97-10

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

CS&P, INC., d/b/a LASERCOLOR PRESENTATIONS, 3-S CONSTRUCTION INC., and L.B.L. INVESTMENTS,

Plaintiffs-Appellees,

-v-

THE CITY OF MIDLAND,

Defendant-Appellant.

-and-

THE CINCINNATI INSURANCE COMPANY, As Subrogee of CS&P, INC., d/b/a LASERCOLOR PRESENTATIONS,

Plaintiff-Appellee,

-v-

THE CITY OF MIDLAND,

Defendant-Appellant,

-and-

CS&P, INC., d/b/a LASERCOLOR PRESENTATIONS,

Not Participating.

S.C. No: 112921 and 112922

Court of Appeals Nos: 192303 and 192304

Lower Court Nos: 94-003609-NZ-C 94-003640-NZ-C

BRIEF OF AMICUS CURIAE THE MICHIGAN MUNICIPAL LEAGUE

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES i

STATEMENT OF THE QUESTION PRESENTED iv

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 3

A PROPER READING OF THE SECOND SENTENCE OF MCLA 691.1407(1); MSA 3.996(107)(1) COMPELS THE CONCLUSION THAT THERE IS NO TRESPASS NUISANCE EXCEPTION TO A CITY'S GOVERNMENTAL IMMUNITY AND THAT, EVEN IF SUCH A TRESPASS NUISANCE EXCEPTION TO IMMUNITY EXISTS, THE *HADFIELD* HISTORICAL ANALYSIS MERELY PROVIDES A MEANS OF DETERMINING WHETHER THE CLAIM SURVIVES IMMUNITY, IT REMAINING THE PLAINTIFF'S BURDEN TO THEN PROVE THE SUBSTANTIVE ELEMENTS OF THE ASSERTED CLAIM. 3

A. Introduction. 3

B. The confusion marking courts' efforts to deal with trespass and nuisance claims. 5

C. Some proposed solutions 10

1. Revisiting the statute: MCLA 691.1407(1); MSA 3.996(107)(1). 10

2. The clear and plan wording (the "letter") of MCLA 691.1407(1); MSA 3.996(107)(1) 13

2. Declaring *Hadfield's* immunity analysis to be only the first step of a two-step inquiry. 19

RELIEF 23

INTRODUCTION

The creation, operation, and aims of the Michigan Municipal League Legal Defense Fund readily attests to the numerous reasons why the Legal Defense Fund supports the City of Midland's position herein.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative efforts. Its membership is comprised of some 512 Michigan cities and villages. Among the League's membership are 380 city and village members of the Michigan Municipal League Legal Defense Fund which the Michigan Municipal League operates through a board of directors. The purpose of the Legal Defense Fund is to represent its member cities and villages in litigation of statewide significance. Cognizant of its obligation to represent the best interests of the Legal Defense Fund's membership, the board of directors has authorized the filing of this amicus curiae brief.

The issue raised in this appeal concerning the trespass-nuisance exception to immunity bears substantially on the interests of the various member entities comprising amicus curiae. Therefore, amicus curiae takes this opportunity to participate in the process of the Court's consideration and resolution of the City of Midland's appeal and the proffered issue concerning the trespass-nuisance/exception to immunity.

STATEMENT OF FACTS

The Michigan Municipal League Legal Defense Fund relies upon the statement of facts as set forth in the City of Midland's brief on appeal.

ARGUMENT

A PROPER READING OF THE SECOND SENTENCE OF MCLA 691.1407(1); MSA 3.996(107)(1) COMPELS THE CONCLUSION THAT THERE IS NO TRESPASS NUISANCE EXCEPTION TO A CITY'S GOVERNMENTAL IMMUNITY AND THAT, EVEN IF SUCH A TRESPASS NUISANCE EXCEPTION TO IMMUNITY EXISTS, THE *HADFIELD* HISTORICAL ANALYSIS MERELY PROVIDES A MEANS OF DETERMINING WHETHER THE CLAIM SURVIVES IMMUNITY, IT REMAINING THE PLAINTIFF'S BURDEN TO THEN PROVE THE SUBSTANTIVE ELEMENTS OF THE ASSERTED CLAIM.

