2006-01

STATE OF MICHIGAN

IN THE SUPREME COURT

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST and LAURENCE G. WOLF, as trustee and individually,

Plaintiffs-Appellees,

v

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER and THOMAS W. BARWIN,

Defendants-Appellants.

Supreme Court No. 130748

Court of Appeals No. 262721

Lower Court No. 03-051450-CK

BRIEF AMICUS CURIAE

BY

MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, AND THE MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY

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IDENTIFICATION OF THE AMICUS CURIAE PARTICIPANTS

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 519 Michigan cities and 437 villages.

The Michigan Townships Association is a Michigan non-profit corporation whose membership includes in excess of 1,235 townships within the State of Michigan (including both general law and charter townships).

The Michigan Municipal Risk Management Authority is a pool of 338 self-insured municipalities and government agencies consisting of 67 cities, 60 counties, 38 townships, 10 villages, and 163 other public entities located throughout the State of Michigan. The other public entities include cable commissions, medical care facilities, community mental health facilities, fire departments, libraries, courts, transportation departments, parks and recreation departments, airport authorities, and other such municipal agencies.

The Michigan Municipal League, Michigan Townships Association, and the Michigan Municipal Risk Management Authority (Amici) are interested parties that provide education, exchange of information, and guidance to municipalities, municipal officials, and employees to enhance efficient and knowledgeable administration of local government services under the statutes of the State of Michigan. The Amici possess a strong interest in the substantive law at issue before this Court. Their members are diverse and maintain a state-wide presence, and can offer a different perspective on these issues.

INTRODUCTION AND BASIS FOR AMICI' PARTICIPATION

In an Order entered on June 23, 2006 (Ex 1), this Court invited interested groups to file briefs amicus curiae as follows:

> The Michigan Municipal League, the Michigan Townships Association, and the Michigan Association of Counties are invited to file briefs amicus curiae on the

> issue set forth above. Other persons or groups interested in the determination of that issue may move the Court for permission to file briefs amicus curiae.

This Court also set forth the issue to be considered:

> The parties shall include among the issues to be addressed at oral argument whether the phrase "property damage" in the exception to governmental immunity for proprietary functions, MCL 691.1413, encompasses damages caused by tortious interference with a business relationship or, more generally, encompasses damages other than damage to physical property.

The contours of the Proprietary Function Exception have not been considered by this Court since *Coleman v Kootsillas*, 456 Mich 615; 575 NW2d 527 (1998). A damage provision of any of the governmental immunity exceptions has not been addressed since 1982, in *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982). Consequently, Amici support the Court's interest in the legal questions under consideration. Municipal entities are authorized to manage public properties and regulate land-use activities. Municipal entities are required to raise revenue and balance budgets. Because the exercise of these governmental functions occur daily throughout the State, this appeal and the published decision are of major jurisprudential significance.

The Michigan Court of Appeals' decision implying liability and imposing potentially large damage awards will have far-reaching, unintended consequences because the City's purported wrongdoing occurred while it was performing recognized statutory obligations. How and when public entities fulfill their statutory, discretionary obligations will be restricted if this Court interprets the Exception to permit recovery in this case. Plaintiffs, Lawrence Wolf Capitol Management Trust and Laurence Wolf, assert a business, intentional tort under the Propriety Function Exception based upon "the City's" purportedly improper motivation to advance the City's fiscal interests during the performance of its governmental functions. To permit recovery based upon those largely unsupported allegations runs contrary to the State's public policy affording broad, absolute immunity. Expanding recovery where Plaintiffs experience no direct,

physical injury holds the City hostage to perceived, subjective second-guessing in the exercise of its discretionary, but governmental functions. The Legislatively enacted language evidences no intent to include these potentially large damage awards under MCL 691.1413 where no actual "property damage," occurred. If a governmental action is performed improperly, other non-tort remedies are available for relief while allowing public entities the absolute broadest tort immunity for those actions later deemed to be performed in error or under a mistake of law. Because of the significance of these issues and the potential consequences to Amici's members, they recognize their obligation to assist and support the narrow construction of the Proprietary Function Exception.

ARGUMENT

I. PLAINTIFFS' ATTEMPT TO EXPANSIVELY INTERPRET THE PROPRIETARY FUNCTION LIABILITY OR THE SCOPE OF ITS PERMISSIBLE DAMAGES CONTRAVENES THE WELL ESTABLISHED STATUTORY CONSTRUCTION RULES NARROWING THIS BROAD GRANT OF GOVERNMENTAL IMMUNITY.

A. The City of Ferndale's concern for the fiscal management, including the raising of revenue, is not only a legitimate governmental activity, but a required one.

