CIVIL RIGHTS

LEONID FELLER[†]

Table of Contents

I. INTRODUCTION

Although the Michigan Supreme Court issued only four opinions directly impacting civil rights jurisprudence during the *Survey* period, the majority justices made plain that in this arena, as in others, they would demand strict construction of pertinent law. Thus, the Court twice reversed plaintiff-friendly results under the Religious Land Use and Institutionalized Persons Act (RLUIPA),[1] shunning economic-based analyses by the court of appeals and confining the federal statute's

---

† Assistant United States Attorney, Eastern District of Michigan. Adjunct Professor, Wayne State University Law School. B.A. 1997, University of Michigan; J.D. 2000, Harvard Law School, *cum laude*. The author would like to thank Robert Murkowski, third-year student and Managing Editor of the *Wayne Law Review*, who made this article possible.

1. 42 U.S.C. §§ 2000cc *et seq.* (2000).

applicability to the rare case where a land-use regulation can be shown to coerce individuals into acting contrary to their religious beliefs.[2] The court likewise limited the availability of claims under the Michigan Elliott-Larsen Civil Rights Act,[3] saving its most significant rebuke of "judicial activism" for a seemingly innocuous denial of leave to appeal that rejected both the classification of the Act as a "remedial statute" and it must be "liberally construed."[4]

Following the Supreme Court's lead, two cases decided by the court of appeals during the *Survey* period further restricted the scope of the Civil Rights Act, holding the statute's antidiscrimination protections unavailable to juridical plaintiffs, such as corporations,[5] and its public accommodation provisions inapplicable to private clubs.[6] Other court of appeals panels, however, seemingly set about challenging the orthodoxy laid down by the state's highest court. These cases expanded the coverage of the Civil Rights Act to include claims of same-sex discrimination[7] and held casino security officers to be state actors working under color of law for purposes of 42 U.S.C. § 1983.[8]

II. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

The Religious Land Use and Institutionalized Persons Act (RLUIPA)[9] prohibits any state or local government from enforcing a land use regulation, allowing for individualized assessments of property use, in a way that imposes a substantial burden on the free exercise of religion *unless* the government demonstrates that its action is the least restrictive means of furthering a compelling government interest.[10]

---

2. *See* Greater Bible Way Temple of Jackson v. City of Jackson et al, 478 Mich. 373, 733 N.W.2d 734 (2007), *cert. denied*, 128 S. Ct. 1894 (2008); and Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 480 Mich. 1143, 746 N.W.2d 105 (2008).

3. MICH. COMP. LAWS ANN. §§ 37.2101 *et seq.* (West 2001). *See* Ramanathan v. Wayne State Univ. Bd. of Governors, 480 Mich. 1090, 745 N.W.2d 115 (2008).

4. *See* Elezovic v. Bennett, 480 Mich. 1001, 742 N.W.2d 349 (2007).

5. *See* Safiedine v. City of Ferndale, 278 Mich. App. 476, 753 N.W.2d 260, *aff'd in part*, 482 Mich. 995, 755 N.W.2d 659 (2008).

6. *See* Doe v. Young Marines of The Marine Corps League, 277 Mich. App. 391, 745 N.W.2d 168 (2007).

7. *See* Robinson v. Ford Motor Co., 277 Mich. App. 146, 744 N.W.2d 363 (2007).

8. *See* Moore v. Detroit Entertainment, L.L.C., 279 Mich. App. 195, 755 N.W.2d 686 (2008).

9. 42 U.S.C. § 2000cc (2000).

10. 42 U.S.C. §§ 2000cc (a)(1), (a)(2)(C) (2000). The statute provides:

> No government shall impose or implement a land use regulation [under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the

On a constitutional level, the RLUIPA was passed by Congress in response to *City of Boerne v. Flores*,[11] in which the United States Supreme Court struck down the Religious Freedom Restoration Act (RFRA).[12] On a practical level, the RLUIPA was aimed squarely at city-planning conventions that eliminated religious institutions "from downtown and commercial areas because municipalities believe that such uses do not attract enough traffic to generate retail and tax revenues for surrounding areas [while] they are simultaneously being eradicated from residential districts for creating too much traffic and noise."[13]

A. Greater Bible Way Temple of Jackson v. City of Jackson

In *Greater Bible Way Temple of Jackson v. City of Jackson*,[14] the plaintiff congregation purchased eight contiguous lots across the street from its church.[15] Seven of the lots were vacant while the last held an empty single-family residence.[16] The Temple sought to build an assisted living center for elderly and disabled people on the property, a cause "central" to the ministry according to its founder, and asked to rezone the parcels from "single-family residential" (R-1) to "multiple-family residential" (R-3).[17] When the city refused, the church sued under RLUIPA.[18]

---

proposed uses for the property involved] in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

Id.

11. 521 U.S. 507 (1997).

12. 42 U.S.C. §§ 2000bb *et seq.* (1993). RFRA, in turn, had been passed in answer to Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), in which the Supreme Court upheld Oregon's ban on the use of peyote in religious ceremonies. *See generally* Michael Paisner, Note, *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537 (2005).

13. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 930 (2001).

14. 478 Mich. 373, 733 N.W.2d 734.

15. 478 Mich. at 377, 733 N.W.2d at 737.

16. *Id.*

17. *Greater Bible Way*, 268 Mich. App. 673, 676-80, 708 N.W.2d 756, 759-61 (Mich. App. 2005), *rev'd*, 478 Mich. 373, 733 N.W.2d 734 (2007), *cert. denied*, 128 S. Ct. 1894 (2008).

18. *Greater Bible Way*, 478 Mich. at 378, 733 N.W.2d at 738.

Following a bench trial, the circuit court ruled that the city and its planning commission had violated RLUIPA, ordered the city to implement the necessary rezoning, and awarded plaintiff more than $30,000 in attorney fees and costs.[19] A unanimous court of appeals affirmed.[20]

The Michigan Supreme Court, in an opinion authored by Justice Markman, and joined by Justices Taylor, Corrigan, and Young, reversed.[21] In an expansive ruling, the Court held:

> We conclude that a refusal to rezone does not constitute an "individualized assessment," and, thus, that RLUIPA is inapplicable. Further, even if RLUIPA is applicable, the building of an apartment complex does not constitute a "religious exercise," and even if it does constitute a "religious exercise," the city of Jackson's refusal to rezone plaintiff's property did not substantially burden plaintiff's religious exercise, and even if it did substantially burden plaintiff's religious exercise, the imposition of that burden is in furtherance of a compelling governmental interest and constitutes the least restrictive means of furthering that interest. Therefore, even assuming that RLUIPA is applicable, it has not been violated.[22]

In reaching this result, the Court likely foreclosed not only the Greater Bible Way Temple's proposed assisted living center but, likely, any future RLUIPA claim in Michigan.