A. Introduction.

The issue of when a municipality has immunity from and/or liability for trespass-nuisance implicates legal principles of major significance to the State. This Court has recognized trespass-nuisance as a judicially created exception to the doctrine of governmental immunity Trespass-nuisance is currently in vogue as the vehicle by which aggrieved plaintiffs seek redress for damages claimed to have been caused by flooding or sewer backups. In the face of such circumstances, it is imperative that the Court precisely define the parameters of this exception to immunity and that governmental agencies be afforded specific guidance in analyzing their immunity and in construing the elements of the torts of trespass and nuisance so as to be in a position to accurately and to confidently gauge and assess any potential liability therefor.

Even a cursory review of the published and unpublished opinions of the Michigan Court of Appeals on the topic of trespass-nuisance supports the view that the decisions are inconsistent with each other, that they contravene decisions by this Court,

and that they lack any predictability of outcome. This Court has not hesitated to consider cases where the state of the law reflects confusion, *Fletcher v Fletcher,* 447 Mich 871; 526 NW2d 889 (1994); *People v Cetlinski,* 435 Mich 742; 460 NW2d 534 (1990); *Smith v Dep't of Public Health,* 428 Mich 540; 410 NW2d 749 (1987); *People v Smith,* 420 Mich 1, 11 n 3; 360 NW2d 841 (1984); *Frederick v City of Detroit,* 370 Mich 425; 121 NW2d 918 (1963); and *Wickey v Appeal Bd of Michigan,* 369 Mich 487; 120 NW2d 181 (1963). Whether difficulties in interpretation have arisen due to the Court's failure to make appropriate distinctions or to some conflict between a statute and principles of the common law, it is this Court's obligation to try to clear up the confusion. The "continued piling of case after case without an examination of the causes of . . .difficulty can only result in confusion the worse confounded." *Stevens v Stevens,* 355 Mich 363, 369; 94 NW2d 858 (1959) (Smith, J.). And where the confusion has been created by this Court's prior pronouncements, it is especially appropriate for this Court to clear up the confusion.

In participating as amicus curiae, the Michigan Municipal League Legal Defense Fund will comment upon the reigning state of confusion permeating the case law pertaining to trespass-nuisance and offer some suggestions for clarifying the analysis and eliminating the confusion.

Since the issuance of *Hadfield v Oakland County Drain Comm'r,* 430 Mich 139; 422 NW2d 205 (1988), courts throughout the State have grappled with the task of understanding, analyzing, and applying immunity to claims of trespass and nuisance. Those efforts have resulted in huge inconsistencies in the definition, interpretation, and

application of immunity and of the elements of trespass and nuisance. Thus, if for no other reason other than to eliminate and to eradicate the overarching confusion and to lend much-needed clarity to the law so that governmental agencies will have the guidance they need to govern and to conduct their affairs, this Court must speak.

B. The confusion marking courts' efforts to deal with trespass and nuisance claims.

The confusion that has engulfed both bench and bar stems from a lack of precision in understanding and in applying *Hadfield v Oakland County Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988); *Li v Feldt*, 434 Mich 584; 456 NW2d 55 (1990); and *Li v Feldt(After Second Remand)*, 439 Mich 457; 487 NW2d 127 (1992). In each of these cases, this Court considered the scope and parameters of a judicially-created exception to immunity. The *Hadfield* court rejected a statutory approach that would have limited the exceptions to immunity to those set forth in the Governmental Tort Liability Act. Instead, it allowed for the recognition of common law exceptions to the statutory immunity scheme envisioned by Michigan's legislature. *Hadfield*, 430 Mich at 144-148. Significantly, this Court in *Hadfield*, noted that its conclusion that a common-law nuisance exception to governmental immunity "survived through the passage of the second sentence of §7 of the governmental tort liability act does not answer the more difficult question presented." 430 Mich at 149. In the words of that court, the challenge was to "provide a formula for any nuisance exception that may be said to have been embraced by the Legislature through the language of §7." 430 Mich at 150.

This Court's fatal decision to conjure up a common law exception to immunity in the absence of language creating any trespass or nuisance exception has led to the confusion that reigns today. With no language defining the common law exceptions to immunity that the *Hadfield* court judicially recognized, this Court has been forced to create law. The dangers of such an approach have been discussed by great legal thinkers from Montesquieu to Madison to Scalia. See generally, Antonin Scalia, A Matter of Interpretation, pp 10-12 (1997).

