 238.
391. *Id.* at 412-13, 716 N.W.2d at 241.
392. *Id.* at 414, 716 N.W.2d at 242.
393. *Id.* at 409-10, 716 N.W.2d at 240 (citing Robinson v. City of Detroit, 462 Mich. 439, 459, 613 N.W.2d 307, 317-18 (2000)).
394. *Id.* at 410, 716 N.W.2d at 240 (citing Mack v. Detroit, 467 Mich. 186, 203 n.18, 649 N.W.2d 47, 57 n.18 (2002).
395. *Id.* at 410, 716 N.W.2d at 240.
396. *Costa,* 475 Mich. at 419, 716 N.W.2d at 244 (Kelly, J., dissenting).
397. *Id.* at 419, 716 N.W.2d at 244-45.
398. *Id.* at 421, 716 N.W.2d at 245.
399. *Id.* at 424, 716 N.W.2d at 247.

C. Motor Vehicle Exception

The plaintiff in *Martin v. Rapid Inter-Urban Transit Partnership*[400] was injured when she slipped and fell down the steps of a shuttle bus operated and maintained by a municipal transportation authority.[401] Ice and snow had accumulated on the steps, and the bus was not equipped with a required step heater or an ice scraper.[402] Plaintiff asserted, among other claims, that defendant negligently operated the vehicle pursuant to the motor vehicle exception of the governmental immunity statute.[403]

Defendants argued that since the fall occurred when the bus was stopped, the incident did not arise from the negligent operation of the bus. Defendants relied on *Chandler v. Muskegon Co.*,[404] which held that the "operation" of a motor vehicle encompasses activities that are directly associated with the driving of a motor vehicle.[405] The unsuccessful *Chandler* plaintiff was injured when the bus was parked in the maintenance garage. The *Martin* plaintiff argued in response that the determining factor in *Chandler* was whether the vehicle was in use as a bus at the time of the accident, not whether it was moving.[406] The trial court agreed with plaintiff and denied defendant's motion for summary disposition based upon *Chandler*.[407]

The court of appeals disagreed and reversed the trial court. The court stated that under the *Chandler* standard, "the proper inquiry is whether defendants' acts of alleged negligence include 'activities that are *directly* associated with *the driving* of a motor vehicle.'"[408] The court of appeals held that since the supreme court did not state that the exception encompasses activities *indirectly* associated with the driving of a motor vehicle, defendants' failure to install step heaters or clear the snow and ice "are not the type of activities directly associated with the driving" of the shuttle bus."[409]

In *Kik v. Sbraccia (Kik II)*,[410] a township EMS ambulance was transporting a pregnant woman to a hospital when the vehicle rolled,

400. 271 Mich. App. 492, 722 N.W.2d 262 (2006), *rev'd*, 480 Mich. 936, 740 N.W.2d 657 (2007).

401. *Id.* at 493, 722 N.W.2d at 263-64.

402. *Id.* at 494, 722 N.W.2d at 264.

403. *Id.* at 494-95, 722 N.W.2d at 264.

404. 467 Mich. 315, 320-21, 652 N.W.2d 224 (2002).

405. *Martin*, 271 Mich. App. at 495, 722 N.W.2d at 264.

406. *Id.*

407. *Id.* at 495-96, 722 N.W.2d at 265.

408. *Id.* at 500, 722 N.W.2d at 267 (citing *Chandler*, 467 Mich. at 321, 652 N.W.2d 224).

409. *Id.* at 500, 722 N.W.2d at 267. As this edition was going to press, the Michigan Supreme Court reversed the judgment of the Court of Appeals, holding that the loading and unloading of passengers is an activity within the "operation" of a shuttle bus. *See* Martin v. Rapid Inter-Urban Transit Partnership, 480 Mich. 936, 740 N.W.2d 657 (2007).

