STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

SHENIECE BALLARD, Personal Representative of the Estate of KASSIM BALLARD, and DOROTHY J. WILKES and EDNA REID, Co-Personal Representatives of the Estate of ANTHONY DEON WILKES,

Plaintiffs-Appellants and Cross-Appellees,

S.C. NO: 106941; 106954

C.A. NO: 173829 L

vs.

YPSILANTI TOWNSHIP,

Defendant-Appellee and Cross-Appellant,

- and -

JOANN BRINKER and DAVE COOPER, Jointly and Severally,

Defendants.

_____/

BRIEF OF AMICUS CURIAE THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWNSHIPS ASSOCIATION

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IS YPSILANTI TOWNSHIP ENTITLED TO A SUMMARY DISPOSITION IN ITS FAVOR INASMUCH AS PLAINTIFFS' CLAIM, BASED ON THE RECREATIONAL USE ACT, DOES NOT CONSTITUTE A CLAIM IN AVOIDANCE OF THE TOWNSHIP'S GOVERNMENTAL IMMUNITY?

Defendant-Appellee Ypsilanti Township says "Yes."

Amicus Curiae the Michigan Municipal League and the Michigan Townships Association say "Yes".

Plaintiffs-Appellants say "No."

The Court of Appeals answered "Yes."

STATEMENT OF FACTS

The Michigan Municipal League and the Michigan Townships Association rely upon the statement of facts as recited in Ypsilanti Township's brief on appeal.

INTRODUCTION

In seeking the Court's permission to file an amicus brief in support of Ypsilanti Township's position in these appeals, the Michigan Municipal League and the Michigan Townships Association state that the following explanation of their creation, operation, and aims readily attests to the numerous reasons why their respective memberships support the Township of Ypsilanti's position in these appeals.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative efforts and whose membership consists of some 510 Michigan cities and villages. Among the League's members are 370 city and villages which belong to the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent member cities and villages in litigation of statewide significance. This brief amicus curiae is authorized by the board of directors of the Legal Defense Fund.

For its part, the Michigan Townships Association, through its governing board, has likewise formally voted in favor of participating in these appeals in the status of amicus curiae.

It goes without saying that the Court's decision in this appeal will bear substantially on the numerous member entities constituting amicus curiae. Therefore, amicus curiae seek an opportunity to participate in the process of the Court's consideration and resolution of these appeals. Specifically, amicus curiae urge the Court to rule in favor of Ypsilanti Township and to find that the provisions of Michigan's Recreational Use Act do not constitute an additional statutory exception to

the governmental immunity cloaking governmental agencies in MCL 691.1407(1); MSA 3.996(107)(1).

ARGUMENT

YPSILANTI TOWNSHIP IS ENTITLED TO A SUMMARY DISPOSITION IN ITS FAVOR INASMUCH AS PLAINTIFFS' SUIT, BASED ON THE RECREATIONAL USE ACT, DOES NOT CONSTITUTE A CLAIM IN AVOIDANCE OF THE TOWNSHIP'S GOVERNMENTAL IMMUNITY.

A. The overarching principles of statutory construction support the township's position.

The problem presented to the Court is one of statutory construction. The question is whether the Recreational Use Act creates a statutory exception to the Governmental Tort Liability Act so that claims brought against a governmental entity, which owns or leases a large undeveloped tract of land held open to the public for free, may proceed against the governmental entity under the provisions of the Recreational Use Act, notwithstanding the separate and independent protections normally available under the Governmental Tort Liability Act. Amicus curiae contends that the answer is no. Before analyzing the specific text of the two statutes, it is important to recall those fundamental principles that guide this Court's decision-making in the area of statutory construction.

The Court's function is to interpret the statutes to "decide what meaning ought to be given the directions of the statute[s] in the respects relevant to" this case. Henry M. Hart, Jr., and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, p 1374 (1994). This directive compels a review of the statutes with respect for the "position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution under which it exercises its powers." Id. Justice Holmes explained that statutes are to be interpreted

according to the meaning of the enactment, looking at "what the words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used...." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv L Rev 417, 417-19 (1899), reprinted in Collected Legal Papers, 204, 207 (1920). It is axiomatic that judges are subordinate to legislators when interpreting and applying statutes. Donald A. Farber, Statutory Interpretation and Legislative Supremacy, 281, 281-85 (1989) (judges "compared to military officers attempting to obey unclear orders from headquarters").

