GOVERNMENT LAW

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I. INTRODUCTION

Both the Michigan Supreme Court and the Michigan Court of Appeals issued opinions on a wide variety of government law topics during the 2007-2008 *Survey* period. Unlike prior years, only a few of the reported cases represent significant changes in state law. This *Survey* period was also noteworthy for the relatively few opinions issued involving governmental immunity from tort liability. The Michigan Supreme Court has significantly narrowed the exceptions to immunity over the past six years. As a result, potential plaintiffs may be filing fewer cases against government actors, and fewer cases may be heard by the Court of Appeals.

II. ELECTIONS

The Michigan Supreme Court issued a landmark advisory opinion on voting rights in this *Survey* period.[1] The Michigan Legislature added a

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1. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 479 Mich. 1, 740 N.W.2d 444 (2007).

voter identification requirement to Michigan election law in 1996.[2] The amended statute requires every voter to present an "operator's or chauffer's license, state identification card, or other generally recognized picture identification card" before voting.[3] Any voter that does not have photo identification "shall sign an affidavit to that effect" before being allowed to vote.[4] Any voter without photo identification is "subject to challenge" under the statutory challenge procedures.[5]

Before the amendment could take effect, the Michigan Attorney General opined that the identification requirement violated the Equal Protection Clause of the U.S. Constitution.[6] The attorney general concluded that the photo identification requirement was "not necessary to further a compelling governmental interest" in the absence of "substantial voter fraud in Michigan."[7] The opinion further concluded that the requirement imposed "economic and logistical burdens" on the 377,000 Michigan citizens who do not have photo identification.[8]

As a result of the attorney general's opinion and while awaiting the report of the Federal Commission on Federal Election Reform, the Michigan Secretary of State did not enforce the new amendment. The Federal Commission issued its report in 2005.[9] The Michigan House of Representatives subsequently requested the Michigan Supreme Court to issue an advisory opinion on whether the photo identification requirement violated either the Michigan or U.S. Constitutions.[10] The Michigan Supreme Court asked the attorney general to submit briefs and argue as both proponent and opponent of the issue.[11]

The subsequent opinion first analyzed the statutory provision that an elector voting by affidavit without identification is "subject to challenge."[12] The opposing attorney general argued that the challenge language impermissibly burdens certain voters because the challenge procedure is mandatory whenever a voter without proper identification seeks to vote.[13] The Michigan Supreme Court disagreed that such a

2. 1996 Mich. Pub. Acts 583; MICH. COMP. LAWS ANN. § 168.523 (West 2008).
3. MICH. COMP. LAWS ANN. § 168.523(1) (West 2008).
4. MICH. COMP. LAWS ANN. § 168.523(1) (West 2008).
5. MICH. COMP. LAWS ANN. § 168.523(1) (West 2008).
6. 6930 Op. Att'y Gen. 1 (Mich. 1997-98).
7. *Id.* at 3.
8. *Id.* at 5.
9. Commission on Federal Election Reform, *Building Confidence in U.S. Elections* (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf (last visited Mar. 30, 2009).
10. 2005 Mich. Pub. Acts 71.
11. *See In re Request for Advisory Opinion*, 479 Mich. at 6, 740 N.W.2d at 446.
12. *In re Request for Advisory Opinion*, 479 Mich. at 14, 740 N.W.2d at 451.
13. *Id.* at 14-15, 740 N.W.2d at 452.

challenge is mandatory, arguing that the "plain meaning of the phrase 'subject to' connotes possibility and is appropriately defined as meaning 'open or exposed to.'"[14] The Court noted that another provision provides that a voter "shall be challenged" when a signature or an item of information does not correspond to the registration list, or if the person challenging the voter "knows or has good reason to suspect" that the voter is not a registered elector of that precinct.[15] The Court concluded that "the fact that the Legislature used both the mandatory and permissive language" in the same section indicates that the Legislature did not intend for the words "subject to" to be equivalent to "shall."[16]

The Michigan Supreme Court then analyzed the constitutional issues. The Court first discussed the nature of the right to vote and the state and federal laws regulating the time, place, and manner of all elections. The Court concluded that "while a citizen's right to vote is fundamental, it is not unfettered."[17] The Court noted favorably the balancing test articulated by the U.S. Supreme Court in upholding the State of Hawaii's ban on write-in voting.[18] The U.S. Supreme Court held that the ban is a reasonable, nondiscriminatory restriction when balanced against the state's interest in preserving the integrity of the election.[19] In applying the *Burdick* test to the Michigan voter identification law, the Michigan Supreme Court concluded that the voter identification law similarly serves the state's compelling interest in "preserving the integrity of its elections . . . including ensuring that lawful voters not have their votes diluted."[20]

As to the specific constitutional issues, the opposing attorney general first argued that the mandatory photo identification requirement violated the First and Fourteenth Amendments to the U.S. Constitution because it imposed a "severe" burden on certain potential voters, especially elderly and low-income voters without driver's licenses or other identification.[21] The opposing attorney general further argued that all voters regardless of income, class, age, or ethnicity are entitled to "free and unfettered access to the ballot box."[22]

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14. *Id.* at 15, 740 N.W.2d at 452.
15. *Id.*
16. *Id.*
17. *Id.* at 20, 740 N.W.2d at 455.
18. *In re Request for Advisory Opinion*, 479 Mich. at 7, 740 N.W.2d at 448-49 (citing Burdick v. Takushi, 504 U.S. 428 (1992)).
19. *Burdick*, 504 U.S. at 433.
20. *In re Request for Advisory Opinion*, 479 Mich. at 20, 740 N.W.2d at 455.
21. *Id.* at 23, 740 N.W.2d at 457-58.
22. *Id.*

The Michigan Supreme Court acknowledged that when a voting regulation severely burdens a right guaranteed by the First and Fourteenth Amendments, the regulation must be "narrowly drawn to advance a state interest of compelling importance."[23] But when a regulation imposes only a "reasonable, nondiscriminatory" restriction on voting rights, the state's regulatory interests are usually sufficient to justify the regulation.[24] The court held that the voter identification requirement did not impose a severe burden on a class of voters because any voter who does not have photo identification can sign an affidavit at the polling booth.[25] The court found no evidence that the act of signing an affidavit is more burdensome than producing photo identification.[26] The court concluded that the regulation is a "reasonable, nondiscriminatory restriction" on the right to vote that is warranted by the state's regulatory interest in preventing voter fraud.[27] Because the regulation does not impose a severe burden on any class of voters, the court concluded that the photo identification requirement did not violate the First and Fourteenth Amendments. The court similarly concluded that the regulation did not impose a severe burden on a citizen's exercise of "civil and political rights" as protected by the Michigan Constitution.[28]

The opposing attorney general next argued that requiring voters to purchase a state-issued photo identification card is tantamount to a poll tax.[29] The Court scrutinized the regulation under the analysis of two U.S. Supreme Court voting rights cases from the 1960s.[30] In *Harper,* the U.S. Supreme Court struck down a Virginia law that imposed an annual poll tax on every resident as a precondition to voting.[31] In *Harman,* the same Court struck down an "onerous" requirement that a voter either pay a poll tax or file a certificate of residency at least six months before the election.[32] In both cases, the U.S. Supreme Court held that the regulation imposed an unconstitutional condition that handicapped the exercise of the voting franchise.

As to the Michigan voter identification requirement, the Michigan Supreme Court held that the regulation is not unconstitutional under the

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23. *Id.* at 21, 740 N.W.2d at 455.
24. *Id.*
25. *Id.* at 23-24, 740 N.W.2d at 456-57.
26. *In re Request for Advisory Opinion*, 479 Mich. at 24, 740 N.W.2d at 457.
27. *Id.*
28. *Id.* at 35-36, 740 N.W.2d at 463.
29. *Id.* at 36, 740 N.W.2d at 463.
30. *Id.* at 37-38, 740 N.W.2d at 464 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Harman v. Forssenius, 380 U.S. 528 (1965)).
31. *Harper*, 383 U.S. at 665 n.1.
32. *Harman*, 380 U.S. at 541.

Harper analysis.[33] The Court argued that if a voter cannot afford to pay a fee for a state-issued identification card, the voter may sign an affidavit at the polls.[34] The court also concluded that the regulation is not unconstitutional because the affidavit procedure is not "cumbersome" or "onerous" like the *Harman* certificate of residency requirement.[35] The Court further noted that the fee for an identification card can be waived entirely if the voter is elderly, disabled, or presents good cause to have the fee waived.[36] The Court also rejected the argument that the identification requirements will disparately impact racial and ethnic populations.[37]

Justices Cavanaugh and Kelly issued separate, vigorous dissents.[38] The majority characterized their arguments as "emotional" and "inflammatory."[39] Both dissenting opinions echoed arguments made by opponents of PA 71 in 2005. The new voter identification law split the Michigan Legislature along party lines. Democrats argued that the law was a veiled attempt by Republicans to suppress voting by minorities in Democratic districts. Republicans countered by pointing to documented cases of "dead" voters casting ballots in various cities as proof that the new law is necessary to protect the integrity of elections.[40] In response to arguments by the dissenters that the affidavit procedure will deter certain voters from voting, the court stated that its advisory opinion considered only whether the new law "facially" violated the Michigan Constitution.[41] The Court said that it was leaving the door open for as-applied challenges if certain voters face future obstacles.[42]

In another election law case, the Michigan Court of Appeals held that a city clerk has no legal authority under Michigan election law to mail unsolicited applications for absentee ballots to qualified voters.[43] The particular city clerk in question undoubtedly drew the attention of her election opponent and ultimately of the court of appeals by including an elaborate cover letter proclaiming her incumbency (deemed "propaganda" by the court)[44] along with each mailed ballot application.[45]

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33. *In re Request for Advisory Opinion*, 479 Mich. at 38, 740 N.W.2d at 464-65.
34. *Id.* at 38, 740 N.W.2d at 465.
35. *Id.*
36. *Id.* at 39-40, 740 N.W.2d at 465.
37. *Id.* at 45-46, 740 N.W.2d at 468-69.
38. *Id.* at 47, 740 N.W.2d at 469.
39. *In re Request for Advisory Opinion*, 479 Mich. at 41-42, 740 N.W.2d at 466.
40. *Id.* at 60, 740 N.W.2d at 476.
41. *Id.* at 46, 740 N.W.2d at 469.
42. *Id.*
43. Taylor v. Currie, 277 Mich. App. 85, 743 N.W.2d 571 (2008).
44. *Id.* at 97, 743 N.W.2d at 578.