410. 272 Mich. App. 388, 726 N.W.2d 450 (2006).

causing the premature birth and subsequent death of the child.[411] The plaintiff parents claimed that the driver's negligent driving resulted in the mother's bodily injury and the child's death.[412] The parents also asserted a number of derivative claims on behalf of the father including loss of consortium.[413] The court of appeals initially upheld the ruling of the trial court that the loss of consortium claim was barred by governmental immunity.[414] The trial and appellate courts based their decisions on a prior court of appeals decision in *Wesche v. Mecosta County Road Commission*.[415] In *Wesche*, the court of appeals held that because a loss of consortium claim does not encompass bodily injury or property damage to the accident victim, it is not included in the motor vehicle exception to governmental immunity.[416] The appellate judges in *Kik I* emphatically stated, however, that in their opinion "*Wesche* was incorrectly decided."[417] The court of appeals stated further that if the Michigan appellate court rules did not obligate them to follow a prior court of appeals opinion that was not subsequently overruled,[418] they would render a different opinion.[419] Based on the court rule, the *Kik I* panel reversed the trial court's denial of summary disposition on the husband's loss of consortium claim.[420] The court of appeals provided an extensive analysis of *Wesche* and their reasons for disagreeing with its holding.[421]

Pursuant to the same court rule, the court of appeals convened a seven-judge conflict panel[422] to resolve the inconsistency between the *Kik I* and the *Wesche* decisions.[423] After review of both the trial and appellate court analyses, a four-judge majority of the conflict panel adopted the reasoning and analysis of the *Kik I* opinion and expressly

411. *See generally id.*
412. *Id.* at 390, 726 N.W.2d at 451.
413. *Id.* at 392, 726 N.W.2d at 267.
414. Kik v. Sbraccia (*Kik I*), 268 Mich. App. 690, 708 N.W.2d 766 (2005).
415. 267 Mich. App. 274, 705 N.W.2d 136 (2005).
416. *Id.* at 278-79, 705 N.W.2d 766.
417. *Kik I*, 268 Mich. App. at 711, 708 N.W.2d 766.
418. MICH. CT. R. 7.215(J)(1) provides:
> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

MICH. CT. R. 7.215(J)(1).
419. *Kik I*, 268 Mich. App. at 711, 708 N.W.2d 766.
420. *Id.* at 711-12, 708 N.W.2d 766.
421. *See id.* at 695-96, 708 N.W.2d at 769-70; *see also* MICH. CT. R. 7.215(J)(2):
> A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of the Court of Appeals.

MICH. CT. R. 7.215(J)(2).
422. MICH. CT. R. 7.215(J)(3).
423. *Kik II*, 272 Mich. App. at 391, 726 N.W.2d at 451.

overruled the portion of the *Wesche* opinion on the loss of consortium claim.[424] The panel ordered the trial court to vacate its order granting summary disposition to the township.[425] The three-judge conflict minority disagreed, and would hold that the motor vehicle exception to governmental immunity does not provide an exception for loss of consortium claims.[426]

D. Highway Exception

Both the court of appeals and the supreme court further limited the highway exception to governmental immunity during this *Survey* period. The decisions extended a multi-year pattern of decisions which significantly narrow the circumstances in which an injured plaintiff can successfully claim damages due to roadway and sidewalk defects.

In *Paul v. Wayne County Deptartment of Public Service*,[427] a motorcyclist was seriously injured when he drove his motorcycle onto the shoulder of the road to avoid a collision with an automobile.[428] The motorcycle hit a rut in the shoulder and crashed. The cyclist sued the county citing defects in the shoulder, relying in part on *Gregg v. State Hwy. Dep't.*[429] *Gregg* and two subsequent decisions held that defects in the shoulder of a highway come under the duty of repair and maintenance required by the governmental liability statute.[430] After plaintiff filed his lawsuit, the supreme court overruled *Gregg* in *Grimes v. Dep't. of Transportation.*[431] The trial court ruled that *Grimes* did not have retroactive application to this case; however, the court of appeals disagreed and held that the holding in *Grimes* should be applied retroactively.[432] The court of appeals reasoned that the purpose of the new rule in *Grimes* was to bring case law in line with the explicit language of the statute, and that allowing plaintiff's lawsuit to proceed would be "inconsistent with the Legislature's intent in carving out only a

424. *Id.*

425. *Id.*

426. *Id.* at 393, 726 N.W.2d at 452.

427. 271 Mich. App. 617, 722 N.W.2d 922 (2006).

428. *Id.* at 618, 722 N.W.2d at 923.

429. *See id.* at 619, 722 N.W.2d at 923-24 (citing *Gregg*, 435 Mich. 307, 458 N.W.2d 619 (1990)).

430. *See Gregg*, 435 Mich. at 317, 458 N.W.2d at 623. The liability statute is MCL section 691.1402(1), which provides in part:

> A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

MICH. COMP. LAWS ANN. § 691.1402(1) (West 2000).