But once these principles are accepted, it remains occasionally difficult to put them into effect in a particular situation. "Language being what it is -- an inexact, clumsy tool -- words ... must be construed and interpreted...." Arthur S. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 Virginia L Rev 23 (1956). Despite these difficulties, the "statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L Rev 621 (1990). This pre-eminent rule of construction has been recognized by the new strict constructionists as well as the legal process theorists. See Antonin Scalia, A Matter of Interpretation (1997) and Hart & Sacks, *supra*, p 1374-1380. And this Court has repeatedly announced that it "first considers the specific language of the statute itself." *Kalamazoo City Education Association v Kalamazoo Public Schools*, 406 Mich 579, 463; 281 NW2d 454 (1979); *Sam v Balardo*, 411 Mich 405, 417; 308 NW2d 142 (1981). Only if there is some ambiguity does the Court resort to other approaches to interpreting and applying the

statutory text. *Achtenberg v East Lansing*, 421 Mich 765, 770; 364 NW2d 277 (1985) (courts must apply language as written when it is clear).

The problem presented here is created by the interplay or relationship between the Recreational Use Act and the Governmental Tort Liability Act, two separate statutes which were enacted at different times and to accomplish different purposes. The Wilkes plaintiffs contend that the Recreational Use Act was a recognized statutory exception to governmental immunity when the governmental immunity statute was passed in 1964. They take the position that the historical approach to immunity embodied in MCL 691.1407(1); MSA 3.996(107)(1) requires interpreting the Recreational Use Act as an exception to immunity. Under this view, if a claim is brought against a governmental entity and the claim falls within the scope of the Recreational Use Act, it nullifies the protections ordinarily afforded by the Governmental Tort Liability Act.

The Ballard plaintiff advances the position that rules of statutory construction require the Court to read the Recreational Use Act was an exception to the protections of statutory governmental immunity that would otherwise be available. Careful consideration of both arguments confirms that the Recreational Use Act was not a pre-1965 exception to immunity and that it should not be interpreted as an exception to the Governmental Tort Liability Act, which would nullify protections otherwise available under that Act.

In an effort to avoid judicial overreaching and interference with the legislative will, courts have generally sought to avoid reading exceptions into statutes or to interpret one statute as silently repealing or nullifying all or some portion of another

statute. This rule rests upon the salutary purpose of preserving and effectuating legislative enactments as much as possible. When the application of a seemingly apposite rule is compatible with the sense of the rule and its scope, the "rule of singing reason" permits the court to apply the statute without strain. Karl Llewellyn, The Common Law Tradition: Deciding Appeals, pp 180-183.

It is amicus curiae's position that both statutes may be applied without strain to provide layers of protection for governmental entities in situations where the field of operation of each statute overlaps. In other words, when a governmental entity is sued for injuries that occur on a large tract of undeveloped land, a plaintiff must fit his or her case within an exception to immunity and must satisfy the burden of proof and the other requirements of the Recreational Use Act. By and large, the Recreational Use Act and the Governmental Tort Liability Act exist side-by-side to address different problems by providing liability-limiting protection or immunity in specified circumstances. When the statutes intersect, there is no conflict. Both statutes can and must be given full effect. Plaintiffs' attempt to nullify the provisions of statutory immunity whenever a case falls within the Recreational Use Act must be rejected.

Amicus curiae take the position, consistent with that urged by Ypsilanti Township, that the Recreational Use Act does not furnish litigants with a statutory exception to immunity in addition to the statutory exceptions set forth in Michigan's Governmental Tort Liability Act, upon which to predicate a tort claim against a governmental agency. The Governmental Tort Liability Act is the source of all of the statutory exceptions to a governmental agency's governmental immunity. A review of the text and the legislative history of both acts, along with an understanding of the aims

and purposes sought to be achieved by each, proves the merits of Ypsilanti Township's contention.

The recreational use statute, first passed in 1953, is a liability-limiting statute. Its purpose is to promote tourism in the State by encouraging state residents and visitors alike to take advantage of Michigan's acres and acres of undeveloped, unspoiled scenic lands while simultaneously offering the owners, tenants, or lessees of those lands a degree of protection from liability. In recognition of the fact that the type of land covered by the statute is difficult , if not impossible, to make free from dangerous conditions, the legislation affords special and favorable treatment to those owners, tenants, and lessees whose lands come within the meaning of the act. Specifically, the owners, tenants, and lessees are answerable only for gross negligence or willful and wanton misconduct. The liability-limiting aspect of the statute relates directly to the type of land and to the use of the land.