In reality, many municipal clerks routinely mailed absentee voter applications to voters in their communities as a matter of convenience to certain voters such as senior citizens. This case ended that practice. After a lengthy procedural battle, the trial court ultimately held the clerk in criminal contempt for mailing the applications in defiance of a court-ordered injunction and ordered the clerk to pay costs and attorney fees to the defendant opponent.[46]

The court of appeals affirmed the trial court holding that the city clerk had no authority to mass mail absentee ballot applications.[47] The court relied on the long-established rule of municipal law that municipal officers only have such powers "as are expressly granted by statute or by sovereign authority or those which are necessarily to be implied from those granted."[48] The court reviewed Michigan election law as to absentee ballots.[49] The election law statute provides that the clerk of a city, township, or village "shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request."[50] The court concluded that the power to mail unsolicited absentee ballot applications is not expressly stated in this section or in any other statute.[51] Since the authority to mail such applications is not expressly granted, state law prohibits a city clerk from mailing such applications to voters who have not submitted a request.[52] A different panel of the court of appeals subsequently issued an unpublished opinion which held that a county clerk is prohibited from mailing unsolicited absentee voter applications to citizens over the age of sixty living in communities in which the city, township, or village clerk did not mail such applications.[53]

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45. *Id.* at 89-90, 743 N.W.2d at 574.

46. *Id.* at 93, 743 N.W.2d at 576.

47. *Id.*

48. *Id.* at 94, 743 N.W.2d at 277 (citing Presnel v. Wayne Co. Bd. of Co. Comm'rs, 105 Mich. App. 362, 369, 306 N.W.2d 516 (1981) (quoting 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 276)).

49. *Taylor*, 277 Mich. App. at 95-96, 743 N.W.2d at 577-78.

50. MICH. COMP. LAWS ANN. § 168.759(5) (West 2005).

51. *Taylor*, 277 Mich. App. at 95, 743 N.W.2d at 577.

52. *Id.* at 96, 743 N.W.2d at 578.

53. Fleming v. Macomb County Clerk, No. 279966, 2008 WL 2553266 (Mich. Ct. App. June 26, 2008).

II. FREEDOM OF INFORMATION ACT

The Michigan Supreme Court continues to interpret the various disclosure exemptions in the Michigan Freedom of Information Act (FOIA).[54] Most of the recent opinions have broadened the exemptions and limited the category of documents that a governmental unit must disclose. The opinion in *Bukowski v. City of Detroit*[55] issued during this *Survey* period continued this trend.

In 2000, the Chief of Police in the City of Detroit created a three-person Board of Review to investigate alleged misconduct of a police officer. The Board completed its investigation and issued a written report. The Wayne County Prosecutor declined to file charges against the officer.[56]

In 2002, a reporter for the *Michigan Citizen* filed a FOIA request for a copy of the Board's report. The City of Detroit denied the request citing the "frank communications" exemption[57] under FOIA.[58] The newspaper filed suit. The trial court and the court of appeals both held that the frank communication exemption no longer applied to the report at the time of the FOIA request because "there is no evidence that the report is *currently* preliminary to any agency determination or action," even if it was preliminary at the time the report was made.[59]

The Michigan Supreme Court disagreed. The supreme court argued that the court of appeals had "misconstrued" the frank communication exemption "because the requirement that communications or notes '*are* preliminary to a final agency determination of policy or action' has nothing to do with the timing of the FOIA request. Rather, this phrase speaks to the purpose of the communication or notes *at the time of their creation*."[60] The court noted that the definition of "frank communication" in FOIA includes the "at the time of their creation" phrase, and this inclusion "signifies the Legislature's intent to exclude . . . those communications and notes that were not preliminary to a final agency determination . . . when they were created."[61] The court stated that the dissent's reliance on the verb "are" preceding "preliminary" was

54. MICH. COMP. LAWS ANN. § 15.231-46 (West 2004).

55. Bukowski v. City of Detroit, 478 Mich. 268, 732 N.W.2d 75 (2007).

56. *Id.* at 270-71, 732 N.W.2d at 77.

57. MICH. COMP. LAWS ANN. § 15.243(1)(m) (West 2008).

58. *Bukowski*, 478 Mich. at 271, 732 N.W. 2d at 77.

59. *Id.* at 273-74, 732 N.W.2d at 78 (quoting Bukowski v. City of Detroit, No. 256893, 2005 WL 1249367, at *4 (Mich. Ct. App. May 26, 2005)).

60. *Bukowski*, 478 Mich at 275, 732 N.W.2d at 80.

61. *Id.* at 276, 732 N.W.2d at 80.

"misplaced."[62] The court also noted that other FOIA exemptions include specific time limits when the exemption no longer applies to a specific document, such as appraisals, bids and proposals, and certain test results.[63] The court relied upon these specific limits as further evidence that the Michigan Legislature intended the frank communication exemption to apply to preliminary documents even after the agency decision is final.[64]

Justices Kelly and Weaver dissented. Both dissenters argued that the exemption "speaks in the present tense" as to when the FOIA request is received.[65] Justice Kelly stated that if "the Legislature wanted the determinative time to be when the communications were created, it would have used the word 'were' in the language of the exemption, not the word 'are.'"[66] Justice Kelly included an extensive analysis of the legislative history of this exemption and also the federal FOIA.[67] Court interpretations of identical language in the federal FOIA hold that the exemption from disclosure disappears when the agency makes a decision.[68] Justice Kelly opined that the Michigan Legislature specifically rejected this policy and never intended that the exemption apply to certain preliminary documents once a final agency decision is made.[69] She concluded that the Michigan Supreme Court's decision is an "overbroad reading" which "undermines the very purpose of FOIA."[70]

III. STATE AND LOCAL REGULATORY POLICIES

In 2005, the Michigan state Police (MSP) stopped a truck driven by an employee of a well drilling company and issued a citation to the driver for driving an unlicensed company truck. The truck included a large tank for carrying water in the company's well drilling operations. The defendant company admitted to the district court that the truck also routinely carried well pipe, grout, and electrical generators and operated on a daily or semi-daily basis on public roads.[71]

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62. *Id.*
63. *Id.*
64. *Id.* at 277, 732 N.W.2d at 80.
65. *Id.* at 285, 732 N.W.2d at 85.
66. *Bukowski*, 478 Mich. at 283-84, 732 N.W.2d at 84.
67. *Id.* at 286-89, 732 N.W.2d at 85-87.
68. *Id.* at 289, 732 N.W.2d at 87 (citing Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 (1975)).
69. *Id.*. at 289, 732 N.W.2d at 87.
70. *Id.* at 291, 732 N.W.2d at 88.
71. People v. Metamora Water Serv., Inc., 276 Mich. App. 376, 377-78, 741 N.W.2d 61, 63 (2007).

The defendant argued that the water trucks were "special mobile equipment" exempt from registration requirements under the Motor Vehicle Code.[72] The Motor Vehicle Code defines "special mobile equipment" as "every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways."[73] The definition lists examples of special mobile equipment such as "farm tractors, road construction or maintenance machinery, mobile office trailers, mobile tool shed trailer . . . and well-drilling and well-servicing apparatus" which are exempt.[74] The district court agreed with defendant's assertion that the truck was exempt from registration requirements as "special mobile equipment" and dismissed the citation.[75] The prosecutor appealed.