This Court has tried to judicially define and limit an exception that lacks any real statutory basis. As a result, its efforts have led to near chaos. In a shifting blend of past and present law, of liability and immunity analysis, and of statutory and common law considerations, lower courts and this Court have been unable to provide a clear and predictable rule (or rules) that will allow municipalities to predict their potential responsibility for claims in the nature of a trespass or nuisance. At the same time, litigants flock to the courthouse hoping for an opportunity to benefit from the confused state of affairs, which in the view of some, nearly equates with strict liability. This case offers the Court the opportunity to correct the situation.

Before offering any solution to the problems, amicus curiae will try to provide some background and context for the Court. It is well to start at the beginning, with *Hadfield*. *Hadfield* offered a historical approach to determining whether a nuisance (or trespass) exception to immunity had been embraced by the Legislature. The *Hadfield* Court did not purport to decide the existing elements of a common law cause of action for nuisance or trespass of any type. It did not analyze the proofs

necessary to prevail under such theories except as that analysis pertained to the availability of immunity. It did not announce that the elements of common law trespass or nuisance claims had been subsumed into the immunity analysis.

In *Hadfield*, this Court commented on the amorphous nature of nuisance as a cause of action. 430 Mich at 150. After discussing the types of nuisance and trespass liability that had been recognized before 1964, the Court concluded that the exception to immunity should be limited to "the type of governmental nuisance liability that was recognized prior to 1964." 430 Mich at 169. The Court analyzed the early case law to determine the factual elements or features that comprised the historically recognized nuisance or trespass claims brought against governmental agencies. It then compared modern versions of trespass or nuisance causes of action to determine whether the same elements or features existed in the modern-day versions of the torts. 430 Mich at 170. If not, those modern versions did not circumvent the bar of immunity. Only when a particular contemporary variant of nuisance or trespass factually coincided with the historical version did this Court decide that the claim would survive immunity.

Likewise, in *Li v Feldt*, 434 Mich 584; 456 NW2d 55 (1990), this Court faced the task of deciding "whether defendants are immune from liability on the basis of their status as governmental entities on the facts of these cases." 434 Mich at 586. It answered by embracing *Hadfield*'s historical analysis. Specifically, the Court examined case law prior to July 1, 1965, to determine whether the decisions recognized an "intentional-nuisance claim which could escape governmental immunity." 434 Mich at

595. The *Li* court did not address the liability analysis but held only that intentional nuisance did not amount to an exception to immunity.

Later, in *Li v Feldt (After Second Remand)*, this Court examined whether a public nuisance or a nuisance per se claim had historically been seen as an exception to immunity. The *Li* Court surveyed the early case law and compared the features of various trespass or nuisance decisions to those required under a modern-day public nuisance claim. It then concluded that the sparse authority recognizing such a claim meant that the "exception cannot properly be recognized under § 7(1)." 439 Mich at 468. It declined to decide whether a nuisance per se would amount to an exception to immunity because it concluded that the plaintiffs had failed to present a colorable claim of nuisance per se under existing law. 439 Mich at 477.

Confusion has reigned as bench and bar attempt to apply the principles set forth in this line of decisions. Much of that confusion comes from the blurring of the immunity and tort analyses. This blurring is understandable. It stems from the fact that the historical approach requires a court to examine the features of historically recognized trespass and nuisance claims and then to compare them to the features of a modern day cause of action to determine whether the latter presents an exception to immunity. But, once that analysis has been concluded, courts must still proceed to evaluate the tort under modern day elements of the appropriate cause of action. It is, in other words, a two-step analysis.

In neither *Hadfield* nor its progeny did this Court purport to address the elements or proofs available in a modern day tort claim brought under the rubric of

trespass or nuisance. Nor did this Court suggest that the elements of the modern-day tort have been subsumed into the immunity analysis. Indeed, if this Court had adopted that approach, the elements of a trespass or nuisance-type claim, at least when brought against the government, would be frozen in time, a result that is fraught with difficulties both practical and legal. In *Hadfield* and its progeny, this Court did not freeze the development of common law torts of nuisance or trespass. All that *Hadfield* and its progeny did was to locate the types of nuisance or trespass actions historically recognized as exceptions to immunity and to compare the elements of a modern day trespass or nuisance claim to determine whether the immunity exception applied to present-day cases.