Plaintiff's Brief and the appellate decision do not appear to address the issue of whether the Proprietary Function Exception was triggered under these facts. This Court can affirm the trial court decision for any reason, even when it was not addressed below, but is a pure issue of law. *DeSaele v Sterling Heights*, 123 Mich App 610, 614; 333 NW 496 (1981); *Providence Hospital v Labor Fund*, 162 Mich App 191, 194-195; 412 NW 690 (1987).

Further, this question should be addressed if only to fully grasp the nature and scope of this Exception under the current case law precedent. Plaintiff Wolf's premise that Ferndale's activity constituted a Proprietary Function is faulty. It ignores the basic tenets of both the governmental immunity doctrine affording absolute immunity to public entities, and the

requisite municipal duties and fiscal obligations to serve its citizens. Cities are not precluded from advancing their revenue and pecuniary interests. Every city has the obligation to create a budget for sound fiscal management as if it were a successful private business:

> Their purpose, . . .is the same—to ascertain the amount of money which must be raised to conduct the affairs of the municipality for the ensuing fiscal year, so that the business of the municipality may be conducted on a balanced budget, and on sound business principles, and, as far as practicable, *on the same basis that a successful private business is conducted.* The function of the budget process is to eliminate wasteful or extravagant expenditures by considering the financial aspects of the municipal government as a whole rather than from the limited viewpoint of any particular department . . . to control all expenditures for the year under budget appropriations. . . . and provide for a hearing and . . . secure greater uniformity in municipal financing . . . to give the members of the public a better understanding of the financial affairs and condition of municipalities in which they are interested and to place at the disposal of the governing bodies the data necessary for intelligent action on financial matters, and safeguarding the public interest. 15 *McQuillan Muncipal Corp*, Financial Powers in General, §39:49, pp 158-159.

A municipality's concern for raising revenue to advance the security of its fiscal management is not unlawful, but recognized and encouraged:

> Account must usually be taken of surplus funds on hand at the beginning of the fiscal year. The fact that the levying of a tax results in a budget surplus does not of itself render the tax invalid. These funds are available and may be used in making up the next budget. Surpluses from any particular budgeted fund cannot be used to pay liabilities which should be charged to another budgeted fund for the current year, but may be carried over and used in the succeeding year for any purpose authorized by law, whether budgeted or not. 15 *McQuillans Municipal Corp*, §39:49, Financial Powers in General, pp 162-163.

Fiscal management is a significant public obligation, and is performed on behalf of and for the benefit of all of its citizens. Ferndale owed all of its citizens a duty to both regulate land-use and properly maintain and operate its public properties. Here, Plaintiffs asserted that the City exercised this authority merely to interfere[1] with their potential to benefit from a

[1] "A plaintiff must allege that the interferer did something illegal, unethical, or fraudulent in the filing of the lawsuit to succeed under a claim of interference. Under Michigan law an act is wrongful per se for purposes of a claim of tortious interference with contractual or business relationships only if it is inherently wrongful or is never justified under any circumstances."

business relationship with a telecommunication company and relying solely on a purported improper motive of fiscally advancing the City's own interests. These assertions are not sufficient to trigger liability under the Proprietary Function Exception. Allegations of a public entity competing[2] with private concerns should not transform a governmental function into a Proprietary Function, as that term has been defined under MCL 691.1413. A municipality and its citizenry should always benefit from the exercise of statutorily authorized municipal actions; it is inherent in the nature of performing governmental activities. To enlarge the scope of the Proprietary Function Exception to those instances where a city acts to advance its fiscal interests as a proprietary function opens the liability door wide open. Here, no facts show the variance was not allowed because the City wanted to lease its property to AT&T. On the contrary, rational reasons existed at the time of enacting the ordinance regulating placement and construction of communication towers in either a certain matter or in certain parts of the City. If later it is deemed the reasons for the ordinance or denial of the variance were insufficient it does not transform the proper exercise of a governmental function into a

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Henslee, Monek & Henslee v DN Central Transp, Inc, 870 F Supp 764 (ED, Mich 1994), citing 24 *Mich Civ Jur* Torts §13; 24 *Mich Civ Jur* Torts §31.

[2] *Competition.* Competition itself represents both lawful means and good motive that suffices to justify the defendant's competitive action. Even if the defendant's psyche was tinged with dislike of the plaintiff or similar "bad" motive, courts will protect the defendant against liability if he also had justifiable motives such as competition. Thus as a practical matter most courts probably do not now impose liability for lawful competition even if it is accompanied by some bad motive. In fact, courts may directly recognize that the defendant is simply free to compete without using unlawful or wrongful means.