In *People v. Metamora Water Service, Inc.*, the court of appeals held that the water truck did not fit the definition of special mobile equipment and that the company should have registered the truck.[76] The court argued that stipulated facts in the district court case indicated that the truck "carries a significant amount of material for use in defendant's water business and appears to be a common commercial truck."[77] The stipulated facts also showed that the trucks are used on a daily or almost daily basis on all roads in the county.[78] The court analyzed the case in light of a prior case on similar facts.[79] In *Davidson*, the owner of highway cement batching trucks carrying cement from a batch plant to a nearby paving site challenged the truck registration requirement.[80] The *Davidson* court held that even though the trucks could be considered "road construction" equipment under the exemption, a defendant must first satisfy the incremental-use factor in the general definition of "special mobile equipment" before the enumerated vehicles could be exempt.[81] Since the batching trucks made hundred of trips over service roads and highways open for public travel, the trucks did not satisfy the incidental-use requirement in the definition.[82] The *Metamora Water Service* panel similarly concluded that the daily use of the water truck

72. *Id.* at 380-81, 741 N.W.2d at 64.
73. MICH. COMP. LAWS ANN. § 257.62 (West 2007).
74. *Id.*
75. *Metamora Water Serv.*, 276 Mich. App. at 381, 741 N.W.2d at 65.
76. *Id.* at 385-86, 741 N.W.2d at 67.
77. *Id.* at 386, 741 N.W.2d at 67.
78. *Id.*
79. *Id.* at 386, 741 N.W.2d at 67-68 (citing Davidson v. Sec'y of State, 351 Mich. 4, 87 N.W.2d 131 (1957)).
80. *Id.* at 387, 741 N.W.2d at 67-68.
81. *Metamora Water Serv.*, 276 Mich. App. at 387, 741 N.W.2d at 68.
82. *Id.*

does not satisfy the incidental-usage requirement of the exemption.[83] Because the company used the water trucks on a daily basis throughout the county, the court held that the district court erred in dismissing the citation.[84]

In another case involving vehicle registration, the Michigan State Police Motor Carrier Division decided to issue civil infraction citations to trucking companies who registered their truck cabs in Michigan but their trailers in other states, particularly Maine.[85] This new enforcement program followed amendments to the Motor Vehicle Code which significantly increased the trailer registration fees.[86] The parties stipulated that the MSP had never issued citations to trucking companies operating non-Michigan registered trailers prior to the amendments.[87] Plaintiff trucking companies asked for injunctive relief and a writ of mandamus to stop the enforcement program. The circuit court granted the requested relief, and the state appealed.

Plaintiffs argued that the trailers were exempt from registration because the trucking companies participate in the International Registration Plan (IRP).[88] The IRP is an apportioned registration plan in which each of the forty-eight continental states and Canada participates.[89] IRP permits carriers to register the power unit of their trucks annually in one "base" jurisdiction where the registrant has an established place of business and where it maintains the operational records of the fleet.[90] Each carrier pays an annual registration fee to the base jurisdiction. The base jurisdiction then distributes the fees to the various jurisdictions in which the carrier operates, apportioned according to the mileage driven by the carrier during the preceding year in each jurisdiction.[91] Trailers are not apportionable vehicles, and the IRP does not require the apportionment of trailers.[92]

The State of Michigan argued that the IRP should be interpreted to require registration of trailers in the state where the company registers its apportioned vehicles.[93] The trucking company argued that Section 404 of the IRP provides that "trailers, semitrailers, and auxiliary axles properly

83. *Id.* at 386, 741 N.W.2d at 67.
84. *Id.*
85. Behnke, Inc. v. Mich., 278 Mich. App. 114, 115, 748 N.W.2d 253, 255 (2008).
86. 2003 Mich. Pub. Acts 152; MICH. COMP. LAWS ANN. § 257.801(1)(l) (West 2008).
87. *Behnke*, 278 Mich. App. at 116, 748 N.W.2d at 255.
88. *Id.*
89. *Id.* at 116-17, 748 N.W.2d at 255.
90. *Id.* at 118-19, 748 N.W.2d at 256-57.
91. *Id.*
92. *Id.* at 117-18, 748 N.W.2d at 256.
93. *Behnke*, 278 Mich. App. at 118, 748 N.W.2d at 256.

registered in any member jurisdiction and used, moved, or operated in accordance with the Section shall be given full and free reciprocity."[94] Section 404 further provides:

> When registration fees are paid on apportionable vehicles, full and free reciprocity shall be granted to all trailers, semitrailers and auxiliary axles used in the combination. No member jurisdiction shall require a registrant of power units to register any amount of trailers, semitrailers or auxiliary axles in any proportion to the registrant's apportioned power unit fleet.[95]

The court of appeals agreed with the trucking company that Section 404 of the IRP specifically forbade a state registration requirement and any fee for IRP apportioned trucks.[96] The court concluded that the exemption language was "clear," and further judicial construction of the statutory language was "neither necessary nor permitted."[97] Trailers can be registered in any apportioned jurisdiction, and trailers can operate in any other apportioned jurisdiction without further registration requirements.

Almost every *Survey* article includes at least one case concerning the ability of a local unit of government to regulate an activity that the State of Michigan already regulates to some degree. The courts ultimately decide whether state law preempts the local regulation. This *Survey* period is no exception.

The Northwest Michigan Community Health Agency (NMCHA) is a multicounty district health department covering four northern Michigan counties. The counties organized the NMCHA under Part 24 of the Michigan Public Health Code.[98] In 2005, NMCHA promulgated a regulation prohibiting smoking in all public places.[99] The NMCHA regulation further required all employers who do not completely prohibit smoking in their place of employment to designate a separate NMCHA-approved smoking room with an independent ventilation system.[100]

Part 126 of the Michigan Public Health Code regulates smoking in every "public place."[101] The Public Health Code defines a public place as

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94. *Id.* at 118-19, 748 N.W.2d at 256-57.

95. *Id.*

96. *Id.* at 120, 748 N.W.2d at 257.

97. *Id.* at 121, 748 N.W.2d at 257-58.

98. McNeil v. Charlevoix County, 275 Mich. App. 686, 689, 741 N.W.2d 27, 29 (2007) (citing MICH. COMP. LAWS ANN. § 333.2401-.2498 (West 2008)).

99. *McNeil*, 275 Mich. App. at 689, 741 N.W.2d at 29.

100. *Id.* at 689, 741 N.W.2d at 29-30.

101. MICH. COMP. LAWS ANN. § 333.12603 (West 2001).

an "enclosed, indoor area owned or operated by a state or local governmental agency and used by the general public or serving as a place of work for public employees or a meeting place for a pubic body."[102] Regulated public places also include certain enclosed indoor areas not owned by a governmental unit but used by the general public, such as theaters, medical, and educational facilities.[103]

All four counties in NMCHA approved the nonsmoking regulation. A group of residents and business owners in Charlevoix County sought a judicial declaration that NMCHA had no authority to promulgate such a regulation, and that state law preempts the regulation.[104] The trial court denied the plaintiffs' motion for summary disposition, and the plaintiffs appealed.

Plaintiffs argued that nothing in Part 126 authorizes a local health department to "enforce or augment" the smoking regulation set forth in the Public Health Code, and that the Michigan Department of Community Health has exclusive jurisdiction to enforce the Code.[105] Defendant counties countered that the Public Health Code grants to local health departments the authority to "adopt regulations to properly safeguard the public health" that are "at least as stringent as the standard established by state law applicable to the same or similar subject matter."[106] The court of appeals agreed with the counties, holding that the NMCHA regulation, "being more restrictive than the standards set by the [Code], meet this requirement."[107]

Plaintiffs next argued that state law preempts the local regulation.[108] Under Michigan case law, state law generally preempts local regulations when the local regulations are either in direct conflict with a state statute, or when the state statute completely occupies the field.[109] Plaintiffs asserted that the NMCHA regulation was in direct conflict with the Public Health Code, which allows designated smoking areas under conditions that are less stringent than NMCHA requirements.[110] Plaintiffs further argued that the state regulatory scheme for regulating

102. MICH. COMP. LAWS ANN. § 333.12601(m) (West 2001).

103. MICH. COMP. LAWS ANN. §§ 333.12601(m)(i)-(ii) (West 2001).

104. *McNeil*, 275 Mich. App. at 689-90, 741 N.W.2d at 30.

105. *Id.* at 690, 741 N.W.2d at 30.

106. *Id.* at 695, 741 N.W.2d at 33 (citing MICH. COMP. LAWS ANN. § 333.2441(1) (West 2008)).

107. *McNeil*, 275 Mich. App. at 695, 741 N.W.2d at 33.

108. *Id.* at 697, 741 N.W.2d at 33.

109. *Id.* at 697, 741 N.W.2d at 33-34 (citing Rental Prop. Owners Ass'n of Kent County v. Grand Rapids, 455 Mich. 246, 257, 566 N.W.2d 514 (1997)).

110. *McNeil*, 275 Mich. App. at 697-98, 741 N.W.2d at 34.

smoking in public places is so broad and detailed in scope that it precludes all local regulation.[111]

The court of appeals disagreed with both of these arguments. The court first agreed with defendants that the NMCHA regulation did not directly conflict with state regulations.[112] The court argued that under the Code, the discretion to designate a smoking area is "expressly excepted from those public places 'in which smoking is prohibited by law.'"[113] The court cited an earlier opinion that "[t]he term 'law' may include those principles promulgated in constitutional provisions, common law, and regulations as well as statutes."[114] Further, the court argued that since the Code provides that a violation of a local health department regulation is a misdemeanor punishable by a fine or imprisonment, the Code anticipates local regulation beyond the Code.[115] The court concluded that the NMCHA regulation does not prohibit what the state law permits, and there is no conflict between the two.[116]

The court of appeals further concluded that state law does not completely occupy the field of smoking regulation.[117] The court cited an earlier Michigan Supreme Court case which set forth the four guidelines for finding exclusive occupation: (1) an express provision in the state law, (2) legislative history, (3) pervasiveness of the state regulatory scheme, and (4) the necessity of statewide regulatory uniformity.[118] Applying the *Llewellyn* factors to this case, the court of appeals agreed with plaintiffs that the statute did not expressly preempt local regulation and that legislative history does not imply preemption.[119] The court also found no evidence in the legislative history that the legislature thought that there was a need for uniform statewide control of smoking.[120] The court cited other sections of the Code which do contain express provisions of preemption, such as the section of the Code regulating smoking in food service establishments.[121] The court concluded that "in the absence of any express preclusion, the inference to be drawn from the

111. *Id.* at 698, 741 N.W.2d at 34.