Accordingly, bench and bar do not properly read these decisions as presenting a shorthand formulation for the elements of a trespass or nuisance cause of action. Likewise, these cases are not correctly used to bar proofs or determine on the substantive elements of the particular tort. This case offers the Court the opportunity to eliminate the confusion and to correct the error that has permeated this area of the law as litigants have attempted to employ these cases for precisely these purposes. The Court can do so by revisiting the statutory framework itself to conclude that no judicially-created exception was intended in the second sentence of Section 7 or by clearly arranging the proper analytical framework for handling such cases as dictated by a correct construction of *Hadfield, Li,* and *Li (After Second Remand).*

C. Some proposed solutions.

1. Revisiting the statute: MCLA 691.1407(1); MSA 3.996(107)(1).

The confusion surrounding the trespass-nuisance exception to immunity stems from its very recognition via the existing judicial interpretation of MCLA 691.1407(1); MSA 3.996(107)(1). Thus, that statute is the departure point for any discussion concerning any effort to correctly define and delimit the trespass-nuisance exception to governmental immunity. The statute reads as follows:

> (1) 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. (Emphasis added).

The underscored language presents the critical wording. The heretofore difficult task of giving meaning to the term "governmental function" as used in the first sentence of the statute has been resolved, *Ross v Consumers Power Company (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). The key to analyzing the scope and extent of any common law judicially created exception(s) to immunity lies in ascertaining the meaning of the second sentence.

Initially, amici asserts that the critical language of MCLA 691.1407(1); MSA 3.996(107)(1) is self-explanatory. As those 34 words clearly express, their purpose is to do no more or less than to preserve for the *State of Michigan* the full range and scope of sovereign immunity as that existed before July 1, 1965. Thus, no reasonable or proper reading of the statutory language supports the imposition of liability for

trespass-nuisance on governmental agencies other than the "state".[1] Such a result takes into account both the spirit and letter of MCLA 691.1407(1); MSA 3.996(107)(1).

1. The "spirit" of MCLA 691.1407(1); MSA 3.996(107)(1)

> In its decision in *Ross, supra*, this Court confirmed Michigan's continuing commitment to the doctrine of governmental immunity. In choosing to ascribe an admittedly broad and liberal definition to the term "governmental function" as found in 1964 PA 170, the *Ross* court necessarily embraced the sound and cogent public policy underpinnings allowing immunity to governmental agencies involved in a governmental function, which is described as an activity expressly or impliedly mandated or authorized by constitution, statute, or other law. Since *Ross*,

[1] The Governmental Tort Liability Act contains its own definitional section found at MCLA 691.1401; MSA 3.996(101). At MCLA 691.1401(c); MSA 3.996(101)(c), "state" is defined to mean "the State of Michigan and its agencies, departments, commissions, courts, boards, councils, statutorily created task forces, and shall include every public university and college of the state, whether established as a constitutional corporation or otherwise." Cities, villages, and townships fall outside the definition of "state" and are each deemed to constitute a "municipal corporation" within the meaning of MCLA 691.1401(a); MSA 3.996(101)(a).

the Court has repeatedly pursued a path evidencing its awareness of the broad grant of immunity chosen in *Ross*.[2]

Michigan's Governmental Tort Liability Act was passed in 1964 to halt judicial attempts to abolish sovereign and governmental immunity, *Hyde v University of Michigan Board of Regents*, 426 Mich 223, 245; 393 NW2d 847 (1986). By declining to find in the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1) any legislative authorization for the maintenance of trespass-nuisance claims against governmental agencies other than the State, the court steers trial courts throughout the state on the proper course of analyzing and deciding immunity issues for cities, townships, and villages engaged in a governmental function. Rejection of trespass-nuisance claims against governmental agencies other than the State also fosters and furthers the legislative aim of immunizing from tort liability those governmental agencies engaged in governmental functions.