1. The Majority Analysis

Taking each rationale in turn, the Court first decided that Jackson's municipal zoning ordinance did not involve an "*individualized* assessment" of property use by the government, a necessary predicate for application of RLUIPA.[23] An "individualized assessment" is one that involves a "case-by-case evaluation of the proposed activity."[24] The majority held that even though the church's request to rezone directly affected only the Temple's particular parcels, "the entire community would be bound by the city's decision to rezone or not rezone that

19. *Id.*
20. *Id.*
21. *Id.* at 377, 733 N.W.2d at 737.
22. *Id.*
23. *Id.* at 388-90, 733 N.W.2d at 743-44 (emphasis added).
24. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1225 (11th Cir. 2004).

property" and, therefore, "applied to the entire community, not just plaintiff."[25]

Despite this seemingly dispositive conclusion, the Court turned to the next question of whether plaintiff was seeking to use its property for the purpose of religious exercise.[26] RLUIPA defines "religious exercise" to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[27] But the Court rejected Bible Way Temple's claim that an assisted living center was "central" to its teachings, deciding that "the building of an apartment complex [is] not a religious exercise."[28]

---

25. *Greater Bible Way*, 478 Mich. at 389 n.12, 733 N.W.2d at 743-44 n.12 (quotations and citation omitted). The Court's mode of analysis, by connecting site-specific determinations to the municipality at large, would imply that no zoning board judgment would ever constitute an "individualized assessment." Under this reasoning, all local zoning ordinances, in Michigan and elsewhere, therefore would stand outside RLUIPA's reach. But this plainly could not have been Congress' intent, which defined "land use regulation"—the subject of the statute—to include "a *zoning* or landmarking law, or the *application* of such a law, that limits or restricts a claimant's use or development of land . . . ." 42 U.S.C. § 2000cc-5(5) (2000) (emphasis added). And even if the Court's reasoning as to what constitutes an "individualized assessment" did not paint with too broad a brush, the majority's interpretation necessarily relied on semantics, something Justice Markman's opinion apparently recognized in a footnote: "if plaintiff had requested a variance [rather than a rezoning] and the city had refused that request, this might constitute an 'individualized assessment' [under RLUIPA."] *Greater Bible Way*, 478 Mich. at 390 n.14, 733 N.W.2d at 744 n.14 (citing *Shepherd Montessori Ctr. Milan*, 259 Mich. App. at 320, 675 N.W.2d at 276).

26. *Greater Bible Way*, 478 Mich. at 391-93, 733 N.W.2d at 745.

27. 42 U.S.C. § 2000cc-5(7)(2000) (emphasis added).

28. *Greater Bible Way*, 478 Mich. at 394, 733 N.W.2d at 746 (emphasis added). It is worth comparing the Supreme Court's "religious exercise" conclusion, and the recitation of facts leading thereto, to that of the Court of Appeals' unanimous opinion affirming judgment in favor of the church. In particular, the appellate court quoted an affidavit from the Temple's founder, describing the property's intended use as an assisted living center for the aged and averring that "providing housing to the elderly and disabled 'is central' to plaintiff's ministry in Jackson . . . this mission is given to the church through the teachings of Jesus Christ 'and is a religious belief held by the Greater Bible Way Temple.'" *Greater Bible Way*, 268 Mich. App. at 680, 708 N.W.2d at 761. In the Supreme Court's version, no mention is made of the land's proposed use as an assisted living center to advance the church's central mission. Instead, the majority gives short shrift to the clergyman's affidavit in concluding that "[n]o evidence has been presented to establish that the proposed apartment complex would be used for religious worship or for any other religious activity. Instead, it appears that the only connection between the proposed apartment complex and 'religious exercise' is the fact that the apartment complex would be owned by a religious institution." *Id.* at 394, 733 N.W.2d at 746. Considering the gulf between the factual recitations offered by the Court of Appeals and the Supreme Court, one cannot help but be reminded of Senator Daniel Patrick Moynihan's oft-heard refrain, "[e]veryone is entitled to his own opinions, but not his own

After rejecting the church's "individualized assessment" and "religious exercise" arguments, the most significant part of the majority's opinion came in considering the third RLUIPA factor: whether the city's refusal to rezone the property imposed a "substantial burden" on Greater Bible Way's free exercise of religion.[29] The court of appeals had adopted a "substantial burden" analysis at the intersection of religious doctrine and economic reality. Because of the array of services the congregation provided to the elderly, the appellate court found, the assisted living center had to be located close to the Temple but no land nearby was zoned "R-3" to permit construction of the facility.[30] As a result, the rezoning denial would cost the church a $150,000 investment in the property, a "substantial burden" in the appellate court's judgment.[31]

The Supreme Court disagreed. After surveying a body of federal case law,[32] the majority restricted the definition of "substantial burden" to include only those situations "where there is governmental action that coerces one into acting contrary to one's religious beliefs by way of doing something that one's religion prohibits or refraining from doing something that one's religion requires."[33] On the other hand, "[a] mere inconvenience or irritation does not constitute a 'substantial burden.' Similarly, something that simply makes it more difficult in some respect to practice one's religion does not constitute a 'substantial burden.'"[34]

Without considering the economic realities put forth by the court of appeals, the majority concluded that no "substantial burden" had been imposed against the church.[35] The majority reasoned that "[t]he city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants

---

facts." *Daniel Patrick Moynihan*, GAIA COMMUNITY, *available at* http://www.gaia.com/quotes/Daniel_Patrick_Moynihan (last visited Apr. 21, 2009).

29. *Greater Bible Way*, 478 Mich. at 394, 733 N.W.2d at 746.

30. *Id.* at 680, 708 N.W.2d at 762.

31. *See id.* at 681, 708 N.W.2d at 762.

32. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 717-18 (1981); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988); Civil Liberties for Urban Believers v. Chicago, 342 F.3d 752 (7th Cir. 2003); San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004); Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004); Lighthouse Institute for Evangelism Inc. v. City of Long Branch, 100 Fed. Appx. 70 (3d Cir. 2004); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006); Spratt v. Rhode Island Dep't of Corrections, 482 F.3d 33, 38 (1st Cir. 2007).

33. *Greater Bible Way*, 478 Mich. at 400-01, 733 N.W.2d at 750.

34. *Id.* at 401, 733 N.W.2d at 750.

35. *See id.*

to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes."[36]

Finally, the Supreme Court turned to the last two RLUIPA factors: whether the municipality acted in furtherance of a compelling government interest, and whether it did so using the least restrictive means possible.[37] The trial and appellate courts had held that the city of Jackson failed to demonstrate that traffic regulation, blight prevention, and urban sprawl represented compelling government interests warranting denial of the church's rezoning request.[38] Instead, the lower courts concluded that Jackson's characterization of the neighborhood as "single-family residential" had already been compromised by the presence of the plaintiff church across the street and by the absence of improvements on seven of the eight parcels at issue.[39] Further, expert testimony demonstrated that rezoning would result in traffic congestion only two or three times a year and that there was little likelihood of either blight or urban sprawl.[40] And, in any event, the city had available to it any number of less restrictive options to deal with its concerns, including but not limited to a "compromised reduction in the size of the assisted living complex."[41]

The Supreme Court disagreed. Setting aside the lower courts' analyses in favor of the general principle that a "city has [a] cognizable compelling interest to enforce its zoning laws,"[42] the Supreme Court held that "[g]iven the city's general interest in zoning, and the city's specific interest in maintaining the character of this single-family residential neighborhood, we conclude that the city has a compelling interest in maintaining single-family residential zoning and in not rezoning this area of the city."[43] As to the least restrictive means available, the majority reduced the analysis to a simple binary choice: "the city could have done one of two things—it could have granted or it could have denied plaintiff's request to rezone the property. The city decided to deny plaintiff's request to rezone the property . . . There do not appear to be any less restrictive means of maintaining the single-family residential zoning."[44]

---

36. *Id.*
37. *Id.* at 402-08, 733 N.W.2d at 751-54.
38. *Id.* at 683, 708 N.W.2d at 763.
39. *Greater Bible Way*, 268 Mich. App. at 683, 708 N.W.2d at 763.
40. *See id.*
41. *Id.* at 684, 708 N.W.2d at 763.
42. *Id.* at 404, 733 N.W.2d at 751 (quotations and citation omitted).
43. *Id.* at 406-07, 733 N.W.2d at 753.
44. *Id.* at 407, 733 N.W.2d at 753.