112. *Id.* at 699, 741 N.W.2d at 34.

113. *Id.* at 698, 741 N.W.2d at 34.

114. *Id.* (quoting Vaqts v. Perry Drug Stores, Inc., 204 Mich. App. 481, 485, 516 N.W.2d 102 (1994)) (emphasis omitted).

115. *Id.* at 698-99, 741 N.W.2d at 34 (citing MICH. COMP. LAWS ANN. § 333.2441) (West 2008)).

116. *McNeil*, 275 Mich. App. at 699, 741 N.W.2d at 34.

117. *Id.* at 699, 741 N.W.2d at 35.

118. *Id.* (citing People v. Llewellyn, 401 Mich. 314, 257 N.W.2d 902 (1977)).

119. *Id.* at 700-01, 741 N.W.2d at 35-36.

120. *Id.* at 701, 741 N.W.2d at 35-36.

121. *Id.*, 741 N.W.2d at 36.

Legislature's having given preclusive effect to Part 129 of the PHC is a concomitant intention not to give preclusive effect to Part 126."[122] The court continued that the state regulatory scheme is not so "broad and detailed" that it has precluded local regulation in that area.[123] The court noted that to the contrary, the Code expressly addresses many of its requirements as "minimums."[124] Since the Code appears to allow more stringent local regulations, the court held that the Code does not preempt the NMCHA regulations.[125]

The Michigan Supreme Court subsequently ordered that the plaintiff's application for leave to appeal is "considered."[126] As this article went to press, the Michigan Supreme Court directed each party to submit briefs on whether the section of the Public Health Code giving local units the authority to promulgate and approve local regulations is an "improper delegation of legislative authority."[127] The Court's directive is a hint that the court may overturn the court of appeals decision.

IV. INTERGOVERNMENTAL RELATIONS

Chapter IV of the Public Highways and Private Road Act (County Road Law) provides that a county commission may place a millage proposal for roads and bridges on the ballot for voter consideration.[128] The statute further provides that the county treasurer must distribute the proceeds of any approved millage to cities and villages for their roads as well as to the county road commission.[129] The county treasurer must use the distribution formula in the statute, unless the units of government agree on an alternative formula.[130] The statute provides that the millage proposal is not properly before the voters if the proposal does not expressly contain a distribution formula.[131]

Despite this requirement, Van Buren County presented to the voters, and the voters approved, seven millage proposals from 1978 through 2003 which specifically allocated road millage proceeds only to the

122. *McNeil*, 275 Mich. App. at 701, 741 N.W.2d at 36.
123. *Id.* at 702, 741 N.W.2d at 36.
124. *Id.*
125. *Id.* at 703, 741 N.W.2d at 37.
126. McNeil v. Charlevoix County, No. 134437, 743 N.W.2d 55 (Mich. Jan. 11, 2008) (unpublished in official Michigan reporter).
127. *Id.*
128. MICH. COMP. LAWS ANN. § 224.20b(1) (West 2008).
129. MICH. COMP. LAWS ANN. § 224.20b(2) (West 2008).
130. *Id.*
131. MICH. COMP. LAWS ANN. § 224.20b(4) (West 2008).

county road commission.[132] None of the proposals mentioned the distribution of any of the funds for city or village roads.[133] The county treasurer never distributed any road millage funds to the local units during those years.[134]

In 2004, the City of South Haven first objected to the county's failure to allocate any road millage funds to the city as required by the statute.[135] The city eventually sued and sought restitution of its portion of the funds.[136] The trial court and the court of appeals agreed with the city that the county had violated the statute, but stopped short of ordering restitution.[137] The Michigan Supreme Court granted the city's leave to appeal, but limited consideration to whether the city was entitled to any of the tax proceeds.[138] The Court ordered the parties to address "whether the ballot proposal violated the statute and, if so, what remedy might be available, and whether the parties by their conduct 'otherwise agreed' to a different allocation."[139]

The subsequent opinion first analyzed the statutory language that all funds collected under the county road law "shall be allocated" according to the formula unless the cities and villages agree to a different formula.[140] The Court concluded that the word "shall" is mandatory.[141] Because the county did not allocate the road millage funds in accordance with the statutory formula and the cities and villages in Van Buren County did not have an alternative distribution formula, the county violated the statute.[142]

The Michigan Supreme Court further concluded, however, that the city is not entitled to restitution of its share of the road millage funds.[143] The Court noted that the statute does not provide a remedy of restitution if the county fails to carry out its obligations under the statute.[144] Rather, the Court stated, the statute provides that if an audit or investigation shows statutory violations, a copy of the report shall be filed with the

132. City of South Haven v. Van Buren County Bd. of Comm'rs., 478 Mich. 518, 522-23, 734 N.W.2d 533, 536 (2007).
133. *Id.*
134. *Id.*
135. *Id.* at 523, 734 N.W.2d at 536.
136. *Id.*
137. *Id.* at 524-25, 734 N.W.2d at 536-37.
138. *City of South Haven*, 478 Mich. at 523-24, 734 N.W.2d at 536-37.
139. *Id.* at 525, 734 N.W.2d at 536-37.
140. *Id.* at 525-26, 734 N.W.2d at 537-38.
141. *Id.* at 526, 734 N.W.2d at 538.
142. *Id.* at 527, 734 N.W.2d at 538.
143. *Id.* at 528, 734 N.W.2d at 539.
144. *City of South Haven*, 478 Mich. at 529, 734 N.W.2d at 539.

attorney general.[145] Upon receiving the report, the attorney general can file suit and seek "recovery of public property" that has been "misappropriated."[146] The Court concluded that since the Michigan Legislature specifically authorized the attorney general to bring a lawsuit to recover misappropriated funds, but did not "authorize plaintiff to bring a similar suit, [Section] 224.30 indicates the Legislature did not intend to allow the city to seek restitution."[147]

The Michigan Supreme Court also rejected three other potential remedies. The Court noted that under the Michigan Constitution, judicial remedies are available in a case where voters approve a millage that misallocates proceeds.[148] The Court can either enjoin the collection of the millage, or refund any collected taxes to the taxpayers.[149] The Court concluded in a footnote, however, that neither of these remedies are "appropriate" in this case.[150] Since "the millage has already been collected," an injunction is not appropriate.[151] Since the city is seeking restitution, not the taxpayers, the refund remedy is also not appropriate.[152]

The Court also rejected the city's request for a writ of mandamus compelling the county to "disgorge the finds and allocate them in accordance with the statutory formula."[153] The Court argued that since the ballot proposal did not expressly mention allocation of any of the funds to the cities and villages, but only mentioned county roads and bridges, the voters did not approve an allocation of any of the funds to the city.[154] The Court further argued that the voters of Van Buren County may not have approved the millage if they had been presented with a formula that distributed funds to the city.[155] "While no court has warrant to violate [Section] 224.20b by ordering distribution contrary to that statute, it likewise may not violate [the General Property Tax Act] by ordering these funds to be used for a purpose not approved by the

145. *Id.* at 530, 734 N.W.2d at 540.
146. *Id.*
147. *Id.* at 530-31, 734 N.W.2d at 540.
148. *Id.* at 531, 734 N.W.2d at 540-41.
149. *Id.* at 531, 734 N.W.2d at 541.
150. *City of South Haven*, 478 Mich. at 531 n.20, 734 N.W.2d at 541 n.20.
151. *Id.* at 532-33, 734 N.W.2d at 541-42.
152. *Id.*
153. *Id.* at 531, 734 N.W.2d at 541.
154. *Id.* at 531-32, 734 N.W.2d at 541.
155. *Id.* at 532, 734 N.W.2d at 541.

voters."[156] The Court concluded that it "cannot use its judicial power to provide a remedy that would itself violate the law."[157]

V. TAXATION

The plaintiffs in *Kinder Morgan Michigan, L.L.C. v. City of Jackson* own and operate an electric power generating plant in a renaissance zone in the City of Jackson.[158] The Michigan Legislature approved the Renaissance Zone Act in 1997 "to assist certain local governmental units in encouraging economic development, the consequent job creation and retention, and ancillary economic growth in this state."[159] The Michigan Legislature further provided that "all powers granted by this act shall be broadly interpreted to effectuate the intent and purposes of this act and not as a limitation of powers."[160] Properties in a renaissance zone are generally exempt from all property taxes except for three specific types of taxes enumerated in the General Property Tax Act: special assessments, "ad valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of local governmental unit," and school enhancement millages.[161]

The 1937 Fire Fighters and Police Officers Retirement Act states that a municipality may collect property taxes to support a police and fire fighters pension system (PA 345 pension).[162] The City of Jackson established such a pension system several years ago and began collecting property taxes to support it.[163] Prior to 2005, the city never levied any PA 345 taxes against plaintiff's renaissance zone property.[164] In 2004, the city received a letter from the State Tax Commission which stated that municipalities must collect certain taxes including "PA 345 Pension, MCL 211.7ff(2)(b)" taxes from all renaissance zone properties.[165]

After receiving a 2005 property tax bill including the PA 345 taxes, plaintiffs filed an appeal with the Jackson Board of Review.[166] The board

156. *City of South Haven*, 478 Mich. at 532-33, 734 N.W.2d at 541.

157. *Id.* at 534, 734 N.W.2d at 542.

158. Kinder Morgan Michigan, L.L.C. v. City of Jackson, 277 Mich. App. 159, 744 N.W.2d 184 (2007).

159. 1996 Mich. Pub. Acts 213; MICH. COMP. LAWS ANN. § 125.2692 (West 2008).