Since its passage in 1964, Michigan's Governmental Tort Liability Act has existed alongside the Recreational Use Act. The Governmental Tort Liability Act sets forth four categories of activity for which tort liability may be imposed on a governmental agency, *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 593; 363 NW2d 641 (1984). Pursuant to the act, governmental agencies remain statutory liable for bodily injury and property damage arising out of their failure to keep highways in reasonable repair; the negligent operation of a government-owned motor vehicle by the agency's officer, agent, or employee; the dangerous and defective condition of a public building under the agency's control; and the governmental agency's carrying on of a proprietary function, *Ross, supra*, at 593-594. Especially significant is

the provision for broad immunity from tort liability given by § 7 of the act to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function.

Until now, the Court has not been called upon to directly decide whether the Recreational Use Act and the Governmental Tort Liability Act operate in totally independent spheres or whether in fact, there is some point of congruence between the two. Amicus curiae proposes that, when properly construed, the statutes are seen to have a distinct field of operation which, under certain limited and defined circumstances, allow for some overlap. Stated otherwise, the Recreational Use Act is not an additional statutory exception to a governmental agency's governmental immunity. Instead, the Recreational Use Act comes into play if and only if a plaintiff first fits his/her case within one of the exceptions to immunity provided by the Governmental Tort Liability Act. Then, and only then, in the case of a governmental agency-landowner/tenant/lessee of land do the provisions of the Recreational Use Act become operative.

B. The Governmental Tort Liability Act and Recreational Use Act are not irreconcilable and one does not amount to a legislative repeal or nullification of all or part of the other.

A further discussion of the aims and purposes to be served by both the Governmental Tort Liability Act and the Recreational Use Act is instructive and confirms that there is no irreconcilable conflict between the statutes. *See generally, State Highway Comm'r v Detroit City Controller*, 331 Mich 337, 358; 49 NW2d 318 (1951). Interpreting a later-enacted statute to be a repeal by implication of an earlier act is a disfavored construction. *Couvelis v Michigan Bell Telephone Co*, 281 Mich 223;

274 NW 771 (1937). The courts are to read later statutes on the same general subject as supplementary to those preceding them. *Wayne Co v Auditor General*, 250 Mich 227; 229 NW 911 (1930). If possible, a court must reconcile them and enforce them both. *Board of Control of the Michigan State Prison v Auditor General*, 197 Mich 377; 163 NW 921 (1917).

These rules reflect the important notion that courts are subservient to the legislature and must faithfully give effect to the directives embodied in statutory text. A repeal by implication is at odds with that goal. It involves overriding part or all of a statute by judicial decree. Because of its potential to interfere with the measures that the democratically-elected legislative body has adopted, a repeal by implication will be found by courts only by an express provision of a subsequent law or by necessary implication through a positive repugnancy between provisions of the latter and former enactment to such an extent that they cannot stand together or be consistently reconciled. *Edwards v Auditor General*, 161 Mich 639, 644-645; 126 NW 853 (1910). *See also, Council No 23, Local 1905, Am Federation of State, County and Municipal Employees v Recorder's Court Judges*, 399 Mich 1; 248 NW2d 220 (1976).

1. **The Recreational Use Act.**

The Recreational Use Act was originally introduced in 1953 as house bill 241. It applied only to persons coming upon the lands of another for the purpose of "hunting", 1953 Journal of the House, 374, 483. The bill was revised from its original form by adding "fishing" as one of the designated activities encompassed by the statute, 1953 Journal of the House, 496, 516. Trapping was later included in the list of activities by the house committee on conservation, 1953 Journal of the House, 609, 646-647, 665.

Accordingly, when first enacted into law as 1953 PA 201, the Recreational Use Act provided that:

> No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other valuable consideration for the purpose of fishing, hunting, or trapping, with or without permission, against the owner, tenant or lessee of the premises unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

The bill remained in that form until 1964, when the enumerated activities were expanded, 1964 Journal of the House, 822 and 1964 Journal of the Senate, 919-920. The 1964 version of the statute stated that:

> No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, or other similar outdoor recreational use, with or without permission, against the owner, tenant or lessee of said premises unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant or lessee.