Short of explicit legislative authorization to do so, courts do not properly burden cities, townships, and villages with additional liabilities through allowance of claims sounding in trespass-nuisance. To do so would be contrary to sound judicial

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[2] On numerous occasions, the Court has instructed that the statutory definition of "governmental function" found at MCLA 691.1407(1); MSA 3.996(107)(1) provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function, *Hyde v University of Michigan Board of Regents*, 426 Mich 223, 245; 393 NW2d 847 (1986); *Wade v Dep't of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992); and *Peterman v Dep't of Natural Resources*, 446 Mich 177, 203; 521 NW2d 499 (1994). Concomitantly, the exceptions to such a broad grant of immunity are to be narrowly construed, *Bayn v Dep't of Natural Resources*, 202 Mich App 66; 507 NW2d 746 (1993).

expressions recognizing the legislature's intention to confer immunity upon governmental agencies for most of the activities in which they participate. *See Ross, supra*, at pp 620-621 and MCLA 691.1407(1); MSA 3.996(107)(1). As specifically observed by the *Ross* court, the consensus which the court's efforts produced in that case was not to be viewed as the Court's individual or collective determination as to what would be the most fair or just or the best public policy. Rather, the Court's decision was intended to reflect the legislature's intention concerning the nature and scope of governmental immunity, *Ross, supra*, at p 596.

2. **The clear and plan wording (the "letter") of MCLA 691.1407(1); MSA 3.996(107)(1).**

The clear and unambiguous language of the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1) allows that, except as otherwise provided, the Governmental Tort Liability Act does not impact the state's sovereign immunity as that existed before July 1, 1965. Therefore, to the extent that the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1) operates to retain any common law exceptions to immunity, those pertain to the State and its sovereign immunity and not to governmental agencies and governmental immunity. In sum, the "letter" of the statute does not contemplate the recognition of common law exceptions to governmental immunity.

The *Ross* court described the second sentence of MCLA 691.1407; MSA 3.996(107) as one that "statutorily affirms the law of sovereign (state) immunity from tort liability as it existed". 420 Mich at 595. As such, the *Ross* court set out to examine the history of sovereign immunity in order to determine the exact parameters of the

state's immunity from tort liability. At pp 605-606 of the *Ross* decision, the Court explained that:

> In reaction to this Court's abolition of common law governmental immunity for municipalities in *Williams* [*v Detroit*], 364 Mich 231; 111 NW2d 1 (1961)] and in anticipation of a similar demise of immunity for counties, townships, and villages, the Legislature enacted the Governmental Immunity Act in 1964. The first sentence of § 7 was intended to not only restore governmental immunity to non-sovereign governmental agencies, but to provide uniform treatment for state and local agencies. Furthermore, the affirmance of common-law sovereign immunity in the second sentence of § 7, was a clear directive that this Court henceforth could not further extend *Williams* and judicially abrogate the state's immunity . . .
>
> Therefore, at the time § 7 was enacted, the state was immune from tort liability when it was engaged in the exercise or discharge of a governmental function, unless a statutory exception was applicable. This same immunity is reiterated by the first and second sentences of § 7.

Speaking to the changes brought about by the passage of 1970 PA 155, the *Ross* court characterized those in footnote 22 of its opinion as being "merely stylistic". Further explaining the language included in the second sentence of MCLA 691.1407; MSA 3.996(107), the *Ross* court said that:

> In summary, at the time § 7 was enacted and became effective, the state enjoyed immunity from tort liability at common law whenever it was engaged in the exercise or discharge of a governmental function, unless a statutory exception was applicable. This common-law sovereign immunity was codified by the second sentence of § 7. The immunity granted to the state by the first sentence of § 7 is essentially co-extensive with this common-law immunity. We note that this interpretation furthers the Legislature's intent to create uniform standards of liability for state and non-sovereign governmental agencies.

420 Mich 567, 608. So, too, at page 613 of its opinion, the *Ross* court referred to the second sentence of MCLA 691.1407; MSA 3.996(107) as constituting the legislature's attempt to prevent the court from further modifying the common law test for sovereign immunity. For his part, at page 663 of his opinion in *Ross*, Justice Levin agreed that, by the second sentence of MCLA 691.1407; MSA 3.996(107), the State of Michigan and its departments are absolutely immune from tort liability except to the extent that the Legislature has waived the sovereign immunity of the state. Further, Justice Levin offered that he had read the second sentence of § 7 as affirming the common law sovereign immunity of the state and its agencies "as it existed heretofore", *Ross, supra*, at p 666. All of this leads to the conclusion that the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1) is not the vehicle by which the Michigan Legislature engrafted any common law trespass-nuisance exception on to the immunity of governmental agencies when engaged in a governmental function. Stated otherwise, those advocating the existence of a trespass-nuisance exception to governmental immunity are not provided the legal wherewithal to do so by invoking the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1).