160. MICH. COMP. LAWS ANN. § 125.2694 (West 2008).

161. MICH. COMP. LAWS ANN. § 211.7ff (West 2008).

162. MICH. COMP. LAWS ANN. § 38.559(2) (West 2008).

163. *Kinder Morgan Michigan*, 277 Mich. App. at 161, 744 N.W.2d at 187.

164. *Id.*

165. *Id.*

166. *Id.* at 162, 744 N.W.2d at 187.

found no clerical error or mutual mistake of fact in the assessment and denied the appeal.[167] Plaintiffs appealed to the Michigan Tax Tribunal, which ruled that the city lacked the authority to levy PA 345 taxes against the property.[168] The tribunal argued it was not bound by the State Tax Commission's interpretation of the exemption in M.C.L. Section 211.7ff and that PA 345 taxes cannot be levied on renaissance zone properties.[169] The city appealed.

The city first argued that PA 345 taxes fall within the exceptions in M.C.L. Section 211.7ff(2) because PA 345 pensions are "obligations pledging the unlimited taxing power of the local governmental unit."[170] The city further argued that the word "obligations" is not merely limited to bonds and debt obligations, but that the term is "broad enough to encompass any type of responsibility or undertaking, including the obligation to fund and operate a PA 345 pension."[171] The city conceded that PA 345 taxes are not specifically levied for the payment of principal and interest within the first clause of M.C.L. Section 211.7ff(2)(b), but they are collected to fund "obligations pledging the unlimited taxing power of the local governmental unit."[172]

The court of appeals agreed with the power company that the city cannot levy PA 345 taxes against the property under M.C.L. Section 211.7ff(2)(b).[173] The court acknowledged that the term "obligations" in the statute is ambiguous.[174] The court disagreed with the city, however, that the word "obligations" applies to all obligations, including the obligation to fund the pension system.[175] The court focused on the word "pledging" which modifies the word "obligations" in the M.C.L. Section 211.7ff(2) exception list.[176] Noting that the dictionary definition of the word "pledge" calls it "the act of providing something as security for a debt or obligation," the court concluded that the "obligations" contained in the exception "are limited to those evidencing public indebtedness."[177]

The court also noted the city's argument that everyone should defer to the State Tax Commission's opinion expressed in the letter to the

167. *Id.*
168. *Id.*
169. *Kinder Morgan Mich.*, 277 Mich. App. at 163, 744 N.W.2d at 187-88.
170. *Id.* at 167, 744 N.W.2d at 190.
171. *Id.* at 168, 744 N.W.2d at 190.
172. *Id.* at 168-69, 744 N.W.2d at 191.
173. *Id.* at 172, 744 N.W.2d at 192.
174. *Id.* at 168, 744 N.W.2d at 190.
175. *Kinder Morgan Mich.*, 277 Mich. App. at 169, 744 N.W.2d at 191.
176. *Id.*
177. *Id.*

city.[178] The court agreed that "the longstanding and consistent interpretation of a statute by an agency charged with its administration is entitled to considerable weight unless that interpretation is clearly erroneous."[179] The court concluded, however, that based upon its own statutory construction, "the Tax Tribunal properly declined to defer to the State Tax Commission's contrary interpretation of the statute."[180]

It is unclear how many PA 345 pension systems in Michigan lose revenue under this decision. Since the decision prohibits the City of Jackson from collecting over four mills of taxes to fund its pension system from certain properties, the economic and budgetary consequences of the decision could be significant.

In another case involving statutory interpretation and the Michigan Tax Tribunal, the Michigan Supreme Court held that homes owned and operated by a nonprofit corporation and leased to low-income and disabled persons are not exempt from property taxes.[181] Liberty Hill Housing Corporation is a nonprofit that provides housing alternatives for low income and special needs clients.[182] The agency owns fifty-one homes in the Detroit metro area which it leases to qualified individuals.[183] Liberty Hill and its referring agencies choose independent living options for their clients based upon each client's ability to live in a residential setting without constant supervision.[184] Liberty Hill's parent agency also provides additional services to the residents such as transportation, meals, and monitoring.[185] The agency has no on going day-to-day presence in the homes.[186]

Under Michigan property tax law, charitable institutions are entitled to a property tax exemption on certain property that they own.[187] Liberty Hill requested property tax exemptions for its homes from the City of Livonia.[188] The city denied the agency's request for the exemption, and the Michigan Tax Tribunal upheld the city's decision.[189]

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178. *Id.* at 172, 744 N.W.2d at 193.
179. *Id.* at 172-73, 744 N.W.2d at 193.
180. *Id.* at 173, 744 N.W.2d at 193.
181. Liberty Hill Housing Corp. v. City of Livonia, 480 Mich. 44, 746 N.W.2d 282 (2008).
182. *Id.* at 46, 746 N.W.2d at 284.
183. *Id.* at 47, 746 N.W.2d at 284.
184. *Id.*
185. *Id.* at 47 n.2, 746 N.W.2d at 284 n.2.
186. *Id.* at 47, 746 N.W.2d at 284.
187. MICH. COMP. LAWS ANN. § 211.7(o)(1) (West 2008).
188. *Liberty Hill Housing*, 480 Mich. at 47, 746 N.W.2d at 284.
189. *Id.*

The tribunal noted that prior cases interpreting this exemption held that a charitable institution "occupied" the housing when its "provision of housing was incidental to the overall corporate purpose."[190] The tribunal relied on prior cases which held that charitable organizations who maintain corporate offices in the same facility as the residential units are tax exempt.[191] The tribunal argued that in the *Liberty Hill* case, the agency's tenants occupied independent homes and did not use the homes for charitable purposes.[192] The tribunal further argued that under a typical landlord-tenant relationship, a landlord did not "have occupancy rights during the term of the lease."[193] Even though Liberty Hill owns the houses, it does not occupy any of them. The tribunal concluded that "the exemption is apparently meant for instances where the offices and operations of the non-profit [sic] charitable institution exist" in the same residential building in which the tenants reside.[194]

Liberty Hill appealed the tribunal decision. The court of appeals affirmed the decision in an unpublished per curiam opinion and agreed with the tribunal's finding that "to find that the non-profit [sic] corporate owner/lessor occupies the properties by virtue of leasing them to tenants-occupants, even though the tenancy is consistent with the non-profit's [sic] corporate purposes, requires a 'significant stretch.'"[195] Liberty Hill appealed.

The Michigan Supreme Court agreed with the Tribunal and the court of appeals.[196] The Michigan Supreme Court also explicitly overruled an opinion that another panel of the court of appeals issued in 2006 while the *Liberty Hill* appeal was pending.[197] The *Pheasant Ring* panel held that transitional living homes for autistic individuals are exempt from property taxes.[198] While *Liberty Hill* and *Pheasant Ring* were pending, the Michigan Legislature amended the exemption language for the fifth time since 1853.[199] The exemption language now reads: "Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely

190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 48, 746 N.W.2d at 285.
194. *Liberty Hill Housing*, 480 Mich. at 48, 746 N.W.2d at 285.
195. Liberty Hill Housing Corp. v. City of Livonia, No. 258752, 2006 WL 1328885 at *2 (Mich. Ct. App. May 16, 2006).
196. *Liberty Hill Housing*, 480 Mich. at 55, 746 N.W.2d at 289.
197. *Id.* (citing Pheasant Ring v. Waterford Twp., 272 Mich. App. 436, 726 N.W.2d 741 (2006)).
198. *Id.*
199. 2006 Mich. Pub. Acts 681.

for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act."[200]

The Michigan Supreme Court analyzed earlier opinions involving exemptions requested by nonprofit and/or charitable organizations in light of the specific statutory language in place at the time of each decision.[201] The Court found no support in the prior case law for Liberty Hill's argument that "occupation" means "charitable use" not requiring physical possession by the charitable agency.[202] The Court cited its comparative analysis of the earlier cases to conclude that in order to qualify for the exemption, the nonprofit organization must be "actually physically present on the property when they engaged in activities that carried out their nonprofit goals."[203] Liberty Hill and Pheasant Ring agency personnel are not routinely physically present on the properties.[204] The Court concluded that since the agency is not physically present on the properties, the individual homes are not tax exempt.[205]

Nonprofit agencies across the state serving clients with all types of disabilities are increasing the number of independent living facilities available to their clients. Many of these homes are in suburban neighborhoods with high property taxes that are close to public transportation and additional services within walking distance. The property tax burden on each agency grows as their independent living portfolio expands, and fewer dollars are available for additional services. As the court noted in this case, "[a]lthough petitioner's goal is to break even while providing necessary housing and services to its clients, petitioner [Liberty Hill] had operated at a deficit for the three years preceding this suit."[206] As costs of services climb and available funds for services shrink, nonprofit agencies may ask the Michigan Legislature to amend the statute again to exempt these homes. Local units of government may resist any proposed amendment, however, since they depend on property tax revenues for funding essential services, including services to the residents of these homes.

200. MICH. COMP. LAWS ANN. § 211.7(o)(1) (West 2008).
201. *Liberty Hill Housing*, 480 Mich. at 51-54, 746 N.W.2d at 286-89.
202. *Id.* at 51, 746 N.W.2d at 286.
203. *Id.* at 59, 746 N.W.2d at 291.
204. *Id.*
205. *Id.*
206. *Id.* at 46 n.1, 746 N.W.2d at 284 n.1.