Under these rules, you are thus free to induce my customers, employees, or suppliers to deal with you instead of me, as long they are not bound to me by contract and your conduct does not restrain trade. Without a rule recognizing the rightfulness of competition, "the whole competitive order of American industry" would be "prima facie illegal." Beyond this, many cases that still use the language of malice and motive now also speak of the defendant's "economic interest," not merely his competition, that justified interference. Thus if the defendant has an economic interest to pursue his right to "interfere may be protected in the same way, even if he is not classed as a competitor." [Dobbs, *The Law of Torts*, Chapter 32, Intentional Interference with Economic Opportunity, §450], pp 1277-1276.

subterfuge. If it did, then similar subjective motives can be attributed to any municipality, municipal official, board, or commission whenever they discharge their duties. Public entities are unquestionably subject to public review and appeal, but any action later to be found in error should not trigger tort liability because it does not expressly fall within one of the Exceptions.

Moreover, the nature of the facts of this case are more akin to allegations against municipalities in taking or inverse condemnation claims. But even there, a property with a diminished property value, less profits, or its use is partially restricted has not established a regulatory taking claim. *Frericks v Highland Twp*, 228 Mich App 575; 579 NW2d 441 (1998). The City here, at best, enacted ordinances that interfered to a limited degree with how Plaintiffs' property could be used. Any interference with land use without a physical invasion or injury is in the nature of a constitutional violation, not a tort claim. As such, this activity should not give rise to an actionable tort claim. For that reason alone, the unintended potential reach of this lower appellate court's decision is expansive, and should be revisited, "because [j]udicial development and refinement of the concept of governmental function allows [the bench and bar] to keep abreast of the changing activities and needs of government and its people." *Ross v Consumers Power Co*, 420 Mich 567, 609-610; 363 NW2d 641 (1984).

B. The intent and purpose of the GTLA is to support, strengthen and protect the special role played by public entities, municipal officials, and municipal employees.

As evidenced in this Brief's earlier reference to McQuillan's *Municipal Corporations,* public entities' fiscal management must equate with good business practices in the private sector, but also requires significantly more public exposure. MCL 15.231, et seq. But in addition to imposing more stringent requirements, the Michigan Legislature recognized under the governmental immunity doctrine that public entities do play a special role, and will receive special treatment under MCL 691.1401 et seq. Unlike the private sector, they are obligated to

perform often politically difficult tasks and costly projects for the public's benefit:

> Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. Private persons do not make laws. Private persons do not issue and revoke licenses to engage in various professions and occupations. Private persons do not quarantine sick persons and do not commit mentally disturbed persons to involuntary confinement. Private persons do not prosecute and incarcerate violators of the law or administer prison systems. Only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency. Moreover, in our system of government, decision-making has been allocated among three branches of government-legislative, executive and judicial-and in many cases decisions made by the legislative and executive branches should not be subject to review in tort suits for damages, for this would take the ultimate decision-making authority away from those who are responsible politically for making the decisions." 4 California Law Revision Comm. Reports, Recommendations & Studies, p 810 (1963) cited by *Ross*, 420 Mich 567, 618-619.

All political power is inherent in the people. Municipal regulation by its very nature restricts the activity of private persons or corporations because [g]overnment is instituted for [the people's] equal benefit, security and protection[3]. *Ross*, 420 Mich at 619, citing 1963 Const, art 1, §1.

> In our organized society, people, through the state constitution they have ratified and the laws enacted by representatives they have elected, require or authorize their government to perform certain activities in their behalf. People allow government to handle these matters for a variety of reasons. Often, an individual or group of people cannot accomplish an activity or project because of, *e.g.,* the amount of financing required, the tremendous risks involved, or the size or scope of the project or activity. Regardless of the reason, however, the fact that the people have delegated these responsibilities to government indicates their belief that a particular activity or function is one which the government must or can undertake to meet their individual and collective needs. In other

[3] In general, municipal corporations possess no power to encroach on individual rights unless such authority is plainly conferred by the city charter or other law, and municipal ordinances ordinarily should not contravene those principles of common right which are embodied in the common law. On the other hand, a municipal regulation is not necessarily rendered invalid by the mere fact that private rights are subjected to restraint or that loss will result to individuals from its enforcement, and as long as municipal bodies confine their enactments within the proper limits of their police power, they do not unlawfully violate the private rights of the individual. 62 CJS Municipal Corporations §148.

> words, the people, by mandating or authorizing the government to engage in certain activities, have determined that these activities are governmental in nature. 420 Mich at 620-621.