2. Concurrences

Although all seven members of the Court concurred in the outcome in *Greater Bible Way Temple*, the four-justice majority's expansive rejection of RLUIPA clearly troubled the remaining three, two of whom wrote separate concurrences. Justice Cavanagh agreed that the Temple had failed to demonstrate that construction of its assisted living center was a religious exercise but found the remainder of the majority's analysis "unnecessary."[45] Justice Kelly, in turn, concluded that Jackson's zoning regulations did not involve an "individualized assessment" but, like Justice Cavanagh, believed the rest of the opinion to be surplusage, finding "[t]he majority's discussion of these issues is mere *dicta*."[46]

B. Shepherd Montessori Center Milan v. Ann Arbor Charter Township

The Supreme Court added a final addendum to the constraints on RLUIPA it had imposed in *Greater Bible Way Temple* in *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*.[47] There, the plaintiff operated a Catholic Montessori day-care program at the Domino's Farms Office Park in Ann Arbor.[48] The Catholic group then leased additional property immediately adjacent to its day-care facility, intending to operate a consolidated school for up to 100 students.[49] The newly-leased space was zoned for office park use but the prior occupant, "Rainbow Rascals," (a non-religious, pre-school day-care program), had secured a variance, which Catholic Montessori sought to transfer to itself.[50] After the Ann Arbor Charter Township Zoning Board refused the transfer, plaintiff brought suit under RLUIPA.[51]

Following two grants of summary disposition by the trial court in favor of the zoning board and two rounds of appeal, the Michigan Court of Appeals ordered judgment in favor of Catholic Montessori.[52] Finding that the Ann Arbor board's refusal to grant a variance was an "individualized determination" and that "plaintiff's use of the property

45. *Greater Bible Way*, 268 Mich. App. at 410, 733 N.W.2d at 755.

46. *Id.* at 410-11, 733 N.W.2d at 755 (emphasis added).

47. 480 Mich. 1143, 746 N.W.2d 105.

48. *See* Shepherd Montessori Ctr. Milan v. Ann Arbor Twp., 259 Mich. App. 315, 321-23, 675 N.W.2d 271, 276-77 (2003).

49. *See id.*

50. *See id.*

51. *See id.*

52. *See* Shepherd Montessori Ctr. Milan v. Ann Arbor Twp., 275 Mich. App. 597, 739 N.W.2d 664 (2007).

for religious education was a religious exercise,"[53] the appellate court—as it had in *Greater Bible Way Temple*—set out an economic-based test for whether the zoning board's determination imposed a substantial burden on the plaintiff:

> [1] whether there are alternative locations in the area that would allow the school consistent with the zoning laws; [2] the actual availability of alternative property, either by sale or lease, in the area; [3] the availability of property that would be suitable for a K-3 school; [4] the proximity of the homes of parents who would send their children to the school; and [5] the economic burdens of alternative locations.[54]

Agreeing that "there were no other available properties in the area for [Catholic Montessori] and that defendants offered no documentary evidence" of a compelling government interest in refusing the variance, the Michigan Court of Appeals ordered summary disposition for the plaintiff.[55]

In a one-page order, the Supreme Court vacated and remanded in lieu of granting leave to appeal, ordering reconsideration in light of *Greater Bible Way Temple*: "In particular, the Court of Appeals should reconsider whether the denial of the zoning variance imposed a 'substantial burden' on the plaintiff's religious exercise, *i.e.*, whether the denial of the variance coerces individuals into acting contrary to their religious beliefs."[56]

Soon after, on remand, "[i]n light of the Supreme Court's interpretation of RLUIPA, [the Michigan Court of Appeals found itself] compelled to reach a similar result."[57] Rather than the economic-centered test it had adopted, the appellate court recognized that under the Supreme Court's analysis, "plaintiff must show that the denial of the variance

---

53. *See id.* at 602, 739 N.W.2d at 668 (citing *Shepherd Montessori*, 259 Mich. App. at 327-29, 675 N.W.2d at 279-81).

54. *See id.* at 602, 739 N.W.2d at 668.

55. *Id.* at 603-10, 739 N.W.2d at 669-73.

56. *See Shepherd Montessori*, 480 Mich. at 1143, 746 N.W.2d at 106 (quotations and citation omitted). Consistent with her concurrence in *Greater Bible Way Temple*—arguing that all but the Court's holding as to "individualized assessment" was "mere *dicta*"—Justice Kelly dissented, urging that leave to appeal should have been granted "to consider whether the denial of a variance implicates [RLUIPA (*i.e.* is an "individualized assessment")]. If it does, we should determine whether it imposes a substantial burden on plaintiff's exercise of its religious beliefs." *Id.*

57. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 280 Mich. App. 449, 454, 761 N.W.2d 230, 233 (2008).

request 'coerces' individuals into acting contrary to their religious beliefs."[58] In the absence of such proof, and "notwithstanding substantial evidence of prohibitive cost and a lack of available, suitable space," plaintiff's RLUIPA claim failed.[59]

In summary, taken together, *Greater Bible Way Temple* and *Shepherd Montessori* severely restrict, and likely eliminate, the availability of any future RLUIPA claim in Michigan. To state a RLUIPA claim under the Supreme Court's analysis, a plaintiff would first have to demonstrate that a municipality's denial of a particular property use "coerces" the plaintiff into acting "contrary to their religious beliefs."[60] Such coercion, moreover, cannot be demonstrated based on the harsh economic consequences of a municipality's refusal to rezone or grant a variance.[61] And because it is always possible to build a structure "on property that is zoned for [a compatible use],"[62] it is difficult to imagine any scenario where a plaintiff could meet this threshold test.

III. THE MICHIGAN CIVIL RIGHTS ACT

The Elliott-Larsen Civil Rights Act[63] broadly protects "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination."[64] "Fundamentally, the [Civil Rights Act] prohibits decision makers from using race, sex, national origin, and marital status, among other human characteristics, as determining factors in decisions affecting the employment, education, housing, and public accommodations of people."[65]

Following an introductory section, the Civil Rights Act is broken up into four substantive parts. Article 2 forbids employment-related decisions, including but not limited to hiring, firing, and compensation, from being made on account of "religion, race, color, national origin, age, sex, height, weight, or marital status."[66] Article 3 bars the denial of

58. *Id.*

59. *Id.* Despite the failure of the RLUIPA claim, the appellate court affirmed on remand its prior holding that Catholic Montessori also prevailed on equal protection grounds. "[P]laintiff and Rainbow Rascals were similarly situated, and defendants failed to offer a reason for refusing to permit plaintiff to operate its school in the same space that Rainbow Rascals had operated its day care program." *Id.* at 455, 761 N.W.2d at 233.

60. *Shepherd Montessori*, 480 Mich. at 1143, 746 N.W.2d at 106.

61. *Greater Bible Way*, 478 Mich. at 400-01, 733 N.W.2d at 750.

62. *Id.* at 401, 733 N.W.2d at 750.

63. MICH. COMP. LAWS ANN. §§ 37.2101 *et seq.* (West 2001).

64. MICH. COMP. LAWS ANN. § 37.2102 (West 1992).

65. *See Safiedine*, 278 Mich. App. at 484, 753 N.W.2d at 264.

66. MICH. COMP. LAWS ANN. §§ 37.2201 *et seq.* (West 1980).

"the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" on the basis of these prohibited characteristics.[67] Article 4 applies the statute's prohibitions to the actions of educational institutions.[68] Lastly, Article 5 bans the denial of housing or other real estate opportunities on the basis of these outlawed considerations.[69]

During the *Survey* period, the Michigan Supreme Court and court of appeals issued significant decisions interpreting Articles 2 and 3 of the Michigan Civil Rights Act, impacting both employment and public accommodation jurisprudence.