431. 475 Mich. 72, 74, 715 N.W.2d 275, 276 (2006) (holding that "a shoulder, unlike a travel lane, is not the improved portion of a highway designed for vehicular travel" described in the highway exception).

432. *Paul*, 271 Mich. App. at 620, 722 N.W.2d at 924.

limited exception to immunity" under the statute.[433] The court further explained that there are "no reliance interests at work that support the continuation of *Gregg*'s erroneous interpretation of the highway exception."[434] The court stated that "motorists do not traverse shoulders because our case law might permit them to recover against the governmental agency in the event of an accident."[435] The court of appeals also concluded that retroactive application of *Grimes* would further the goals of the administration of justice because it would preclude plaintiffs such as this one from bringing claims "that never existed."[436]

The plaintiffs in *Buckner v. City of Lansing* represented two minor children who were struck by a car on a Lansing street, one of whom died as a result of her injuries.[437] The children had attempted to walk on the sidewalk along the street, but snow and ice that had accumulated on the walk after city snowplows cleared the street obstructed the girls' way.[438] The girls walked instead in the roadway next to the curb and against traffic flow, where they were struck by a car.[439] The court of appeals consolidated their individual claims for damages. As to the first case, the court of appeals held that the trial court's denial of summary disposition for the city was appropriate.[440] The court concluded that additional fact finding was necessary to determine if the "unnatural accumulation" of snow and ice caused by the plowing proximately caused the damage to the plaintiffs.[441] Additional fact finding was also necessary to determine whether the city breached its duty under the governmental liability statute and the "natural accumulation" precedents which the court discussed.[442] As to the second case, plaintiff had alleged that an incomplete city repair project created a defect in the sidewalk.[443] The court of appeals held that plaintiff failed to plead facts that showed that the defect proximately caused the accident.[444] "Further, the record indicates that at the point where the accident occurred, the girls had moved well beyond where the sidewalk was defective and the only thing preventing them from returning to the sidewalk was the accumulation of

433. *Id.* at 622, 722 N.W.2d at 925.
434. *Id.* at 622-23, 722 N.W.2d at 925.
435. *Id.* at 622, 722 N.W.2d at 925.
436. *Id.* at 624, 722 N.W.2d at 926.
437. 274 Mich. App. 672, 737 N.W.2d 775 (2007).
438. *Id.* at 670-71, 737 N.W.2d at 497-98.
439. *Id.* at 673, 737 N.W.2d at 777-78.
440. *Id.* at 673, 737 N.W.2d at 777.
441. *Id.* at 678, 737 N.W.2d at 780.
442. *Id.* at 677-78, 737 N.W.2d at 779.
443. *Buckner*, 274 Mich. at 682, 737 N.W.2d at 782.
444. *Id.* at 682-83, 737 N.W.2d at 782.

snow and ice."[445] The court of appeals affirmed the decision of the trial court as to the first case, but reversed and remanded as to the second.[446]

The supreme court issued an 81-page opinion in the case of *Rowland v. Washtenaw County Road Commission*[447] near the end of its 2006-2007 term. More than any other case reviewed for the *Survey* article in recent memory, the *Rowland* opinion illustrates the deep philosophical divisions and thinly-disguised animosity among the judicial factions on the court. Three justices wrote separate opinions along with the opinion of the court authored by Chief Justice Clifford Taylor.

The case arose from relatively simple facts. A pedestrian fell and was injured while crossing a street under the jurisdiction of a county road commission.[448] Plaintiff served her notice to the road commission on the 140th day after the accident, and then sued the road commission asserting the defective highway exception to governmental immunity. Plaintiff alleged that the pavement had "broken, uneven, dilapidated, depressed and/or potholed areas."[449] The road commission responded that the claim should be barred because the plaintiff failed to serve notice of the accident within the 120 days as the statute requires.[450] The trial court denied the road commission's motion for summary disposition, holding that there were genuine issues of fact concerning whether the defendant had shown prejudice in the statute's application to her case.[451] The trial court based its opinion on two prior supreme court opinions[452] which held that a defendant government agency must show prejudice before the 120 day deadline will be strictly enforced.[453] The court of appeals affirmed, and the supreme court granted the road commission's application for leave to appeal.