Ten years later, additional recreational activities were included within the operation of the statute, 1974 Journal of the Senate, 879. The statute then recited that:

> No cause of action shall arise for injuries to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use, with or without permission, against the owner, tenant, or lessee of said premises unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

1987 PA 110 provided minor modifications to the Recreational Use Act. That version of the statute was effective on July 4, 1991, the date of the incident complained of by plaintiffs. Specifically, as it existed on July 4, 1991, the Recreational Use Act read in pertinent part as follows:

> Except as provided in subsection (3), no cause of action shall arise for injuries to any person who is on the lands of

> another without paying the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use with or without permission against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful or wanton misconduct of the owner, tenant or lessee.[1]

In *Wymer v Holmes,* 429 Mich 66; 412 NW2d 213 (1987) the court analyzed the legislative history of the Recreational Use Act. As explained in *Wymer,* more than 40 states have adopted recreational use laws which limit the liability of landowners whose lands are used for outdoor recreational activities such as those enumerated in Michigan's statute. Most states were encouraged to pass such laws by virtue of a model act promulgated in 1965. However, Michigan's legislature had years earlier taken steps to protect Michigan landowners. Consequently, the *Wymer* court said that it was reasonable to assume that Michigan's statute shared the same general purpose as similar acts in other jurisdictions.

Generally speaking, with the passage of recreational use laws, states aim to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the liability of landowners towards persons entering thereon for such purposes. Still, other states perceive the purpose of their Recreational Use Acts as furthering the legitimate state objective of promoting tourism and of opening up and making available vast areas of vacant lands to the use of the general public. Reconciling the objectives to be attained by Michigan's Recreational Use Act

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[1] MCL 300.201; MSA 13.1485 was later repealed by 1994 PA 451. The legislature then amended the language of the statute and included the statute at MCL 324.73301; MSA 13A.73301. The new statute took effect on May 24, 1995, 1995 PA 58.

and the specific amendments enacted by the Michigan legislature, the *Wymer* court proffered the following observations concerning Michigan's Recreational Use Act:

> By the terms of the statute as enacted in 1953, it applied only to those who were hunting, fishing, or trapping. Reference to the history of the act demonstrates that the legislature only intended to limit a landowner's liability where others fished, hunted, or trapped upon his land. Later, as increased leisure time allowed our society to expand its inclination for outdoor recreation, the legislature expanded the scope of the statute in parallel fashion.
>
> The activities added in 1964 were logical extensions of the original act. Yet, the legislature, by adding the term "outdoor" gave a more restricted meaning to the statute than the original "recreational use." In the context of more specific words, the term "outdoor" connotes more than a mere inside-outside distinction.
>
> The last amendment in 1974, in adding two more enumerated activities – motorcycling and snowmobiling – shows no intent to change the common law. The additional change in the 1974 amendment to "or any other outdoor recreational use" from the 1964 "or other similar outdoor recreational use" appeared to have allowed expansion of the list of activities to include new and novel outdoor recreational activities without creating a laundry list. We do not see this legislative response as an indication that the legislature intended a major restructuring of Michigan's common-law premises liability.
>
> The legislative history of the recreational use statute and its predecessor statutes, as well as other interpretive aids, also indicate that the legislature intended the act to apply to specifically enumerated outdoor activities (fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling) which, ordinarily, can be accommodated on tracts of land which are difficult to defend from trespassers and to make safe for invited persons engaged in recreational activity. The commonality among all of these enumerated uses is that they generally require large tracts of open, vacant land in a relatively natural state.

429 Mich 66, 78-80. From its examination of the legislative history of the Recreational Use Act, the *Wymer* court concluded that the statute was intended to apply only to large tracts of undeveloped land suitable for outdoor recreational uses. Consequently, urban, suburban, and subdivided lands do not fall within the operation of the Recreational Use

Act. The *Wymer* court viewed such a result as being consistent with the legislative intent to limit owner liability based upon the impracticability of keeping certain tracts of land safe for public use. By contrast, the court noted that recreational facilities are relatively easy to supervise and to monitor for safety hazards. That being the situation, the *Wymer* court instructed that:

> As our analysis reveals, Michigan's recreational use statute redirected the focus of landowner liability from the status of the user of the property, making the purpose of going on the land and the character of land central to the determination of the owner's liability. Accordingly, we have determined the applicability of the statute in these cases with that same focus in mind, as opposed to the status-of-the-user focus applied by the lower courts when emphasizing the status of the plaintiffs as social guests. . .
>
> The language of the Recreational Use Act, read in the light of its legislative history, is intended to apply to large tracts of undeveloped land suitable for outdoor recreational uses. Urban, suburban, and subdivided lands were not intended to be covered by the Recreational Use Act. Therefore, the Recreational Use Act is not applicable to the two cases before the court.