A. Employment Discrimination

1. Ramanathan v. Wayne State University Board of Governors

In *Ramanathan v. Wayne State University Board of Governors*,[70] the plaintiff, of Asian-Indian descent, alleged that he was denied tenure at Wayne State University's School of Social Work because of racial and national origin discrimination.[71] After being hired in 1992, Ramanthan first received a favorable review from the school's dean in the spring of 1993, attaining the highest possible ranking.[72] In October 1993, however, Ramanthan met again with the dean and complained that another professor had made discriminatory remarks to him about his race.[73] Ramanthan also complained to the school's Equal Opportunity Office (EOO).[74]

After the EOO complaint was filed, the dean, said to be a closet racist himself, allegedly initiated a campaign of retaliation against the plaintiff.[75] The dean purportedly made repeated derogatory comments about Indians, referring to a sitar, an Indian musical instrument, as "outdated" and responding to criticism at a faculty meeting by saying, "I don't mind being the sacrificial lamb, I just hope I'm not curried."[76]

---

67. MICH. COMP. LAWS ANN. §§ 37.2301 *et seq.* (West 2000).
68. MICH. COMP. LAWS ANN. §§ 37.2401 *et seq.* (West 1977).
69. MICH. COMP. LAWS ANN. §§ 37.2501 *et seq.* (West 1977).
70. 480 Mich. 1090, 745 N.W.2d 115.
71. *See id.* at 1091-92, 745 N.W.2d at 116-17 (Markman, J., dissenting).
72. *See id.* at 1091, 745 N.W.2d at 116.
73. *See id.*
74. *See id.*
75. *See id.* at 1091-92, 745 N.W.2d at 116-17.
76. *See Ramanathan*, 480 Mich. at 1091-92, 745 N.W.2d at 116-17.

In October 1994, Ramanthan applied for tenure.[77] The dean recommended that tenure be denied, as did two of nine letters from reviewers.[78] The School of Social Work Promotion and Tenure Committee recommended that tenure be granted, the University Promotion and Tenure Committee recommended that it be denied, and the university provost ultimately rejected Ramanathan's application in April 1995.[79]

Just shy of three years later, Ramanathan brought suit alleging, inter alia, racial discrimination and retaliation under the Civil Rights Act.[80] After motion practice and multiple appellate decisions and remands considering whether plaintiff's claims were time-barred,[81] the university moved for summary disposition, arguing that Ramanathan had failed to present any genuine issue of material fact to sustain either his discrimination or retaliation claims because there was no evidence that the decision-making provost, as opposed to the dean, harbored any racial animus toward the plaintiff.[82]

The trial court disagreed, denying summary disposition, and the court of appeals affirmed.[83] The appeals court held that the dean's comments could be viewed as discriminatory and, in conjunction with the negative actions taken against Ramanathan following his EOO

77. *See id.* at 1092, 745 N.W.2d at 117.

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* The University initially moved for summary disposition on Ramanathan's Civil Rights Act claims, arguing that they were barred by the three-year statute of limitations because all the events at issue, with the exception of the ultimate tenure decision, took place more than three years before suit was brought. The trial court granted summary disposition but the court of appeals reversed under the "continuing violations" doctrine of Sumner v. Goodyear Tire & Rubber Co., 427 Mich. 505, 398 N.W.2d 368 (1986). Shortly, however, the Michigan Supreme Court overruled *Sumner* in Garg v. Macomb Co. Community Mental Health Svcs., 472 Mich. 263, 696 N.W.2d 646 (2005). Defendant filed a new motion for summary disposition arguing that plaintiff's claims were time-barred and that, under note fourteen of the *Garg* decision, events occurring outside the statute of limitations period could not be considered even as evidence to prove up a timely claim. *Id.* The trial court again granted summary disposition to defendant. *Id.* Subsequently, the Michigan Supreme Court changed the rules again, modifying *Garg* by removing footnote fourteen. *See* Fillmore Twp. v. Sec. of State, 473 Mich. 1205, 699 N.W.2d 697 (2005). Although the implications of deleting footnote fourteen were, at best, "unclear with respect to the admission of evidence," as a result, the trial court reinstated Ramanathan's case and the Court of Appeals affirmed. *See Ramanathan*, 480 Mich. at 1092, 1097, 745 N.W.2d at 117, 121.

82. *See id.* at 1092-93, 745 N.W.2d at 117-18 (Markman, J., dissenting)

83. *See id.*

complaint, were sufficient to create a triable issue of fact on his discrimination and retaliation claims.[84]

The Michigan Supreme Court denied leave to appeal but reversed in part, with the same four-justice majority as in *Greater Bible Way Temple* and *Shepherd Montessori* holding that Ramanathan had "not presented a genuine issue of material fact to sustain his claim of racial or national origin discrimination in violation of the Civil Rights Act."[85] Justices Taylor, Markman, Corrigan, and Young reasoned that "[t]he plaintiff presented no evidence that the Provost [who made the tenure decision] harbored any national origin or racial animus toward the plaintiff [and] the plaintiff cannot show any relevant connection between the identified comments of the Dean of the School of Social Work in 1993 and the Provost's tenure decision in 1995."[86]

On the other hand, three of the four majority justices believed that Ramanathan *had* done enough to survive summary disposition on his retaliation claim. They were joined in this regard by Justices Cavanagh, Weaver, and Kelly, who would have affirmed the court of appeals both as to the retaliation claim and the discrimination claim.[87]

Justice Markman dissented in part from the majority opinion, arguing that Ramanathan's retaliation claim should be dismissed as well.[88] To establish a prima facie retaliation claim, Justice Markman summarized, a plaintiff must show: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action."[89]

Here, in the dissent's view, Ramanathan had failed to satisfy the fourth factor, establishing a causal connection, in at least two respects. First, the dean's "sitar" and "curried lamb" comments—"mere cultural references" made a year prior to the tenure decision in the midst of lengthy faculty meetings unrelated to and not directed toward the plaintiff—"neither constitute direct evidence of discriminatory bias nor rise even to the level of 'stray remarks'[90] of bias."[91] Second, because the

84. Ramanathan v. Wayne State Univ. Bd. of Governors, No. 227726, 2002 WL 551097, *4-7 (Mich. Ct. App. Apr. 12, 2002) (per curiam).

85. *Ramanathan*, 480 Mich. at 1091, 745 N.W.2d at 116.

86. *Id.*

87. *See id.*

88. *See id.* (Markman, J., dissenting)

89. *See id.* at 1093, 745 N.W.2d at 118 (quoting *Garg*, 472 Mich. at 273, 696 N.W.2d at 653).

90. *Id.* "Stray remarks" may constitute circumstantial evidence of bias depending on several factors, including:

provost, not the dean, was the ultimate decision-maker, to survive summary disposition, Ramanathan had to show that "the dean's animus may be imputed to the provost or that the dean's approval was necessary for tenure to be granted, thereby making him the de facto decision-maker."[92] According to the dissent, the plaintiff had failed to produce any evidence in either regard.

In Justice Markman's view, in sum, *Ramanathan* represents a victory for civil rights plaintiffs—despite dismissing half of the plaintiff's claims in the present dispute—because:

> [t]he practical effect of the majority's order will be: (a) to increasingly immunize persons who have filed complaints of discrimination from subsequent adverse employment actions and thereby encourage baseless filings of discrimination by giving greater weight to mere temporal relationships in assessing whether discrimination has occurred; (b) to inject courts more deeply into the business of monitoring what is, at most, insensitive speech rather than speech evidencing discriminatory bias; (c) to throw into confusion the identity of the actual decision-maker in the employment process upon whom evidence of bias must be focused; and (d) to cast doubt upon the integrity of a growing number of discrimination trials by failing to clarify under *Garg* the proper scope of admissible evidence in such trials.[93] The decisions of this Court have consequences and such consequences cannot be disclaimed by the majority simply because a decision is issued by order rather than by opinion.[94]

While Justice Markman surely is correct that consequences may flow as readily from a supreme court order as from an opinion, as discussed with respect to both *Shepherd Montessori*, *supra*, and *Elezovic v.*

> (1) whether they were made by a decision-maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision.

Ramanathan, 480 Mich. at 1094-95, 745 N.W.2d at 119 (Markman, J., dissenting) (quoting Sniecinski v. Blue Cross & Blue Shield of Mich., 469 Mich. 124, 136 n.8, 666 N.W.2d 186, 194 n.8 (2003)).

91. *Ramanathan*, 480 Mich. at 1094, 745 N.W.2d at 119 (Markman, J., dissenting).

92. *Id.* at 1096-97, 745 N.W.2d at 120-21.

93. *See supra* note 81 (discussing subparagraph (d)).