The supreme court majority held that the "plain language of the statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury."[454] The court specifically overruled the *Hobbs* and *Brown* decisions which held that absent a showing of actual prejudice to the agency, failure to comply with the 120 notice provision is not a bar to claims.[455] The court opined that a 100-year history of cases upholding notice requirements demonstrated that the enforceability of

445. *Id.* at 682-83, 737 N.W.2d at 782
446. *Id.* at 633, 737 N.W.2d at 782.
447. 477 Mich. 197, 731 N.W.2d 41 (2007).
448. *Id.* at 201, 731 N.W.2d at 44-45.
449. *Id.* at 201, 731 N.W.2d at 44-45.
450. *Id.* at 201, 731 N.W.2d at 45.
451. *Id.*
452. Hobbs v. Dept. of State Highways, 398 Mich. 90, 247 N.W.2d 754 (1976); Brown v. Manistee County Rd. Comm'n., 452 Mich. 354, 550 N.W.2d 215 (1996).
453. *Rowland,* 477 Mich. at 200, 731 N.W.2d at 44.
454. *Id.*
455. *Id.* at 215-16, 731 N.W.2d at 52-53.

notice requirements was "well settled."[456] The court noted that there was an "abrupt departure" from this history in a series of four opinions issued in the 1970s.[457] The rule which prevailed after the *Hobbs* case was that the notice requirement would be strictly enforced only if the government agency could show prejudice.[458]

The court concluded that the *Hobbs* and *Brown* cases were "wrongly decided and poorly reasoned."[459] The court argued that there is a rational basis for the notice requirements.[460] The court quoted favorably a century-old opinion upholding a similar notice requirement as a "just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments."[461] The court opined that the Legislature was well within its rights to create a statutory exception to broad governmental immunity and to place limits on the exception through the notice requirement.[462] Because the prior decisions "did in fact misread and misconstrue the statute and left it less workable," the court overruled *Hobbs* and *Brown*.[463] The court gave the decision retroactive effect because "there [were] no exigent circumstances that would warrant the 'extreme measure' of prospective application," and "no one was adversely positioned, we believe, in reliance" on the prior cases.[464]

Justice Markham concurred in the result, but wrote separately to respond to Justice Kelly's dissent and her alleged "view that the majority is insufficiently respectful of the precedents of this Court."[465] Justice Markmam attached a 19-page chart[466] which "summarizes the 40 cases during the past seven terms in which a precedent of this Court has been overruled and in which the Court majority has been aligned against Justice Kelly."[467]

Justices Weaver and Kelly dissented in part and concurred in part in an opinion authored by Justice Kelly. Justice Kelly wrote that the defendant was entitled to summary disposition because the plaintiff failed to supply defendant with a notice that included the statutorily-required "exact location and nature of the defect, the injuries sustained, and the names of the witnesses known at the time by the claimant."[468] Justice Kelly opined that the lower courts and the court majority erred in

456. *Id.* at 206, 731 N.W.2d at 47.
457. *Id.*
458. *Id.* at 208, 731 N.W.2d at 49.
459. *Rowland*, 477 Mich. at 210, 731 N.W.2d at 49-50.
460. *Id.* at 211, 731 N.W.2d at 50.
461. *Id.* at 211, 731 N.W.2d at 50 (citing Ridgeway v. Escanaba, 154 Mich. 68, 72-73, 117 N.W.2d 550 (1908)).
462. *Id.* at 212, 731 N.W.2d at 51.
463. *Id.* at 215, 731 N.W.2d at 52-53.
464. *Id.* at 221, 731 N.W.2d at 56.
465. *Rowland*, 477 Mich. at 223, 731 N.W.2d at 57.
466. *Id.* at 228-47, 731 N.W.2d at 60-67.
467. *Id.* at 224, 731 N.W.2d at 57.
468. *Id.* at 248, 731 N.W.2d at 67.

reaching the actual prejudice issue and in rejecting the stare decisis of the *Hobbs* and *Brown* cases.[469]

E. Sewage Disposal Event Exception

The definitions of the various terms in this exception to governmental immunity have been the subject of much controversy and litigation since the Legislature added the exception to the statute in 2001.[470] Defendants in almost all of the prior reported cases concerning this exception have been municipal owners and operators sewage systems. In *Linton v. Arenac County Road Commission*,[471] landowners filed suit against a county road commission whose jurisdiction only includes county roads.[472] Road commission employees cut down tree limbs and branches as part of a road maintenance project and deposited the debris in a drainage ditch.[473] Spring rains floated the debris down the ditch where it dammed against a culvert adjacent to plaintiff's property; the dam caused the property to flood damaging plaintiff's home, barn, and personal property.[474] After giving statutorily required notice of the flooding problem and damage and receiving inadequate response, the homeowners sued.[475]