In passing 1964 PA 170, the Legislature was not being obtuse. It did not contemplate that the words used in the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1) specifically and explicitly reserving to the "state" the full extent of its common law sovereign immunity nevertheless opened the door to some trespass-nuisance claims against governmental agencies other than the state. Such claims simply do not attain legislative sanction with the passage of MCLA 691.1407(1); MSA

3.996(107)(1). There exist certain well-settled rules of statutory construction which no court can safely disregard. The result advocated by amici is entirely consistent with those fundamental rules of statutory construction. Those take into account the legislature's careful and deliberate choice of the word "state" in the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1). To the extent that the second sentence provides that the Governmental Tort Liability Act shall not be construed as modifying or restricting the immunity of the "state" from tort liability as it heretofore existed, no construction is required, *Franks v White Pine Copper Division Copper Range Company*, 422 Mich 636, 650; 375 NW2d 715 (1985); *Satterly v City of Flint*, 373 Mich 102, 109; 128 NW2d 508 (1964); *and Selk v The Detroit Plastic Products*, 419 Mich 1, 9; 345 NW2d 184 (1984). When a statute uses a term in common, understandable language with nothing present to indicate that the words used therein were to convey a meaning other than that which is commonly understood, courts will not attach different or contrary meanings but will adopt a generally accepted construction, *Salas v Clements*, 399 Mich 103; 247 NW2d 889 (1976). The language employed is to be used in its plain and ordinary sense. That is because the Legislature is presumed to have intended the meaning plainly expressed in a statute, *Wilson v League General Insurance Company*, 195 Mich App 705, 709; 491 NW2d 642 (1992).

Of necessity then, courts are duty-bound to interpret statutes as found, *City of Lake Angelus v Oakland County Road Comm'n*, 194 Mich App 200; 486 NW2d 64 (1992) and *Matheson v Secretary of State*, 170 Mich App 216, 219; 428 NW2d 31 (1988). A plain and unambiguous statute is to be applied and not interpreted. The

rationale underlying that rule of statutory construction is that a statute speaks for itself and courts are not to speculate regarding the probable intent of the Legislature beyond the words employed in a statute. Clear and intelligible words cannot be disregarded or distorted. What must govern is the fair and natural import of the terms employed in a statute in view of the subject matter of the law, *Jones v Grand Ledge Public Schools*, 349 Mich 1 (1957) and *Blackwell v Bornstein*, 100 Mich App 550; 299 NW2d 397 (1980). Affording the wording clearly chosen by the Legislature its clear, express, and limited meaning, MCLA 691.1407(1); MSA 3.996(107)(1) does not allow for common law judicial exceptions to governmental immunity. Stated otherwise, the existence of a trespass-nuisance exception against governmental agencies other than the state finds no support in the language of the second sentence of MCLA 691.1407(1); MSA 3.996(107)(1).

Writing his own opinion in *Li, supra.* Justice Griffin voiced concern over the apparent disregard for the literal reading of MCLA 691.1407(1); MSA 3.996(107)(1). Amici shares Justice Griffin's misgiving:

> [N]either the plurality opinion in *Hadfield* nor the majority opinion today, addresses the significance of the Legislature's use of the terms "governmental agencies" in the first sentence of § 7" and "state" in the second. A literal reading of the second sentence of § 7 seems, at most, to require a historical analysis of the state's common-law immunity. The significance of the Legislature's use of "governmental agencies "in the first sentence and the "state" in the second sentence is underscored by the definitions expressly given the terms in the act. "Governmental agency" is defined as "the state, political subdivisions, and municipal corporations." The "state," on the other hand is defined as "the State of Michigan and its agencies, departments, [and] commissions . . . ." The terms are not interchangeable. The statutory provision prohibiting modification or restricting of immunity is specifically applied to the "state," a term which

> does not embrace municipalities and other forms of lower government. Definitions supplied by the Legislature in the statute are binding on the judiciary. Thus, assuming arguendo that the second sentence of § 7 requires a historical analysis, it should be applied to the "state" and not other "governmental agencies."