94. *Id.* at 1097, 745 N.W.2d at 121-22.

Bennett, infra, whether his predictions on *Ramanathan's* impact prove equally accurate remains for a future *Survey*.

2. Elezovic v. Bennett

In its only other decision specifically addressing the Civil Rights Act, as in *Ramanathan*, the Michigan Supreme Court likewise failed to grant leave to appeal. *Elezovic v. Bennett*,[95] a case that had already traveled once to the Michigan Supreme Court and back,[96] involved a claim by an hourly production worker at Ford's Wixom assembly plant that she was sexually harassed by her supervisor.[97] Elezovic filed suit against both Ford and the supervisor, defendant Bennett.[98]

"Following a three-week jury trial, the trial court granted defendants' motion for a directed verdict, holding that plaintiff failed to establish a *prima facie* case of sexual harassment against either Ford or Bennett."[99] The court of appeals affirmed.[100] The supreme court affirmed as to Ford's liability but reversed and remanded as to the supervisor.[101] In doing so, the high court overruled its holding in *Jager v. Nationwide Truck Brokers, Inc.*,[102] which had stood for the general proposition that a supervisor may not be held personally responsible for violating the Civil Rights Act,[103] and instead concluded "that an agent who sexually harasses an employee in the workplace can be held individually liable under the [statute]."[104]

On remand, "the circuit court granted defendant's renewed motion for summary disposition,"[105] ruling that the supervisor had not been "functioning as an agent of Ford when he committed the charged acts of sexual harassment."[106] In the trial court's estimation, a supervisor could be held liable as an agent only if he was serving as "Ford's agent for purposes of creating a sexually hostile work environment."[107]

---

95. 480 Mich. 1001, 742 N.W.2d 349.
96. *See* Elezovic v. Ford Motor Co., 472 Mich. 408, 697 N.W.2d 851 (2005).
97. *See* Elezovic v. Bennett, 274 Mich. App. 1, 4, 731 N.W.2d 452, 455 (2007).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. 252 Mich. App. 464, 485, 652 N.W.2d 503, 515 (2002).
103. *Id.*
104. *Elezovic*, 274 Mich. App. at 4, 731 N.W.2d at 455 (citing *Elezovic v. Ford Motor Co.*, 472 Mich. at 411, 697 N.W.2d at 851).
105. *Id.*
106. *Id.* at 4, 731 N.W.2d at 455.
107. *Id.* at 8, 731 N.W.2d at 457.

The court of appeals reversed.[108] Although the Civil Rights Act did not expressly define the term "agent," the appellate court relied on "general agency principles" to include within its scope all "persons to whom an employing entity delegates supervisory power and authority to act on its behalf [as] 'agents,' as distinguished from coemployees, subordinates, or coworkers who do not have supervisory powers or authority, for purposes of the [Civil Rights Act]."[109] The court rejected the trial judge's conclusion that an individual defendant could be held liable as an "agent" only if he was acting on his employer's behalf in committing the charged acts of sexual harassment.[110] "Almost invariably, the harasser is never acting within the scope of his agency when he breaks the law by sexually harassing a subordinate."[111]

In defining an "agent," the court of appeals noted that the Civil Rights Act "is remedial and thus must be 'liberally construed to suppress the evil and advance the remedy.'"[112] The proposition seemed unremarkable, to be sure, since it came directly from *Eide v. Kelsey-Hayes Co.*,[113] a two-decade-old decision considering the Civil Rights Act in the context of a loss of consortium claim.[114]

In a one-page order, the Michigan Supreme Court decided otherwise.[115] While denying leave to appeal in *Elezovic*, the supreme court held that the court of appeals majority erred "in determin[ing] that the [Civil Rights Act] is remedial and thus must be liberally construed."[116] The opinion, authored by the same four-justice majority as in *Greater Bible Way Temple*, *Shepherd Montessori*, and *Ramanathan*, makes no mention of *Eide*.[117]

---

108. *Id.* at 17, 731 N.W.2d at 462.

109. *Id.* at 10, 731 N.W.2d at 458.

110. *Elezovic*, 279 Mich. App. at 11, 731 N.W.2d at 459.

111. *Id.*

112. *Id.* at 6, 731 N.W.2d at 456 (quoting Eide v. Kelsey-Hayes Co., 431 Mich. 26, 34, 427 N.W.2d 488 (1988)).

113. 431 Mich. 26, 34, 427 N.W.2d 488, 491.

114. *Id.*

115. *Elezovic*, 480 Mich. 1001, 742 N.W.2d 349.

116. *Id.*

117. Instead, the majority relied on note twelve of the Court's 2003 decision in Rakestraw v. General Dynamics Land Systems, Inc., 469 Mich. 220, 233 n.12, 666 N.W.2d 199, 207 n.12 (2003). But the Civil Rights Act was not at issue in *Rakestraw*. *Id.* Instead, that case involved a dispute over whether a worker's injury arose from a preexisting nonwork-related medical condition under the Worker's Disability Compensation Act (WDCA). *Id.* at 222, 666 N.W.2d at 201. *See also* MICH. COMP. LAWS ANN. §§ 418.301 *et seq.* (West 1987). And indeed, in *Rakestraw*, the Court noted that "WDCA matters *are* to be construed liberally because the statute is remedial in nature" and, even beyond statutory construction, approved applicability of the "liberal construction" standard to determining "the extent of the employee's injuries or his ability

In a one-paragraph dissent joined by Justice Cavanagh, Justice Kelly disagreed with the majority's "scolding the Court of Appeals . . . for using the canon of construction that remedial statutes shall be liberally construed."[118] For support, she pointed back to her partial dissent in *Ernsting v. Ave Maria College.*[119] There too the court denied leave to appeal and criticized the court of appeals for remarking that "remedial statutes like the [Whistleblowers Protection Act] are liberally construed in favor of the persons intended to be benefited."[120] Justice Kelly traced the history of the liberal construction principal back to *Heydon's Case,*[121] decided in England in 1584, through Blackstone's Commentaries,[122] and including its adoption in Michigan in 1858.[123] Surveying the present, Justice Kelly found that "courts in all 50 states and in each federal circuit have utilized it [and] [t]he United States Supreme Court has also used the canon to interpret numerous federal laws."[124] She concluded, therefore, that "the canon that remedial statutes must be liberally construed is one of the oldest and most respected tools of construction in all the law. It was perfectly appropriate for the Court of Appeals majority to employ it."[125]

In sum, the import of the Michigan Supreme Court's holding that the court of appeals majority erred "in determin[ing] that the [Civil Rights Act] is remedial and thus must be liberally construed"[126] is by no means clear either in its purpose or effect. Is the court declaring that the Civil Rights Act is not a remedial statute (*i.e.* does not "redress[] individual wrongs . . . under which recovery runs directly to the individual")[127] and that the statutory canon therefore does not apply to it? Or is it announcing more broadly that Michigan law will no longer interpret

---

to return to work after rehabilitation." *Rakestraw*, 469 Mich. at 233 n.12, 666 N.W.2d at 207 n.12 (emphasis added). Thus, on its face, the *Elezovic* Court's reliance on *Rakestraw*—with respect to both the statutory interpretation of remedial statutes in general and the Civil Rights Act in particular—would appear to be misplaced.

118. *Elezovic*, 480 Mich. at 1002, 742 N.W.2d at 350 (Kelly, J. dissenting). Joining neither the majority nor dissent, Justice Weaver stated simply that she would "deny leave to appeal because I am not persuaded that this Court should review the questions presented at this time." *Id.* (Weaver, J.)

119. 480 Mich. 985, 742 N.W.2d 112 (2007).

120. *Id.* at 985, 742 N.W.2d at 112.

121. 76 Eng. Rep. 637, 638 (Exch. 1584).

122. 1 WILLIAM BLACKSTONE, COMMENTARIES 87 (1915).

123. Shannon v. People, 5 Mich. 36, 48 (1858) ("[A] remedial statute . . . should be construed liberally for the advancement of the remedy.").