VI. ZONING AND LAND USE

The courts reported very few cases in the area of zoning and land use in this *Survey* period compared to prior years. The opinions that the courts did publish dealt with relatively obscure issues with limited appeal and application. Two cases are worthy of discussion because they garnered a significant amount of local interest when the disputes were pending. Both have unusual and interesting facts.

The Detroit International Bridge Company (DIBC) owns the Ambassador Bridge as well as the land in and around the bridge on the American side of the Detroit River.[207] The DIBC is a private company that has, what the Michigan Supreme Court noted, to be a "unique relationship with the federal government."[208] Congress gave the DIBC the authority to construct and operate the bridge and its approaches in 1921.[209] The authorizing statute also mandates that the DIBC comply with the Federal Bridge Act regulating all bridges over navigable waters.[210] The Bridge Act requires the U.S. Department of Transportation to approve all proposed construction on new or old bridges.[211]

In 2000, DIBC proposed the installation of new tollbooths for cars and trucks, a diesel fuel station for its duty-free plaza, extended lanes for trucks waiting to cross, and truck weighing stations on the American side of the bridge.[212] Once DIBC received initial approval of the renovation project with modifications from several federal agencies that operate in and around the bridge, DIBC sought city approval to begin construction.[213] The city refused to issue zoning variances based upon the anticipated effect of increased truck exhaust and noise on surrounding neighborhoods.[214] When DIBC proceeded with construction, city inspectors issued citations for various building violations.[215]

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207. City of Detroit v. Ambassador Bridge Co., 481 Mich. 29, 33, 748 N.W.2d 221, 223 (2008).

208. *Id.*

209. *See* Ambassador Bridge Authorization Act, Pub. Law No. 66-395, Ch. 167, 41 Stat. 1439 (1).

210. *City of Detroit*, 481 Mich. at 33, 748 N.W.2d at 223 (citing Bridge Act of 1906, 33 U.S.C. §§ 491-498 (2008)).

211. 33 U.S.C. § 491 (2008).

212. *City of Detroit*, 481 Mich. at 33, 748 N.W.2d at 223.

213. *Id.* at 34, 748 N.W.2d at 223.

214. *Id.*

215. *Id.* at 34, 748 N.W.2d at 224.

In February, 2001, the city sought an injunction to halt construction.[216] After a lengthy bench trial, the trial court orally ruled that DIBC was immune from the zoning ordinance because DIBC was a federal instrumentality.[217] The trial court also held that the federal government's control of the entire bridge complex preempted the city's zoning ordinance.[218] By the time the court issued its written opinion, however, the renovations were complete.[219]

The city appealed the trial court ruling. The court of appeals reversed, holding that the DIBC is not a federal instrumentality immune from state or local regulation.[220] The court of appeals also held that federal law did not preempt the city's zoning ordinance "because the federal government did not intend to exercise exclusive control over the bridge."[221]

The Michigan Supreme Court reversed the court of appeals.[222] The court first agreed with the trial court that DIBC is a "federal instrumentality for the limited purpose of facilitating traffic over the Ambassador Bridge."[223] The court admitted that there is no "bright line rule" for determining if a "private actor" like DIBC has federal instrumentality status.[224] The court adopted its own definition that merges the three-prong test for federal instrumentality set forth by the U.S. Sixth Circuit with a variation of the test adopted by the U.S. Second Circuit.[225]

The three factors in *United States v. Michigan* involve an analysis of the function for which the private actor was established, whether the actor continues that function, and the significance of the federal control over and involvement with the private actions.[226] The *Name.Space* court further differentiated between "status immunity" and "conduct-based immunity" for private entities operating under contract with the federal government.[227] The *Name.Space* court held that a federal instrumentality has status-based immunity, which is "absolute immunity," when the

216. *Id.*
217. *Id.*
218. *City of Detroit*, 481 Mich. at 34, N.W.2d at 224.
219. *Id.* at 34 n.4, 748 N.W.2d at 224 n.4.
220. *Id.* at 34-35, 748 N.W.2d at 224.
221. *Id.*
222. *Id.* at 32, 748 N.W.2d at 223.
223. *Id.*
224. *City of Detroit*, 481 Mich. at 38, 748 N.W.2d at 226.
225. *Id.* (citing U.S. v. Mich., 851 F.2d 803 (6th Cir. 1988) & Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000)).
226. *City of Detroit*, 481 Mich. at 38, 748 N.W.2d at 226 (citing *U.S. v. Mich.*, 851 F.2d at 806).
227. *Name.Space*, 202 F.3d at 581-82.

"federal government or its agencies directly own and/or exercise plenary control over the [private] entity in question."[228] The Second Circuit further held that a court could evaluate the limited conduct-based immunity of certain actors by examining the "nature of the activity" and whether the federal government contract requires certain activities.[229] The Michigan Supreme Court summed up the combined rule that it applied to the DIBC case as: "Did Congress intend to give the private actor the limited authority to carry out a unique federal purpose such that the private actor is immune from state or local regulation when it is carrying out that purpose?"[230]

After a review of the extensive factual analysis conducted by the trial court, the Michigan Supreme Court held that the DIBC is a federal instrumentality for the limited purpose of facilitating international traffic across the bridge.[231] The Court further held that the DIBC has conduct-based immunity from any local or state regulation that would directly inhibit this function.[232] The Court also affirmed the trial court's holding that the city's enforcement of the zoning ordinance in this instance would inhibit the DIBC's federal purpose.[233] The Court noted that its ruling applies to these specific facts, and that future courts will similarly need to analyze whether other state or local regulatory actions inhibit DIBC's "unique and limited federal-instrumentality status."[234]

The court of appeals opinion in *Township of Coldsprings v. Kalkaska County Zoning Board of Appeals* is also worth discussing.[235] The Kalkaska County Zoning Board of Appeals considered setback variances for a new home fronting Manistee Lake. The township supervisor sent a letter to the public hearing panel requesting that the board deny the variances.[236] The supervisor argued that construction of the home would contribute to poor water quality of the lake. The county zoning board of appeals granted the variances despite the township's objection.[237]

The township appealed the decision to the circuit court, arguing that the variances were inconsistent with the zoning ordinance's purpose to

228. *Id.* at 581.
229. *Id.* at 581-82.
230. *City of Detroit*, 481 Mich. at 39, 748 N.W.2d at 226.
231. *Id.* at 47, 748 N.W.2d at 230.
232. *Id.*
233. *Id.* at 52, 748 N.W.2d at 233.
234. *Id.*
235. Twp. of Coldsprings v. Kalkaska County Zoning Bd. of Appeals, 279 Mich. App. 25, 755 N.W.2d 553 (2008).
236. *Id.* at 27, 755 N.W.2d at 554.
237. *Id.*

prevent water pollution.[238] The county zoning board of appeals claimed, and the circuit court agreed, that the township did not have standing to appeal the variance because "it was not a person having an interest affected by the zoning ordinance."[239] The township appealed to the court of appeals. The township argued that it has standing in this matter on behalf of its residents who possess riparian rights to the lake, just like a non-profit corporation has organizational standing on behalf of its members.[240]

The court of appeals disagreed with the township. The court reasoned that the township "does not have 'members' who have voluntarily associated."[241] "Rather petitioner is effectively attempting to assert the alleged interests of its citizens under the doctrine of *parens patriae*."[242] The court continued that "political subdivisions such as citizens and counties, whose power is derivative and not sovereign, cannot sue as parens patriae."[243] The township must show that it, and not merely certain residents, is "detrimentally affected . . . in a manner distinct" from the general public's interest in protecting the lake from pollution and the general public health, safety, and welfare.[244] The township presented no evidence to the trial court that it owned, used, or had access to the lake or that it "'enjoyed a recreational, aesthetic, or economic interest' in the lake."[245] The court concluded that "[t]he absence of a concrete, particularized injury in fact is fatal to petitioner's standing to challenge" the decision of the county zoning board of appeals.[246]

VII. PUBLIC EMPLOYEES

The Michigan Supreme Court issued three opinions of interest during this *Survey* period concerning specific public employee rights and benefits. All three have significant legal and policy implications for almost all units of government.

238. *Id.*
239. *Id.* at 27, 755 N.W.2d at 555.
240. *Id.* at 29, 755 N.W.2d at 554.
241. *Twp. of Coldsprings*, 279 Mich. App. at 29, 755 N.W.2d at 554.
242. *Id.*
243. *Id.*
244. *Id.* at 30, 755 N.W.2d at 556.
245. *Id.*
246. *Id.*

A. Whistleblower Protection Act

Brown v. Mayor of Detroit case[247] is related to the scandals involving the former Mayor of the City of Detroit. Harold Nelthorpe, a former member of the Mayor's Executive Protection Unit of the Detroit Police Department, reported by memorandum "allegations of misconduct" by the Mayor and his wife to the Department's Professional Accountability Bureau.[248] The Deputy Chief of the Bureau Gary Brown authorized an investigation. The deputy chief forwarded a memorandum containing the results of the investigation to the chief of police and ultimately the Mayor's office.[249] Brown was discharged from his position, and the Mayor publicly called Nelthorpe a liar.[250] Both employees filed suit claiming slander and violations of the Michigan Whistleblower's Protection Act (WPA).[251] The city and plaintiffs ultimately settled the damage claims for millions of dollars. Alleged false testimony in this lawsuit led to the felony perjury charges against the Mayor and his top aide.