429 Mich 66, 80.

Following *Wymer,* the court of appeals in *Ellsworth v Highland Lakes Dev Assoc,* 198 Mich App 55; 498 NW2d 5 (1993) decided a case involving the Recreational Use Act. In affirming the trial court's grant of summary disposition to the defendants, the court of appeals ruled that the trial court had properly "granted immunity" to the defendants under the Recreational Use Act. *Ellsworth, supra* at p 57. Amicus curiae find the court's choice of wording significant. It coincides with the position of amicus curiae, to wit: rather than acting as a predicate for the imposition of liability, the Recreational Use Act is more properly regarded as a liability-limiting statute, which, as its legislative history confirms, is triggered depending on the nature and type of land involved. Thus, if a plaintiff is injured on a parcel of land of the type covered by the

Recreational Use Act and under circumstances otherwise falling within the act, the liability limiting feature of the statute only allows for the imposition of liability for acts amounting to gross negligence or willful or wanton misconduct.

2. **The Governmental Tort Liability Act.**

The decision in *Ross v Consumers Power Co (On Rehearing), supra,* ushered in a new era of governmental immunity law in Michigan. Specifically, the *Ross* court described MCL 691.1407; MSA 3.996(107), the "heart" of Michigan's Governmental Tort Liability Act, as providing "broad" immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function, *Ross, supra,* at 595. Upon embracing a definition of the term "governmental function" as that is used in MCL 691.1407; MSA 3.996(107), the *Ross* court had the following to say about the scope of governmental immunity in Michigan:

> [T]he immunity from tort liability provided by Sec 7 is expressed in the broadest possible language – it extends immunity to *all* governmental agencies for all *tort* liability *whenever* they are engaged in the exercise or discharge of a governmental function. This broad grant of immunity, when coupled with the four narrowly drawn statutory exceptions, suggests that the legislature intended that the term "governmental function" be interpreted in a broad manner (emphasis in original).

Ross, supra, at 617. With its acceptance of such a view, the *Ross* court reiterated the expansive scope of governmental immunity in Michigan:

> We realize that the definition we have formulated today is broad and encompasses most of the activities undertaken by governmental agencies. We have adopted this approach because we believe that this is the result envisioned by the enactors of the governmental immunity act.

420 Mich 567, 620-621.

Following the lead of the *Ross* court, the legislature for the first time included in Michigan's Governmental Tort Liability Act a definition of "governmental function" that closely paralleled the *Ross* court's broad pronouncement. Thereafter, post-*Ross* decisions heeded this court's directive that MCL 691.1407; MSA 3.996(107) provides "broad immunity from tort liability." See *Peterman v Dep't of Natural Resources,* 446 Mich 177, 203; 521 NW2d 499 (1994) and *Wade v Dep't of Corrections,* 439 Mich 158, 166; 483 NW2d 26 (1992).[2]

In light of the above, all must agree that Ypsilanti Township's ownership and operation of Ford Lake Park constitutes a governmental function such that Ypsilanti Township is cloaked with immunity from tort liability pursuant to MCL 691.1407(1); MSA 3.996(107)(1). That statute provides that:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.[3]

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[2] The *Wade* court described the *Ross* case as one which settled prior inconsistencies in governmental immunity jurisprudence by calling for broad immunity from tort liability. The *Wade* court also cited *Hyde v University Bd of Regents,* 426 Mich 223, 245; 393 NW2d 847 (1986) as additional support for the proposition that exceptions to governmental immunity are to be narrowly construed.

[3] In turn, MCL 691.1401(f); MSA 3.996(101)(f) defines a "governmental function" as follows:

> (f) "Governmental function" is an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.