124. *Ernsting*, 480 Mich. at 986, 742 N.W.2d at 113 (Kelly, J. dissenting).

125. *Id.*

126. *Elezovic*, 480 Mich. at 1001, 742 N.W.2d at 349.

127. Khan v. Grotnes Metalforming Sys., Inc., 679 F. Supp. 751, 756 (N.D. Ill. 1988).

remedial statutes liberally, a principal of statutory construction that, according to Justice Kelly, has been accepted by every state and federal court to consider it?[128] And while plaintiff-friendly outcomes in both *Elezovic* and *Ernsting* were effectively affirmed through the denial of leave to appeal, will the liberal construction of other seemingly remedial statutes in future cases subject appellate decisions to reversal?

3. Robinson v. Ford Motor Company

The court of appeals eschewed liberal construction of the Civil Rights Act but nevertheless achieved an outcome friendly to both plaintiffs and same-sex litigants in *Robinson v. Ford Motor Co.*[129] In that case, plaintiff Robinson alleged sexual harassment by a male co-worker, Smith, while the two installed truck-hoods at a Ford assembly plant.[130] Robinson complained that the coworker engaged in a variety of sexually unwelcome conduct over a two-year period,[131] ultimately leading to a nervous breakdown after Smith "jumped on [Robinson's] back and forced his fingers in plaintiff's mouth and down his throat while he was wearing a dirty glove."[132]

Robinson brought suit against both Smith and Ford Motor Company, alleging sexual harassment in violation of the Civil Rights Act.[133] Defendants moved to dismiss, "arguing that sexual horseplay by a heterosexual male directed against another male fell outside the statutory definition of sexual harassment."[134] The trial court disagreed and defendants appealed.[135]

The court of appeals first considered Section 202 of the Act, which prohibits "discriminat[ion] against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex."[136] "Discrimination because of sex," in turn, is defined to include "sexual harassment."[137] "Sexual harassment

128. *Ernsting*, 480 Mich. at 986, 742. N.W.2d at 113 (Kelly, J., dissenting).
129. 277 Mich. App. 146, 744 N.W.2d at 363.
130. *Id.* at 149, 744 N.W.2d at 365.
131. *See e.g., id.* at 149, 744 N.W.2d at 365.
132. *Id.* at 149, 744 N.W.2d at 365-66.
133. *Id.* at 150, 744 N.W.2d at 366.
134. *Id.*
135. *Robinson*, 277 Mich. App. at 150, 744 N.W.2d at 366.
136. MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 1991).
137. MICH. COMP. LAWS ANN. § 37.2103(i) (West 2000).

means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature."[138]

Considering the statute, the court of appeals found no ambiguity and interpreted the Civil Rights Act in accord with its plain meaning:

> Where the language is unambiguous, it must be presumed that the Legislature intended the meaning clearly expressed, and no further judicial interpretation is permitted. Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions.[139]

Finding that the "[t]he language of the [Civil Rights Act] does not exclude same-gender harassment claims," the court of appeals "reject[ed] defendant's claim that the [Act] excludes same-gender, hostile-work-environment claims."[140]

In reaching this result, the court of appeals recognized that "the Michigan Supreme Court has not addressed the question whether same-gender, hostile-work-environment claims are recognized under the [Civil Rights Act]."[141] Instead, the court of appeals turned to the United States Supreme Court, which considered a same-sex harassment claim under Title VII—containing language identical to the Civil Rights Act—in *Oncale v. Sundowner Offshore Services, Inc.*[142] In a unanimous opinion, the Supreme Court held that same-sex harassment was actionable under Title VII:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this

138. *Id.*
139. *Robinson*, 277 Mich. App. at 152, 744 N.W.2d at 367 (citation omitted).
140. *Id.*
141. *Id.* at 152, 744 N.W.2d at 367.
142. 523 U.S. 75 (1998).

includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.[143]

Whether Michigan's Supreme Court will adopt the same analysis as its federal counterpart when the issue of same-sex discrimination eventually reaches it, as the court of appeals predicted it would, must be left to a future *Survey*.

B. Public Accommodations and Services

1. Safiedine v. City of Ferndale

Conflicting statutory language forced the court of appeals to abandon plain meaning and resort to a bigger toolbox in interpreting the Civil Rights Act in *Safiedine v. City of Ferndale*.[144] The plaintiffs, a gasoline station and its parent companies, brought suit against the City of Ferndale, charging that a city police officer had made discriminatory comments to the store manager, of Arabic descent, and dissuaded customers from patronizing the station.[145] The corporate plaintiffs alleged that Ferndale was attempting to drive the business away because it was operated by "individuals of Arabic national origin, Islamic religion, and Arabic race," thereby depriving the business of public accommodations and services, in violation of the Civil Rights Act.[146] The trial court granted summary disposition to Ferndale, reasoning that Section 302 of the Civil Rights Act afforded protection only to individuals, not juridical plaintiffs such as corporations.[147]

On review, the court of appeals first considered the plain language of the statute.[148] As defendants argued, Section 302—the provision under which the gasoline station sought to bring suit—prohibited the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service" only to "*an individual*."[149] On the other hand, Section 801 of the Act—setting out the remedies available under the statute—allowed any "*person* alleging a violation of this act [to] bring a civil

143. *Id.* at 79-80.
144. 278 Mich. App. 476, 753 N.W.2d 260.
145. *Id.* at 478, 753 N.W.2d at 261.
146. *Id.* at 478-79, 753 N.W.2d at 261.
147. *Id.* at 479, 753 N.W.2d at 261 (citing MICH. COMP. LAWS ANN. § 37.2302 (West 2001)).
148. *Id.* at 480-82, 752 N.W.2d at 262-63.
149. MICH. COMP. LAWS ANN. § 37.2202(a) (West 1977) (emphasis added).

action for appropriate injunctive relief or damages, or both."[150] The word "person" is broadly defined under the statute to include juridical entities, such as an "association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy . . . or any other legal or commercial entity."[151]

Because of the seemingly irreconcilable uses of "individual" in Section 302 and of "person" in Section 801, the court of appeals had to push past the plain meaning of the statute:

> Read together, §§ 302 and 801 present a seeming incongruity: § 302 prohibits a person from denying public accommodations or services to an individual, but § 801, in providing a remedy for violations of the statute, states that a person may bring a civil action for appropriate injunctive relief or damages. . . [T]hus, the statutory language of § 801 suggests that [juridical] entities are entitled to sue for damages for a violation of the [Civil Rights Act] [but] § 302 plainly refers to the denial of a public service or accommodation to an "individual."[152]

Without plain meaning as a guide, the appellate court turned to "the object of the statute and the harm it is designed to remedy[] and the interests protected in order to apply a reasonable construction that best accomplishes the statute's purpose."[153] Finding the "primary purpose" of the Civil Rights Act to be the protection of "people . . . from discriminatory conduct based on characteristics peculiar to individuals: race, sex, age, national origin, marital status, and so forth," and that "[s]uch characteristics are inherently inapplicable to corporate or juridical entities," the court of appeals reasoned that the Act necessarily "grants protection only to human beings, and not inanimate organizations."[154] Accordingly, the court held that the Civil Rights Act's "substantive antidiscrimination provisions that grant rights and protections apply only to natural, not juridical, persons."[155]

Although decided outside the *Survey* period, the Michigan Supreme Court issued a short order in *Safiedine* in September 2008.[156] As in

150. MICH. COMP. LAWS ANN. § 37.2801(1) (West 1977) (emphasis added).
151. MICH. COMP. LAWS ANN. § 37.2103(g) (West 2000).
152. *Safiedine*, 278 Mich. App. at 481, 753 N.W.2d at 262-63.
153. *Id.* at 482, 753 N.W.2d at 263 (quotations and citation omitted).
154. *Id.*
155. *Id.* at 481, 753 N.W.2d at 262.
156. *Safiedine*, 482 Mich. 995, 755 N.W.2d 659.