434 Mich 584, 598-600. Amici's suggested approach, like that propounded by Justice Griffin in *Li, supra,* furthers the legislature's intent in enacting the Governmental Tort Liability Act, gives meaning to the clear and plain language used in the second sentence of § 7, and satisfies fundamental rules of statutory construction.

The Legislature's purpose in enacting the Governmental Tort Liability Act was to lend clarification and predictability to the subject of immunity from tort liability. The legislative efforts would be in vain were plaintiffs to have their way in the reading of MCLA 691.1407(1); MSA 3.996(107)(1) so as to allow for a trespass-nuisance exception to the governmental immunity of governmental agencies other than the state. Courts may and do take cognizance of the purpose of legislation and the facts and events surrounding the passage of legislation, *Wilkins v Bentley*, 385 Mich 670; 189 NW2d 423 (1971). The circumstances leading to the enactment of 1964 PA 170 were the subject of much discussion in *Ross, supra.* Recognition of a trespass-nuisance exception for governmental agencies other than this state does not comport with the essential language of MCLA 691.1407(1); MSA 3.996(107)(1) and contradicts the well-understood notion that 1964 PA 170 is intended to provide immunity from tort liability in the broadest possible sense.

In light of the above discussion, this Court need only read the clear and unambiguous language of MCLA 691.1407(1); MSA 3.996(107)(1) in order to decide that

there exists no trespass-nuisance exception for claims against governmental agencies other than the state. Therefore, the Court properly rules that trespass-nuisance claims do not successfully avoid the governmental immunity defense of governmental agencies other than the state.

2. **Declaring *Hadfield's* immunity analysis to be only the first step of a two-step inquiry.**

The second resolution proposed by amici would have the Court define with greater precision the bounds of *Hadfield's* historical test by instructing litigants and courts throughout the State on the proper application of *Hadfield*. More particularly, it is amici's position that, consistent with general case law in the area of governmental immunity, the Court properly construes Hadfield as being confused to the issue of immunity, alone. Thus, a plaintiff first avoids governmental immunity by sufficiently pleading the elements of the historically recognized trespass-nuisance claim, and having accomplished that, a plaintiff must then prove his or her entitlement to damages by establishing the substantive elements of a trespass or a nuisance claim.

In the early cases involving the flooding of private property, which were cited in *Hadfield*, many courts addressed an argument by the defendant governmental agency that it enjoyed immunity from liability for acts in the nature of a trespass or nuisance and that there could be no liability because, at the time of the act complained of, the governmental agency was engaged in some governmental undertaking, usually of a discretionary nature, which precluded the imposition of liability. Courts commonly rejected the governmental immunity defense in cases involving the flooding of private property and did so based upon the notion that a city has no more right to invade, or

cause the invasion of, private property than does an individual and that a governmental agency has no right superior to that of the ordinary person to permit it to create a nuisance, *Attorney General ex rel Emmons v City of Grand Rapids*, 175 Mich 503; 141 NW 890 (1913). Clear from a reading of *Hadfield* is that the discussion of the early Michigan furnished the components of the formula for the rule allowing for the avoidance of governmental immunity under a trespass nuisance theory. These cases commonly held that a plaintiff successfully avoids a governmental agency's governmental immunity defense under the rubric of a trespass-nuisance claim when the plaintiff proves the governmental agency's commission of a direct act, the natural result of which is immediate injury, i.e., a trespass, or the commission of an indirect act, the natural result of which is an immediate injury to the plaintiff, i.e., a nuisance. When, and only when, a plaintiff makes such a showing will he have avoided the governmental agency's governmental immunity defense and acquired the right to proceed with the substantive proofs comprising his trespass and nuisance claim.

Under the facts as pled by the instant plaintiffs, the City of Midland committed no direct act, or act through an order, which constituted a trespass onto plaintiffs' property when it built its sewer system. The City did not place any of its pipes directly on plaintiffs' property. It took no other direct act, the natural result of which was an immediate injury to plaintiffs. If anything, the City of Midland's construction of its sewer system improved, rather than injured, plaintiffs' property. Further, any alleged failure on the City's part to maintain its riser by failing to repair

and/or replace the same, did not amount to a direct act, the natural result of which was an immediate injury to plaintiffs.