Governmental agencies have long been authorized to own and maintain recreational facilities and parks. Thus, the maintenance and operation of a park is properly deemed a governmental function, *Richardson v Jackson County,* 432 Mich 377; 443 NW2d 105 (1989); *Dinger v Dep't of Natural Resources,* 147 Mich App 164, 178; 383 NW2d 606 (1985); and *Haselhuhn v Huron-Clinton Metro Authority,* 106 Mich App 461 , 468; 308 NW2d 190 (1981).

Michigan's Governmental Tort Liability Act offers a broad and far more expansive grant of immunity to governmental agencies than does the Recreational Use Act. The Governmental Tort Liability Act provides immunity to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function. The general protection afforded governmental agencies in MCL 691.1407(1); MSA 3.996(107)(1) covers the multitude of functions in which governmental agencies are involved. Those include the ownership and maintenance of property.

3. **A proper reading of the two statutes yields no irreconcilable conflict.**

Striving to avoid the broad grant of immunity afforded Ypsilanti Township in Michigan's Governmental Tort Liability Act and notwithstanding the fact that the Governmental Tort Liability Act is silent on the subject, plaintiffs endeavor to convince the Court that Michigan's Recreational Use Act, first passed in 1953, and thus in existence well before the passage of Michigan's Governmental Tort Liability Act, stands as an additional exception to the grant of immunity afforded Ypsilanti Township in MCL 691.1407(1); MSA 3.996(107)(1). In order to make such a claim, plaintiffs are left to argue that immaterial amendments made to the Recreational Use Act following the passage of 1964 PA 170, Michigan's Governmental Tort Liability Act, somehow

furnish plaintiffs a basis upon which to argue that the Recreational Use Act stands as an additional statutory exception to immunity beyond those explicitly made part of the Governmental Tort Liability Act. *See generally Dodak v State Administrative Bd,* 441 Mich 547, 562-63; 495 NW2d 539 (1993) (drafters should expressly designate offending provisions rather than leave to repeal by implication). Plaintiffs are simply mistaken. Michigan's Recreational Use Act is not an exception to governmental immunity.

Nothing about the timing of the Governmental Tort Liability Act's passage in relationship to the recreational use statute lends support to an argument that the Recreational Use Act is a statutory exception to the immunity granted in MCL 691.1407(1); MSA 3.996(107)(1). Likewise, nothing about the timing of the passage of the two acts gives plaintiffs any opportunity to successfully argue that the statutes are interrelated in the manner proposed by plaintiffs. As the *Wymer* court's decision makes clear, the legislature's intent in passing the Recreational Use Act was to make large tracts of undeveloped land which remained in a relatively natural state available to the public for certain outdoor recreational uses. Since the initial passage of the act in 1953, the changes to the act have focused on the listing of outdoor recreational activities which fall within the act. No significant substantive changes have ensued. Thus, for purposes of the instant discussion, the amendments to the Recreational Use Act are immaterial and irrelevant.

The history and goals of the two pieces of legislation demonstrate that they are intended to operate in independent areas with only a minimal possibility of an "intersection" between the two. When that occurs, i.e., when a person is injured on a large tract of undeveloped land which is still in a relatively natural state and which is

owned or leased by the government, then a plaintiff's burden is clear. In those circumstances, in order to proceed, the plaintiff must first bring his/her case within one of the exceptions to immunity recognized by the Governmental Tort Liability Act. Failing that, the plaintiff cannot proceed with his or her case. Assuming the plaintiff's ability to fit his or her case within an exception to immunity recognized by the Governmental Tort Liability Act, the plaintiff must then also satisfy the burden of proof imposed by the Recreational Use Act.

Thus two statutes act somewhat like filters. The first filter sifts out from the flow of litigation those cases which do not meet one of the exceptions to the immunity afforded by the Governmental Tort Liability Act. The Recreational Use Act stands as the second filter. To pass through that, a plaintiff is bound to show gross negligence or willful and wanton misconduct by the governmental agency.

Plaintiffs obviously do not accept the filter analogy proposed by amicus curiae. Instead of seeing the terms of the Recreational Use Act as a second filter through which a case must pass after it avoids the Governmental Tort Liability Act, plaintiffs offer the Recreational Use Act as an additional vehicle by which to circumvent the restrictions of the Governmental Tort Liability Act. They thus view the two statutes as having a much closer connection than that which they actually enjoy. Plaintiffs choose to see the Recreational Use Act as a means of diminishing a governmental agency's immunity from tort liability by having the Recreational Use Act stand as an additional exception to governmental immunity. In essence, they argue that it amounts to a repeal by implication or nullification of those protections afforded by the Governmental Tort Liability Act and where a claim also and simultaneously falls

within the parameters of the Recreational Use Act. The Court must reject plaintiffs' arguments.