Shepherd Montessori, *Ramanathan*, *Elezovic*, and *Ernsting*, the Supreme Court denied leave to appeal.[157] The court did, however, again in a single paragraph, affirm the appellate court's specific holding that Section 302 of the Civil Rights Act—protecting access to public accommodations and services—was actionable only by individuals, not corporations.[158] But the Court went on vacate, "as *dicta*," the court of appeals' general conclusion that none of the Civil Rights Act's substantive antidiscrimination provisions applied to juridical plaintiffs.[159] Without deciding the issue, since other provisions of the statute were not before it, the supreme court cited to Sections 502 and 504 of the Act, which provided a cause of action to "persons"—not just "individuals"—suffering discrimination in real estate transactions.[160] Thus, the possibility remains open that corporate plaintiffs in future disputes will be able to pursue claims under at least some provisions of the Civil Rights Act.

2. Doe v. Young Marines of The Marine Corps League

While *Safiedine* considered the liability of corporate plaintiffs under the Civil Rights Act, *Doe v. Young Marines of The Marine Corps League*[161] examined whether a private, non-profit corporation could be sued as a defendant under the public accommodation and service provisions of the Act.[162]

The Young Marines, with various chapters throughout the state, aimed "to promote the mental, moral, and physical development of its members . . . ages eight through high school."[163] Plaintiff Doe, a minor, alleged that a fellow Young Marine had inappropriately touched her breast on two occasions.[164] When the club failed to act despite Doe's complaints, she quit the group and brought suit under Section 302, claiming a denial of access to a place of public accommodation and to a public service.[165] The Young Marines moved for summary disposition, arguing that the organization was a private club exempt from the Civil

157. *Id.*
158. *Id.*
159. *Id* (emphasis added).
160. MICH. COMP. LAWS ANN. §§ 37.2502(1)(a), 37.2504(2) (West 1992).
161. 277 Mich. App. 391, 745 N.W.2d 168.
162. *Id.*
163. *Id.* at 392, 745 N.W.2d at 169.
164. *Id.* at 393, 745 N.W.2d at 169.
165. *Id.* at 394, 745 N.W.2d at 169-70.

Rights Act.[166] When the circuit court denied the motion, the Young Marines appealed.[167]

The court of appeals turned to the plain language of the statute. "Where statutory language is clear and unambiguous, judicial construction is neither permitted nor required. And we are to read nothing into an unambiguous statute that is not within the Legislature's manifest intent as expressed by the words of the statute itself."[168]

Section 301 defined a "place of public accommodation" to include *any* "business . . . or institution of any kind, . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public."[169] A "public service" similarly encompassed any "public facility . . . owned, operated, or managed by or on behalf of the state," as well as any "tax exempt private agency established to provide services to the public."[170] The statute specifically excluded from its coverage of both public accommodations and services any "*private club*, or other establishment not in fact open to the public," except for those specifically enumerated.[171] Private clubs made subject to the Act included only "[a] country club or golf club," "[a] boating or yachting club," "[a] sports or athletic club," and "[a] [secular] dining club."[172]

Considering the listed exceptions, the court of appeals concluded that "the Young Marines is not a country club, golf club, boating or yachting club, sports or athletic club, or a dining club,"[173] leading in its view to only one possible outcome:

> The Legislature has clearly and unambiguously expressed that private clubs do not come within the public accommodations provisions of the Civil Rights Act unless the private club falls within one of the clearly expressed exceptions. The Young Marines does not fall within any of those exceptions. Accordingly, the public accommodations [and services] provisions do not apply here."[174]

---

166. *Id.* at 394, 745 N.W.2d at 170.

167. *Young Marines*, 277 Mich. App. at 394, 745 N.W.2d at 170.

168. *Id.* at 397, 745 N.W.2d at 171 (citing Diamond v. Witherspoon, 265 Mich. App. 673, 684, 696 N.W.2d 770 (2005)).

169. MICH. COMP. LAWS ANN. § 37.2301(a) (West 2000).

170. MICH. COMP. LAWS ANN. § 37.2301(b) (West 2000).

171. MICH. COMP. LAWS ANN. § 37.2303 (West 1992) (emphasis added).

172. MICH. COMP. LAWS ANN. § 37.2301(a) (West 2000).

173. *Young Marines*, 277 Mich. App. at 396-97, 745 N.W.2d at 171.

174. *Id.* at 397, 745 N.W.2d at 171.

In reaching this result, the court of appeals had to distinguish two federal cases interpreting the public accommodation and service provisions of the Civil Rights Act.[175] In *Communities for Equity v. Michigan High School Athletic Association*,[176] the United States Court of Appeals for the Sixth Circuit held that the Michigan High School Athletic Association (MHSAA) was a "place of public accommodation" providing a "public service" because "MHSAA sponsor[ed] championship athletic tournament events that are held in public places and open to members of the general public."[177] Likewise, in *Rogers v. International Association of Lions Clubs*,[178] the United States District Court for the Eastern District of Michigan held that a local Lions Club was a "place of public accommodation" providing a "public service": "its meetings are in a public place [a Howard Johnson's] and are open to . . . members, guests, visiting Lions, and strangers. Moreover, the Lions Club's services, the volunteer efforts of its members, are made available to the public."[179] Both cases relied on *Roberts v. United States Jaycees*,[180] a 1984 case from the United States Supreme Court, which distinguished public organizations from private clubs on the basis of size, selectivity, public services offered, and the use of public facilities.[181] Under this mode of analysis, the Young Marines necessarily would qualify as a place of public accommodation that provides a public service.

Having to distinguish *Michigan High School Athletic Association* and *International Association of Lions Clubs*, therefore, the state court of appeals concluded that the two federal courts had misinterpreted the United States Supreme Court in deciding what factors separated public from private facilities.[182] "We find little guidance in these federal decisions . . . and we are not persuaded that those decisions correctly interpret Michigan law."[183] And regardless, the appellate court held, "[w]e are not bound to follow a federal court's interpretation of state law."[184]

In sum, the court of appeals reversed the trial court's denial of summary disposition to the defendant, "conclud[ing] that the Young

175. *Id.*
176. 459 F.3d 676 (6th Cir. 2006).
177. *Id.* at 697.
178. 636 F. Supp. 1476 (E.D. Mich.1986).
179. *Id.* at 1479.
180. 468 U.S. 609 (1984).
181. *Id.* at 619-20.
182. *Young Marines*, 277 Mich. App. at 399-401, 745 N.W.2d at 172-74.
183. *Id.* at 399, 745 N.W.2d at 172.
184. *Id.*

Marines is not a place of public accommodation under the Michigan Civil Rights Act and, therefore, that article 3 of the Civil Rights Act does not apply."[185] The practical import is broader, of course, severely restricting the applicability of the Act to private clubs, at least as compared to the state of the law under prior federal precedent.

IV. SECTION 1983

In stark contrast to *Young Marines*, the court of appeals adopted fully a federal court's analysis of a claim brought under 42 U.S.C. Section 1983 in deciding *Moore v. Detroit Entertainment, LLC.*[186]

In September 2002, plaintiff Moore and five friends took a limousine to the Motor City Casino for dinner and a night of gambling.[187] Upon arriving, an inebriated Moore got into an altercation with a casino security manager.[188] The manager, like other Motor City Casino security officers, had obtained a "PA 330 certification," state licensure that allowed security guards to act as "private security police" and permitted them to carry a pistol and to make misdemeanor arrests.[189]

Moore was taken to a detention room in the casino, where he underwent a pat-down search, had his personal property removed and inventoried, and ultimately was made to sign an "86 form" banning him from the casino.[190] In total, Moore was detained for two-and-a-half hours before being released.[191]

Moore brought suit against the casino's parent company, charging a violation of, *inter alia*, 42 U.S.C. Section 1983.[192] The federal statute provides a civil remedy against any "person who, *under color of any statute, ordinance, regulation, custom, or usage*, of any State . . . subjects, or causes to be subjected, any [person] to the deprivation of any rights, privileges, or immunities secured by the Constitution."[193] To prevail on a Section 1983 claim, a plaintiff must establish that he was "deprived of a right secured by the Constitution or laws of the United

185. *Id.* at 401, 745 N.W.2d at 173.