The whistleblower issues remained on appeal after the settlement of the damage claims. The Michigan Supreme Court granted leave to appeal to determine whether an employee of a public body must report violations or suspected violations to an outside agency or higher authority to receive WPA protection.[252] The Court acknowledged that the case involves statutory interpretation of the relevant WPA language.[253]

The Court summarized the statutory interpretation framework established by prior opinions and stated that a reviewing court must first review the statutory language to discern the intent of the Michigan Legislature.[254] "If the statutory language is unambiguous, the Michigan Legislature is presumed to have intended the meaning expressed in the statute and judicial interpretation is not permissible."[255]

The city argued that both Nelthorpe and Brown should have reported the incidents to the FBI or some other outside agency or higher authority in order to be protected by WPA.[256] The Court disagreed and held that both Nelthorpe and Brown complied with the WPA in reporting the

247. Brown v. Mayor of Detroit, 478 Mich. 589, 734 N.W.2d 514 (2007).
248. *Id.* at 591, 734 N.W. 2d at 516.
249. *Id.* at 592, 734 N.W. 2d at 516.
250. *Id.*
251. *Id.* (citing MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 2008)).
252. *Id.*
253. *Brown*, 478 Mich. at 593, 734 N.W.2d at 516.
254. *Id.*
255. *Id.*
256. *Id.* at 594, 734 N.W.2d at 517.

alleged violations within their own department.[257] The Court cited the WPA language which provides in part: "An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports, verbally or in writing . . . a violation of law . . . to a public body . . . ."[258] The WPA defines "public body" broadly to include numerous local, state, and federal boards, agencies, departments and their employees.[259] The Court characterized this language as "unambiguous."[260] Because the statute has no requirement that the employee must submit the report to an outside agency or higher authority, the Court held that both Nelthorpe and Brown complied with WPA requirements.[261] The Court also held that the WPA does not limit protection to reporting employees if the report is outside the scope of the employee's job duties.[262]

B. Residency Requirements

In 1999, the Michigan Legislature approved a relatively brief statute which limits public employee residency requirements.[263] The statute prohibits a public employer from requiring that an employee "reside within a specified geographic area or within a specified distance or travel time" from the workplace.[264] The statute further provides that a public employer may require that the employee live within twenty miles "or another specified distance greater than twenty miles" from the nearest boundary of the employer.[265] The City of Traverse City subsequently adopted the twenty-mile rule in its collective bargaining agreement with its police officers.

Traverse City conditionally offered a police officer's position to the plaintiff in *Lash v. City of Traverse City*[266] and placed him on a waiting list for upcoming vacancies. After receiving notice of his status, plaintiff purchased a thirty-acre parcel of property in a nearby community and prepared to move his family from Flint.[267] The property was located

257. *Id.* at 594-95, 734 N.W.2d at 517.
258. *Id.* at 593, 734 N.W.2d at 516 (citing MICH. COMP. LAWS ANN. § 15.362 (West 2008)).
259. MICH. COMP. LAWS ANN. § 15.361(d) (West 2008).
260. *Brown*, 478 Mich. at 594, 734 N.W.2d at 517.
261. *Id.* at 595, 734 N.W.2d at 517-18.
262. *Id.* at 596, 734 N.W.2d at 518.
263. 1999 Mich. Pub. Acts 212.
264. MICH. COMP. LAWS ANN. § 15.602 (West 2008).
265. *Id.*
266. Lash v. City of Traverse City, 479 Mich. 180, 735 N.W.2d 628 (2007).
267. *Id.* at 184, 735 N.W.2d at 631.

outside of the twenty-mile limit from Traverse City measured by road miles, but was within the twenty-mile limit measured by radial miles.[268] During a routine pre-employment investigation, the city discovered the distance issue and informed plaintiff that his employment was contingent on his moving within the twenty-mile limit as measured by road miles. When plaintiff refused, the city rescinded the conditional offer.[269]

Plaintiff sued for the city's "unlawful failure to hire"[270] and claimed that the residency requirement violated M.C.L. Section 15.602 because it required him to live closer than twenty miles from the city's boundary as measured on a radial basis.[271] Plaintiff asked only for monetary damages including various expenses related to the employment interviews, expenses related to his wife and children, and purchase and repair of the new home.[272] The trial court granted summary disposition to the city, holding that the city properly measured the twenty-mile limit in road miles, not radial miles.[273] The court also held that a plaintiff could claim damages because there was "no other way to enforce" the statute.[274] Both parties appealed.

Two members of the court of appeals panel agreed with the trial court that the correct method to measure the twenty-mile distance is in radial miles, not road miles.[275] Two different panel members held that the statute permitted a private cause of action for money damages.[276] The city appealed.

The *Lash* case once again plunged the Michigan Supreme Court into statutory interpretation. The court reiterated the general rule that when a statute is unambiguous, "the Legislature's intent in clear and judicial construction is neither necessary nor permitted."[277] The court rejected the plaintiff's claim that the residency statute is ambiguous.[278] The court first argued that the relevant distance in the statute is simply twenty miles, and nothing in the "ordinary definition" of the word "mile" indicates that the "distance is to be measured along available routes of public

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268. *Id.*
269. *Id.*
270. *Id.* at 184-85, 735 N.W.2d at 632.
271. *Id.* at 185, 735 N.W.2d at 632 (citing MICH. COMP. LAWS ANN. § 15.602 (West 2008)).
272. *Lash*, 479 Mich. at 185-86, 735 N.W.2d at 632.
273. *Id.* at 186, 735 N.W.2d at 632.
274. *Id.*
275. *Id.* at 186, 735 N.W.2d at 632-33.
276. *Id.* at 186, 735 N.W.2d at 633.
277. *Id.* at 187, 735 N.W.2d at 633 (citing Koontz v. Ameritech Servs., Inc., 466 Mich. 304, 645 N.W.2d 34 (2002)).
278. *Lash*, 479 Mich. at 188, 735 N.W.2d at 634.

travel."[279] The court noted that the statute further provides that the twenty miles is measured from an employee's property to the nearest "boundary" of the public employer, "which might be in a field, the middle of a lake, or in a backyard."[280] The court further argued that if the Michigan Legislature had wanted municipalities to measure the restriction in road miles rather than radial miles, it would have specified this as it has in other statutes.[281] The court concluded that the city's residency requirement violated the statute.[282]

The court held, however, that the plaintiff is not entitled to monetary damages for the violation.[283] The court noted that Michigan statutes are "replete with instances where the Legislature has explicitly permitted actions for monetary damages against municipalities and their employees."[284] However, there is "no express authorization permitting a private cause of action against a public employer for a violation of Section 15.602(2)."[285] Without an express authorization for damages, plaintiff's only remedies are "injunctive relief" or "declaratory relief."[286] Dissenting Justice Cavanaugh argued that the statute implies a private cause of action for monetary damages and that the twenty-mile limit should be measured in radial rather than road miles.[287]

C. Public Employee Benefits

The Michigan Supreme Court issued its long-awaited opinion on the voter-approved "marriage amendment" to the Michigan Constitution during this *Survey* period.[288] The 2004 amendment provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."[289] Several public employers including city and county governments and universities had policies or agreements that extended health insurance benefits to their employees' same-sex domestic partners.[290] Proponents

279. *Id.* at 188-89, 735 N.W.2d at 634.
280. *Id.* at 190, 735 N.W.2d at 634-35.
281. *Id.* at 189 n.13, 735 N.W.2d at 634 n.13.
282. *Id.* at 191, 735 N.W.2d at 635.
283. *Id.* at 197, 735 N.W.2d at 639.
284. *Lash*, 479 Mich. at 195, 735 N.W.2d at 638.
285. *Id.* at 195-96, 735 N.W.2d at 638 (citing MICH. COMP. LAWS ANN. § 15.602(2) (West 2008)).
286. *Id.* at 196, 735 N.W.2d at 638.
287. *Id.* at 205, 735 N.W.2d at 643.
288. Nat'l Pride at Work, Inc. v. Governor of Mich., 481 Mich. 56, 748 N.W.2d 524 (2008).
289. MICH. CONST. of 1963, art. 1, § 25.
290. *Nat'l Pride*, 481 Mich. at 60, 748 N.W.2d at 529.

of the amendment had argued in pre-election comments that the amendment would not prohibit same-sex partner health benefits if approved.[291] Public employee unions and the State of Michigan raised a concern that the amendment language might prohibit provisions of their collective bargaining agreements that offered such benefits.[292] The plaintiff organization affiliated with the AFL-CIO commenced a lawsuit for a court-determined clarification.[293]

The trial court held that the provision of benefits to same-sex partners does not violate the amendment. The trial court argued that public employers do not recognize domestic partnerships as unions "similar to marriage," because the criteria used by the public employers "even when taken together, pale in comparison to the myriad of legal rights and responsibilities accorded to those with marital status."[294] The court of appeals reversed, holding that the amendment does bar public employers from providing such benefits.[295]

The Michigan Supreme Court affirmed the opinion of the court of appeals.[296] The Court argued that "the pertinent question is not whether these unions give rise to all of the same legal effects; rather it is whether these unions are being recognized as unions similar to marriage 'for any purpose.'"[297] The Court focused on the phrase "similar union" in the amendment and analyzed both the etymological and social meanings of the word.[298] The Court ultimately agreed with the court of appeals that a "publicly recognized domestic partnership need not mirror a marriage in every respect in order to run afoul of [the constitutional provision] because the amendment plainly precludes recognition of a "similar union for any purpose."[299]

The two dissenting justices argued that the campaign advertising by amendment proponents misled the voters by proclaiming that the amendment would not preclude public employers from providing health care benefits for same-sex partners.[300] The court found this argument unpersuasive. The court stated that its role is not "to speculate about how these statements may have influenced voters. Instead, our responsibility