The terms of the two statutes furnish plaintiffs no basis upon which to successfully make this argument. If anything, the language of the Governmental Tort Liability Act supports the opposite position, that of amicus curiae. Amongst other things, the title to the Governmental Tort Liability Act indicates that the act is "to make uniform the liability of municipal corporations, political subdivisions and the state. . .when engaged in the exercise or discharge of a governmental function. . .[and] to define and limit this liability". Further, MCL 691.1407(1); MSA 3.996(107)(1) includes language proving that the statutory exceptions to immunity are confined to those enumerated in the Governmental Tort Liability Act itself:

> (1) *Except as otherwise provided in this act*, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function. . .(emphases added)

This language specifies those exceptions to immunity. It limits exceptions to immunity to those "provided in this act". MCL 691.1407(1); MSA 3.996(107)(1).

Since the passage of the Governmental Tort Liability Act came long after the Recreational Use Act was on the books, the Legislature could have explicitly mentioned the statute or created an exception for causes of action arising on large, undeveloped tracts of land held open to the public for no charge. It did not. Yet, plaintiffs try to read such language into the statute in the absence of any textual support, with no legislative history revealing some implicit intent to cut back on immunity on undeveloped recreational land, and in the face of silence as to any such desire on the part of the Legislature.

Section 12 of the Governmental Tort Liability Act, MCL 691.1412; MSA 3.996(112), also counters plaintiffs' argument. There, the legislature has made it clear that defenses available to private defendants are likewise available to governmental agencies. The statute reads as follows:

> Claims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons.

Since the Recreational Use Act is a liability-limiting statute, it is properly raised as a defense to a plaintiff's tort suit. A defense available to a private defendant is available to a governmental defendant. Therefore, once put in the position of having to raise substantive defenses to a tort claim against it, i.e., after a plaintiff files a claim in avoidance of its governmental immunity, a governmental agency defendant may raise the recreational use statute as a defense. Private owners, lessees, and tenants of large tracts of undeveloped lands which remain in a relatively natural state can resort to the terms of the Recreational Use Act in defending a premises claim. To the extent that the provisions of the recreational use act govern claims arising on public land, the protections of the statute can be asserted by a governmental agency to whom the Recreational Use Act would apply.

The terms of the Recreational Use Act, itself, provide no assistance to plaintiffs. The Act provides:

> . . . . no cause of action shall arise for injuries to any person who is on the land of another without paying to the owner, tenant, or lessee of the lands a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use, with or without injury unless the injuries were caused by gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. MCL 324.73301; MSA 13A.73301.

Nothing in this text suggests an intent to abrogate the protections the otherwise available under the Governmental Tort Liability Act or any other statute. Nothing in the text suggests a limitation of the separately enacted protections to only private landowners. Nothing in the act conflicts with the protections available under the governmental immunity statute.

Amicus curiae's construction of the statutes avoids conflict between the provisions of the Recreational Use Act and the Governmental Tort Liability Act. Each addresses separate and distinct problems sought to be resolved by the legislature. When read in the manner urged by amicus curiae, the statutes can be harmonized.

The object of the *in pari materia* rule of statutory construction is to carry into effect the purpose of the legislature as found in harmonious statutes regarding a subject, *Jennings v Southwood,* 446 Mich 125, 137; 521 NW2d 230 (1994); *Attorney General Ex Rel Dep't of Natural Resources v Michigan Property & Casualty Guar Ass'n,* 218 Mich App 342, 346; 553 NW2d 700 (1996), and *Skene v Feleccia,* 213 Mich App 1, 5; 539 NW2d 531 (1995). Stated otherwise, if statutes lend themselves to a construction that avoids conflict, then that construction should control, *Sanchez v Lagoudakis,* 217 Mich App 535, 546; 552 NW2d 472 (1996). When two statutory provisions share a common purpose, the terms of the provisions should be read *in pari materia* in order to carry into effect the purpose of the legislature as found in harmonious statutes on the subject, *Lindsey v Harper Hosp,* 213 Mich App 422; 540 NW2d 477 (1995).

Contrast this with the situation presented in *Malcolm v City of East Detroit,* 437 Mich 132; 468 NW2d 479 (1991). There, this Court read the Emergency Medical Services Act as a statutory exception to the Governmental Tort Liability Act.