The governmental immunity statute provides that a government agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a "sewage disposal system event."[476] A claimant must demonstrate multiple statutory requirements, including that the sewage disposal system had a defect[477] and that the government agency knew about and failed to correct the defect.[478] A "sewage system disposal event" means the overflow or backup of a *sewage disposal system* onto real property.[479] The statute defines a sewage disposal system as:

> [A]ll interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm

469. *Id.*
470. MICH. COMP. LAWS ANN. §§ 691.1416-.1419 (West Supp. 2007).
471. 273 Mich. App. 107, 729 N.W.2d 883 (2006).
472. *See id.* at 109, 729 N.W.2d 886.
473. *Id.* at 108, 729 N.W.2d at 885-86.
474. *Id.*
475. *Id.* at 109, 729 N.W.2d at 886.
476. MICH. COMP. LAWS ANN. § 691.1417(2) (West Supp. 2007).
477. MICH. COMP. LAWS ANN. § 691.1417(3)(b) (West Supp. 2007).
478. MICH. COMP. LAWS ANN. §§ 691.1417(3)(c),(d) (West Supp. 2007).
479. MICH. COMP. LAWS ANN. § 691.1417(k) (West Supp. 2007).

> water drain system under the jurisdiction and control of a governmental agency.[480]

The homeowners argued that the road commission breached its duty to maintain the roadside drainage ditch and culvert.[481] They also alleged that the drainage ditch and the culvert are a "storm water drain system" as that term is used in the statutory definition of "sewage disposal system."[482] The road commission argued that the roadside ditch is not part of a sewage disposal system because it is neither used nor designed for sewage.[483] The road commission further argued that even though the statute includes the phrase "storm water drain system" in the definition of a sewage disposal system, the exception only applies to storm drains that also service sewage, such as a combined storm and sanitary sewer.[484] The road commission argued that this particular ditch was a "simple county roadside ditch . . . which allowed surface water from heavy spring rains to flood."[485] The trial court granted summary disposition to the road commission. The homeowners appealed.

The court of appeals reversed and remanded. The court of appeals first held that the sewage disposal event exception applies to systems designed for storm water drainage.[486] The court argued that is the Legislature had intended that the exception only apply to sewers carrying sewage, then it would not have made appoint of differentiating between storm sewers, sanitary sewers, and combined sanitary and storm sewers in the definition.[487] The court also held that the ditch in question was a "storm water drain" within the exception, citing an earlier case which held that the exception applies to county drains that carry drainage water.[488]

Since the statute does not define the phrase "storm water drainage *system*," the court analyzed separately the definitions of "drain,"[489] and "system."[490] After consulting relevant dictionary definitions and definitions in the Drain Code,[491] the court concluded that the roadside drainage ditch was a storm water drain for purposes of the exception.[492] As to whether the drainage ditch is part of a storm water drain system

480. MICH. COMP. LAWS ANN. § 691.1416(j) (West Supp. 2007).
481. *Linton*, 273 Mich App. at 109, 729 N.W.2d at 886.
482. *Id.*
483. *Id.*
484. *Id.* at 116-17, 729 N.W.2d at 889.
485. *Id.* at 117, 729 N.W.2d at 890.
486. *Id.* at 116, 729 N.W.2d at 889.
487. *Linton*, 273 Mich App. at 116, 729 N.W.2d at 890.
488. *Id.* (citing Jackson County Drain Comm'r v. Village of Stockbridge, 270 Mich. App. 273, 285-87, 717 N.W.2d 391 (2006)).
489. *Id.* at 118-19, 729 N.W.2d at 890-91.
490. *Id.* at 119-21, 729 N.W.2d at 891-92.
491. MICH. COMP. LAWS ANN. §§ 280.1-.630 (West 1996).
492. *Linton*, 273 Mich. App. at 121, 729 N.W.2d at 892.

under the exception, the court noted that the issue was whether the roadside drainage ditch in this matter is, like the drainage ditch in the *Jackson* case, "part of a system of connected drains, i.e. an assemblage or combination of drains that forms a complex or unitary whole."[493] The court remanded the case to the trial court for further discovery on this issue.[494]

493. *Id.* at 120, 729 N.W.2d at 892.
494. *Id.* at 121, 729 N.W.2d at 892.