At best, it remained a question of law for the trial court as to whether the City of Midland undertook indirect acts, the natural result of which was an immediate injury to plaintiffs.[3] However, the trial court did not ask the proper questions as part of this immunity analysis. It did not explore, but disregarded, the issue of whether the City's alleged failure to maintain the riser naturally resulted in immediate injury to plaintiffs. Therefore, it was not armed with the necessary information to make any determination concerning the availability of the immunity defense to the City of Midland. The trial court compounded its failure by proceeding in a fashion in which the historical analysis, which, while properly relating only to immunity, subsumed the elements of plaintiffs' burden of proving a *prima facie* case for trespass and/or nuisance.

Trespass is an invasion of a plaintiff's interest in the exclusive possession of his land. while nuisance is an interference with one's use and enjoyment of land, *Hadfield v Oakland County Drain Comm'n, supra*, at p 151 and *Adams v Cleveland Cliffs Iron Co*, 237 Mich App 51; 602 NW2d 215 (1999). The court in the latter case emphasized that recovery for trespass to land in Michigan is available only upon proof of an unauthorized, direct or immediate, intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. When and only when

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[3] In some instances, the immunity analysis is predicated upon making certain factual determinations with the immunity question being dependent upon the resolution of those facts. A common example of this is the issue of qualified immunity. However, the ultimate question of the availability of the immunity defense presents a question of law for the court to decide.

such an intrusion is proved, is the tort established and the plaintiff presumptively entitled to at least nominal damages.

Contrarily, the possessory interest implicated in nuisance is that of use and enjoyment, not exclusion. To prevail in nuisance, a possessor of land must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of property, *Adams, supra, citing Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995), and *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992). Stated otherwise, a plaintiff in a nuisance case must prove all damages which may be awarded to the extent that the defendant's conduct was unreasonable according to a public-policy assessment of its overall value.

These plaintiffs were never required to make such a showing. Likewise, the City of Midland was denied its full and fair opportunity to present its defense to plaintiffs' claims. This resulted directly from the trial court's failure to pursue the proper methodology for trespass-nuisance claims against governmental agencies. The resolution proposed by amici would have avoided this. It would have compelled the trial court to initially undertake its immunity analysis by determining whether plaintiffs had plead and could prove a direct act the natural result of which is immediate injury, i.e., a trespass, or an indirect act, the natural result of which is immediate injury, i.e., a nuisance. From there, assuming plaintiffs' ability to avoid the City's governmental immunity and upon recognizing that the immunity analysis did not subsume the substantive tort analysis, the trial court should have proceeded to hear plaintiffs' proofs and the City of Midland's defenses on the tort as pled by plaintiffs.

RELIEF

WHEREFORE, Amicus Curiae the Michigan Municipal League Legal Defense Fund respectfully requests that the Court grant the City of Midland's requested relief.

PLUNKETT & COONEY, P.C.

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DATE: December 10, 1999

01721.82638.455398

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

CS&P, INC., d/b/a LASERCOLOR PRESENTATIONS, 3-S CONSTRUCTION INC., and L.B.L. INVESTMENTS,

Plaintiffs-Appellees,

-v-

THE CITY OF MIDLAND,

Defendant-Appellant.

-and-

THE CINCINNATI INSURANCE COMPANY, As Subrogee of CS&P, INC., d/b/a LASERCOLOR PRESENTATIONS,

Plaintiff-Appellee,

-v-

THE CITY OF MIDLAND,

Defendant-Appellant,

-and-

CS&P, INC., d/b/a LASERCOLOR PRESENTATIONS,

Not Participating.

S.C. No: 112921 and 112922

Court of Appeals Nos: 192303 and 192304

Lower Court Nos: 94-003609-NZ-C 94-003640-NZ-C

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Mary Massaron Ross, being first duly sworn, deposes and says that she is a shareholder with the law firm of PLUNKETT & COONEY, P.C., and that on the 10th

day of December, 1999, she caused to be served a copy of the Brief of Amicus Curiae The Michigan Municipal League and 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.

Mary Massaron Ross

Mary Massaron Ross

Subscribed and sworn to before
me this 10th day of December, 1999.

Tracey Beaudry, Notary Public
Wayne County, Michigan
My Commission Expires: 06/10/00

01721.82638.576302