437 Mich at 139. It did so on the basis that the Legislature specifically imposed liability on certain classes of persons, explicitly differentiated between governmental entities and persons in portions of the statute, and enacted the EMSA after it had adopted the Governmental Tort Liability Act.[4] Significantly, the Legislature immediately enacted a measure that legislatively overruled this interpretation of the Emergency Medical Services Act. 437 Mich at n. 9. This swift legislative response counsels caution in adopting any interpretation that would amount to a judicial abrogation of some portion of the protections established in the Governmental Tort Liability Act. *Malcolm* provides no authority for ruling that the Recreational Use Act amounts to a statutory exception to the Governmental Tort Liability Act.[5]

A harmonious reading of the Governmental Tort Liability Act and the Recreational Use Act is attainable here. As noted above, both are liability-limiting statutes and thus serve the identical purpose of curtailing the potential liability of a certain class of defendants. One such potential class of defendants is that of governmental agencies which own or lease land. When a governmental agency which owns or rents or leases large tracts of land in a relatively natural state is named as a defendant, the goal of each liability-limiting statute is implicated and it is possible to serve both. The process is as follows. Looking first to the terms of the Governmental

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[4] The analysis set forth in *Malcolm* is complicated by the fact that it was decided under the Governmental Tort Liability Act prior to the 1986 amendments. See 437 Mich at 139 n. 8.

[5] Even less persuasive is plaintiffs' reliance on two Court of Appeals opinions involving different statutes with different text, history, and purposes. *See Haberl v Rose*, 225 Mich App 254; 570 NW2d 664 (1997); *Madison v City of Detroit*, 208 Mich App 356; 527 NW2d 71 (1995) rev'd 450 Mich 976, 547 NW2d 653 (1996).

Tort Liability Act, a court must determine if the plaintiff's case fits within any of the statutory exceptions enumerated there. If not, the case proceeds no further. Assuming, on the other hand, that the plaintiff can bring his/her case within a statutory exception to the broad grant of governmental immunity, then the case may proceed forward. In such an instance, the plaintiff's proofs must satisfy the strictures established by the Recreational Use Act. *See generally McNeal v DNR*, 140 Mich App 625; 364 NW2d 768 (1985) (defendants afforded tort immunity under both doctrine of governmental immunity and recreational use statute); *Montgomery v DNR*, 172 Mich App 718; 432 NW2d 414 (1988); but *see Anderson v Brown Bros, Inc,* 65 Mich App 409; 237 NW2d 528 (1975).

RELIEF

Amici Curiae, the Michigan Municipal League and the Michigan Township Association, respectfully request that this Court hold that the Recreational Use Act is not an exception to the Governmental Tort Liability Act and affirm the judgment of the Court of Appeals.

PLUNKETT & COONEY, P.C.

By: Christine D Oldani

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DATED: February 4, 1998

01721.73817.387996

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

SHENIECE BALLARD, Personal Representative of the Estate of KASSIM BALLARD, and DOROTHY J. WILKES and EDNA REID, Co-Personal Representatives of the Estate of ANTHONY DEON WILKES,

Plaintiffs-Appellants and Cross-Appellees,

vs.

YPSILANTI TOWNSHIP,

Defendant-Appellee and Cross-Appellant,

- and -

JOANN BRINKER and DAVE COOPER, Jointly and Severally,

Defendants.
_____/

S.C. NO: 106941; 106954

C.A. NO: 173829 L

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Alta Turner Siverns, being first duly sworn, deposes and says that she is employed by PLUNKETT & COONEY, P.C., and that on the 4th day of February, 1998, she caused to be served a copy of Notice of Hearing, Motion for Leave to File Brief Amicus Curiae, Affidavit of Christine D. Oldani, Brief of Amicus Curiae Michigan Municipal League and the Michigan Townships Association, and a proof of service upon the following:

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by enclosing same in a pre-addressed, pre-stamped envelope and depositing same in the United States Mail.

Alta Turner Siverns

Alta Turner Siverns

Subscribed and sworn to before
me this 4th day of February, 1998.

SANDRA L. CHAMBERS
Notary Public, Wayne County, MI
My Commission Expires Nov. 19, 2000

_____, Notary Public
_____ County, Michigan
My Commission Expires: _____

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