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291. *Id.* at 80, 748 N.W.2d at 540.
292. *Id.* at 60-61, 748 N.W.2d at 529.
293. *Id.* at 61, 748 N.W.2d at 529-30.
294. *Id.* at 62, 748 N.W.2d at 530 (citing Nat'l Pride at Work, Inc. v. Governor of Mich., No. 05-368-CZ, 2005 WL 3048040, at *7 (Mich. Cir. Ct. Sept. 27, 2005)).
295. *Id.*
296. *Nat'l Pride*, 481 Mich. at 60, 748 N.W.2d at 529.
297. *Id.* at 86, 748 N.W.2d at 543.
298. *Id.* at 68, 748 N.W.2d at 533.
299. *Id.* at 71, 748 N.W.2d at 534-35.
300. *Id.* at 95-96, 748 N.W.2d at 548.

is, as it has always been in matters of constitutional interpretation, to determine the meaning of the amendment's actual language."[301]

VIII. GOVERNMENTAL IMMUNITY

The Michigan Supreme Court issued only two noteworthy opinions in this *Survey* period on governmental immunity issues. Both opinions reflect the philosophy of the majority of the Court that exceptions to governmental immunity should be narrowly tailored. As Justice Young noted in a footnote in one of this year's cases, speaking for four justices, "the very purpose of governmental immunity is to *limit* the government's exposure to liability."[302] Both of this year's opinions include very strict, sometimes tortured, construction of the statutory language of the immunity exceptions. As a result, potential plaintiffs allegedly injured by government actions have even fewer legal bases upon which to claim damages than in the past.

In *Renny v. Department of Transportation*, the plaintiff slipped and fell on snow and ice that had accumulated on the sidewalk in front of the door of a rest area building along a state highway.[303] Plaintiff sued the Michigan Department of Transportation (MDOT) and claimed that "by designing, constructing, keeping, and/or maintaining the rest area in a defective condition" and by failing to install gutters and downspouts to channel the water away from the sidewalk, MDOT created a hazardous surface on the walkway.[304] The court of claims granted summary disposition to MDOT on the basis of governmental immunity.[305] The court of appeals reversed and remanded the case to the court of claims, holding that the plaintiff had claimed a design defect under the public building exception and that the damage was directly attributable to a dangerous or defective condition of the building itself even though the snow and ice were outside the building.[306]

A Michigan Supreme Court majority decided that the case should return to the court of claims.[307] Four justices held that the plaintiff had adequately stated a claim for damages for failure to repair and maintain.[308] The same four justices also held, however, that a design

301. *Id.* at 84, 748 N.W.2d at 542.

302. Renny v. Dept. of Transp., 478 Mich. 490, 501 n.28, 734 N.W.2d 518, 525 n.28 (2007).

303. *Id.* at 493, 734 N.W.2d at 520.

304. *Id.*

305. *Id.* at 494, 734 N.W.2d at 521.

306. *Id.*

307. *Id.* at 493, 734 N.W.2d at 520.

308. *Renny*, 478 Mich. at 493, 734 N.W.2d at 530.

defect claim is not cognizable under the public building exception.[309] The justices argued that the "plain language" of the statute requires a government entity only to "repair and maintain" a public building.[310] The justices stated that "neither the term 'repair' nor the term 'maintain,' which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner."[311] The justices argued that including a duty to design a safe building would "be measured in hindsight by courts that are ill-equipped to measure the budgetary and architectural trade-offs involved in the construction of any structure."[312] The four justices explicitly overruled two prior decisions that had recognized a design defect as a cognizable claim under the public building exception.[313]

Justice Weaver concurred in the decision to remand the case to the court of claims.[314] She agreed that the plaintiff had stated a claim for damages for failure to repair and maintain, but called the "commentary" of the four justices on the design defect issue "improvident" and "obiter dictum."[315] Justices Kelly and Cavanaugh also agreed that the case should return to the court of claims. The two justices would "reaffirm the longstanding precedent of this Court that design defects are actionable under the public building exception."[316] Justice Kelly noted that it "defies logic" that a government entity would be "required to maintain a dangerously designed building and be exempted from liability for harm to the public caused by the building's design. It must be presumed that the Legislature intended that the design of public buildings should not cause injury to people."[317] These split opinions leave the design defect issue for future courts to resolve.

Late in the 2008 term, the Michigan Supreme Court issued a consolidated opinion on governmental liability for loss of consortium claims.[318] Two separate cases resulted in conflicting court of appeals opinions on whether the motor vehicle exception to immunity permits

309. *Id.*

310. *Id.* at 500, 734 N.W.2d at 524.

311. *Id.*

312. *Id.* at 501 n.28, 734 N.W.2d at 525 n.28.

313. *Id.* at 505, 734 N.W.2d at 527 (citing Sewell v. Southfield Pub. Schools, 456 Mich. 670, 576 N.W.2d 153 (1998) & Williamson v. Dept. of Mental Health, 176 Mich. App. 752, 440 N.W.2d 97 (1989)).

314. *Renny*, 478 Mich. at 507, 734 N.W.2d at 528.

315. *Id.* at 508, 734 N.W.2d at 529.

316. *Id.* at 517, 734 N.W.2d at 533.

317. *Id.* at 509, 734 N.W.2d at 529.

318. Wesche v. Mecosta County Rd. Comm'n, 480 Mich. 75, 746 N.W.2d 847 (2008).

such claims.[319] In *Wesche*, a county road commission grader struck a motorist's vehicle, seriously injuring the motorist. The motorist's wife claimed loss of consortium. Both the trial court and the court of appeals granted summary disposition to the road commission and held that the motor vehicle exception does not waive governmental immunity for loss of consortium claims.[320]

In *Kik*, the driver of a township ambulance lost control of the vehicle and overturned in a ditch. The pregnant passenger suffered injuries, went into premature labor, and delivered the baby, who died later that day at the hospital. The original claims in the complaint alleged personal injury to the mother, loss of consortium by the father, and wrongful death on behalf of the baby's estate.[321] The case has a lengthy procedural history involving two court of appeals panels which will not be discussed here. The special panel of the court of appeals assigned to resolve the conflict between the *Wesche* holding and the original three-judge appeals panel in *Kik*, with three dissenting judges, overruled *Wesche* and held that loss of consortium claims are permitted under the motor vehicle exception.[322]

In the consolidated opinion, the Michigan Supreme Court held that the two government agencies in the cases are entitled to immunity on the loss of consortium claims.[323] The Court held that loss of consortium is not a "bodily injury" for which the motor vehicle exception waives immunity.[324] The Court relied on the dictionary definition of both "bodily" and "injury" to conclude that "loss of consortium is a non-physical injury."[325] The Court further held that the baby's parents could not pursue a loss of consortium claim in their wrongful death action against the township.[326] The Court did agree with the lower courts, however, that the government employee ambulance driver was not immune from loss of consortium claims if the father could satisfy all of the elements of the gross negligence exception to governmental immunity.[327]

The Court also held that the Wrongful Death Act[328] "does not expand the waiver of immunity set forth in the motor-vehicle exception

319. Wesche v. Mecosta County Rd. Comn'n, 267 Mich. App. 274, 705 N.W.2d 136 (2005); Kik v. Sbraccia, 272 Mich. App. 388, 726 N.W.2d 450 (2006) (*Kik* II).

320. *Wesche*, 480 Mich. at 81, 746 N.W.2d at 852.

321. *Id.* at 81-82, 746 N.W.2d at 852.

322. *Id.* at 83, 746 N.W.2d at 853.

323. *Id.* at 87, 746 N.W.2d at 855.

324. *Id.* at 84-85, 746 N.W.2d at 853-54.

325. *Id.* at 85, 746 N.W.2d at 854.

326. *Wesche*, 480 Mich. at 91, 746 N.W.2d at 857.

327. *Id.* at 92, 746 N.W.2d at 857.

328. *See* MICH. COMP. LAWS ANN. § 600.2922 (West 2008).

to include loss of consortium claims."[329] This decision overruled a 1982 decision which had held that a wrongful death action "exists not as a 'cause of action' which survives the decedent, but as 'a new action . . . which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries.'"[330] The Court argued that *Endykiewicz* was incorrectly decided because it "erroneously treated a wrongful-death claim as a 'new' cause of action rather than a continuation of the decedent's underlying claim."[331]

Justices Weaver and Cavanaugh dissented from the four-justice majority's conclusion that a loss of consortium claim is not a "bodily injury," but concurred that immunity is not available to an employee under the motor vehicle exception if the employee is grossly negligent.[332] Justices Kelly and Cavanaugh also would hold that the motor vehicle exception "establishes only a threshold for liability and does not limit the type of damages that may be recovered once liability is established" and would allow recovery of loss of consortium as well as other damages.[333] The minority concluded that the majority's interpretation would lead to "absurd" results that the legislature could not have intended.[334]

329. *Wesche*, 480 Mich. at 92, 746 N.W.2d at 857.

330. *Id.* at 91, 746 N.W.2d at 857 (citing Endykiewicz, v. State Hwy. Comm'n, 414 Mich. 377, 387, 324 N.W.2d 755 (1982)).

331. *Id.* at 91 n.13, 746 N.W.2d at 857 n.13.

332. *Id.* at 94, 746 N.W.2d at 858-59.

333. *Id.* at 97, 746 N.W.2d at 860.

334. *Id.* at 103, 746 N.W.2d at 863.