186. 279 Mich. App. 195, 755 N.W.2d 686.

187. *Id.* at 198, 755 N.W.2d at 691.

188. *Id.* at 198-200, 755 N.W.2d at 690-91.

189. *Id.* at 199, 755 N.W.2d at 690; MICH. COMP. LAWS ANN. §§ 338.1079, 338.1080 (West 2002).

190. *See Moore*, 279 Mich. App. at 200, 755 N.W.2d at 691.

191. *Id.* at 201, 755 N.W.2d at 691. The ordeal did not appear to have a lasting impact on Moore. Following his detention, "[p]laintiff then left the Motor City Casino with his companions, and everyone went to the Greektown Casino." *Id.*

192. *Id.* at 198, 755 N.W.2d at 690.

193. 42 U.S.C. § 1983 (1996) (emphasis added).

States"—here the Fourth Amendment right against unreasonable search and seizure—and that the defendant was a "state actor," *i.e.*, acting "under color of state law."[194] "[M]erely private conduct, no matter how discriminatory or wrongful," will not support a Section 1983 claim.[195]

In *Moore*, the trial court held as a matter of law that the casino's state-licensed security guards were state actors when they detained Moore.[196] A trial jury later awarded plaintiff $125,000 in compensatory damages and an additional $400,000 in punitive damages.[197] The casino appealed.[198]

The appellate court turned to recent federal precedent, *Romanski v. Detroit Entertainment, LLC*,[199] which presented a fact pattern largely indistinguishable from *Moore*. In that case, a 72-year-old woman brought a Section 1983 claim after being detained at the Motor City Casino for picking up a nickel token left behind at a vacant slot machine.[200] In considering whether the state-licensed security officers acted under color of state law in detaining Ms. Romanski, the United States Court of Appeals for the Sixth Circuit set out a "public function test" for considering such claims:

> [A] private entity is said to be performing a public function if it is exercising powers traditionally reserved to the state, such as holding elections, taking private property under the eminent domain power, or operating a company-owned town. . . . The line divides cases in which a private actor exercises a power traditionally reserved to the state, but not exclusively reserved to it, *e.g.*, the common law shopkeeper's privilege, from cases in which a private actor exercises a power exclusively reserved to the state, *e.g.*, the police power. Where private security guards are endowed by law with plenary police powers such that they are *de facto* police officers, they may qualify as state actors under the public function test . . . . On the other side of the line

194. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999).

195. *Id.* at 50 (quotations and citation omitted). For a cogent analysis of the societal impact of the privatization of criminal law enforcement, *see* Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911 (2007).

196. *Moore*, 279 Mich. App. at 201, 755 N.W.2d at 692.

197. *Id.* at 228, 755 N.W.2d at 706.

198. *Id.* at 201, 755 N.W.2d at 692.

199. 428 F.3d 629 (6th Cir. 2005).

200. *Id.* at 632-34.

> . . . are cases in which the private defendants have some police-like powers but not plenary police authority.[201]

Applying this test to Ms. Romanski's claim, the Sixth Circuit held that because the Motor City Casino's security officers had "the authority to make arrests at one's discretion and for any offenses . . . [they were] state actor[s] as a matter of law."[202]

Following a lengthy examination of *Romanski*, the state court of appeals in *Moore* held that "[a]fter reviewing the record in this case, we find that it falls squarely within the facts and legal analysis presented in *Romanski*."[203] Because the Motor City Casino security officers

> all possessed the power to arrest plaintiff on casino premises for his alleged assault (a part of the police power that the state had traditionally and exclusively reserved for itself), and . . . arranged for plaintiff to be held within the casino's security detention room on the basis of this statutory authority, we conclude that the trial court correctly ruled as a matter of law that defendant . . . acted under color of state law for purposes of [Section] 1983.[204]

In reaching this result, the court of appeals expressly refused defendant's invitation to "reject *Romanski* as a nonbinding intermediate federal appellate court decision [because] this Court plainly may adopt as persuasive a lower federal court decision involving federal law."[205] Indeed, the appellate court relied on *Romanski* over an equally applicable 1982 Michigan Supreme Court case, *Grand Rapids v. Impens*.[206] In *Impens*, which involved the non-custodial interrogation of suspected shoplifters by Meijer security guards, the Supreme Court said, "[w]e do not believe that the mere licensing of security guards constitutes sufficient government involvement to require [a finding of state

---

201. *Id.* at 636-37.

202. *Id.* at 638.

203. *Moore*, 279 Mich. App. at 211, 755 N.W.2d at 697. The Court of Appeals also spent significant time considering another Sixth Circuit case, *Lindsey v. Detroit Entertainment, LLC*, 484 F.3d 824 (6th Cir. 2007), in which the court rejected a Section 1983 claim against Motor City Casino security officers that were *not* licensed pursuant to MICH. COMP. LAWS ANN. §§ 338.1079-.1080 (West 2008). *Lindsey*, 484 F.3d at 829-31.

204. *Moore*, 279 Mich. App. at 212, 755 N.W.2d at 698 (citing *Lindsey*, 484 F.3d at 831).

205. *Id.* at 214, 755 N.W.2d at 699.

206. 414 Mich. 667, 327 N.W.2d 278 (1982).

action]."[207] But, like *Romanski*, *Moore* distinguished *Impens* because the latter case "did not involve an arrest in any form" nor was any shoplifter "held against his will," a power "within the exclusive province of the state."[208]

But, besides standing diametrically opposed to *Young Marines* in considering the deference owed to federal precedent, the lasting impact of *Moore*—if any—is unclear. The court of appeals stressed that "ours is decidedly a fact-specific holding, in accordance with the [precept] that the state-action inquiry is necessarily fact-bound, and that a court's approach to the inquiry must be closely tailored to the evidence before it."[209] The court further rejected "the notion that licensed, private security guards are *always* state-actors, or that the mere performance of a task specifically authorized by a state statute confers state actor status."[210] Litigation involving other professionals with pseudo-public responsibilities, including "Michigan's day-care providers, plumbers, barbers, beauticians, electricians, and cab drivers," is left for another day.[211]

V. CONCLUSION

The cases decided during this *Survey* period demonstrate a continuing tug-of-war between the Michigan Supreme Court and the state's court of appeals in civil rights jurisprudence. Despite repeated rebukes, some appellate judges continue to challenge the strict constructionist orthodoxy laid down by the supreme court for considering such claims. But, whether under the Michigan Civil Rights Act or under federal laws, such as RLUIPA and Section 1983, at present these challenges uniformly continue to be turned back by the state's highest court, often in the form of short orders accompanying the denial of leave to appeal.[212]

---

207. *Id.* at 676, 327 N.W.2d at 281.

208. *Moore*, 279 Mich. App. at 219-20, 755 N.W.2d at 702.

209. *Id.* at 212, 755 N.W.2d at 698 (quotations and citation omitted).

210. *Id.* (emphasis added).

211. *Id.* at 212-13, 755 N.W.2d at 698.

212. As a result, some commentators have argued persuasively that litigants before the state's highest court are best served by couching their arguments exclusively under the plain meaning of the relevant statutes. *See, e.g.*, W. Ann Warner, Anjali Vats, *Civil Rights: Annual Survey of Michigan Law, June 1, 2004 – May 31, 2005*, 52 WAYNE L. REV. 391, 434 (2006) ("The continued practice in our appellate courts of interpreting civil rights statutes literally, using 'strict construction' as the model, means that plaintiffs and their attorneys are best served by basing arguments, where they can, on the text of particular statutes. Arguments appealing to the purposes, intent, and context of civil rights statutes are likely to fail.").