To weaken Ferndale's immunity protection in this context undermines the well established statutory scheme outlining the duties required of their commissions, boards, officials, and employees, most often involving the exercise of legislative power and administrative discretion. To conclude that Ferndale does not have the right to act in the regulatory and fiscal interests of its residents would undermine the constitutional authority liberally construing a municipality's authority to act. 1963 Const, art 7, §34. Further, it disregards the presumption that municipal officials act in good faith and perform their duty pursuant to the statutes. *Veldman v City of Grand Rapids*, 275 Mich 100, 112-113; 265 NW 790 (1936). Likewise, an act of an individual member of boards and commissions is not binding on the entity. *Manning v Hazel Park*, 202 Mich App 685, 691; 509 NW2d 874 (1993). The only way to overcome this rebuttable presumption of good faith is with affirmative evidence of irregularity or failure to perform a duty, and the burden of producing such evidence rests on those who assert unlawful or irregular conduct. 31A CJS Evidence §160, Official Proceedings and Acts – qualifications of presumption as to regularity.

Here, Plaintiffs at best offer only assertions of improper motivations in performance of these governmental functions with little or no direct connection of that improper motivation to the entity's exercise of its statutorily authorized denial of the variance and leasing of a portion of a public building. The Legislature intended to provide protection under a broad immunity umbrella because it recognized that public entities are required to act and regulate, but do and will make mistakes. This Court's decision should be consistent with the GTLA's express purpose to both "define and *limit* the liability of the State when engaged in a proprietary function." Purpose and Title. MCL 691.1401. (emphasis added).

C. Past case law development evidences an intent to narrow this Exception when this Court abandoned subjective tests for defining "governmental functions" and the "proprietary function" under MCL 691.1413.

The Court's pivotal *Ross* decision abandoned prior subjective tests for determining whether the nature of the municipal activity being performed would be characterized as a "governmental function," or some exception to immunity. *Ross*, 420 Mich 618. A governmental function would no longer be explained as an activity that was non-proprietary in nature, or as an activity that occurred for the "common good of all," or as the "essence to/of governing." *Ross*, 420 Mich 567, 617-618. Instead, *Ross* established an objective test as the tool for redefining both a "governmental function," and the Proprietary Function Exception. 420 Mich 612-621. *Ross* established this current statutory construction to advance the public policy of the GTLA, and characterized the performance of a governmental function as those activities expressly and implicitly authorized by State's statutes and Constitution. *Ross'* avoidance of a subjective standard and adoption of this objective standard was later incorporated into the plain meaning of the broad language of the GTLA definition:

> (f) "Governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law. Governmental function includes an activity, as directed or assigned by his or her public employer for the purpose of public safety, performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer's authority. MCL 691.1401.

This standard extended the broad reach of immunity and produced an unambiguous, understandable, and functional test. Simply, if the activity is authorized, it is a sanctioned and protected governmental function unless it falls within one of the GTLA exceptions. The Court could now review tortious allegations and separate out each tort to determine if it fell into one of the enumerated exceptions.

Later, in *Smith v Dept of Mental Health*, 428 Mich 540; 410 NW2d 749 (1987), this Court

enhanced this test to further advance the purpose of the GTLA. In *Smith*, the plaintiff claimed an intentional tort against this state department and its employees for false imprisonment of a person housed in its system. But *Smith* held that no intentional tort exception to governmental immunity existed because false imprisonment was not included within the statutory exceptions to governmental immunity for the public entity. The *Smith* court rejected the respondeat superior or vicarious liability theory of recovery. The municipal entity would not be directly liable for any tortious act of a public employee because that was available under MCL 691.1407(2). To hold otherwise would fly in the face of the governmental function definition. *Smith*, at 607-608.

Most importantly, the *Smith* decision clarified that a court determines whether a governmental function was being performed by considering the municipal entity's general activity being performed and whether it was authorized. It declined to focus on the specific allegations of wrongdoing. *Smith*, 428 Mich 540, at 608. Because the purpose of the GTLA is to expressly "limit" the reach of the Proprietary Function Exception, this Court should continue to act consistently with these prior strict constructions to advance immunity and restrict liability under MCL 691.1413.

Amici contend that the Plaintiff's analysis overlooks the *Smith* holding. Plaintiffs minimize or diminish Ferndale's performance of municipal or government functions, and fail to focus upon the general activity of Ferndale at the time of the allegedly tortious action. At that time, Ferndale was regulating land-use and zoning[4]. Later, when it entered into the lease, the City was operating and maintaining its public buildings by leasing a portion of its building. Ferndale's actions were taken pursuant to statutory authority. Even if the activity was

[4] An obligation to pay for just compensation in an eminent domain, defacto taking or regulatory taking arises out of the Michigan Constitution, not tort liability. *Electro-Tech Inc v HF Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989).

performed improperly, it is entitled to absolute immunity. Absolute immunity is only necessary when the public entity makes a mistake or its actions are later deemed unlawful or an improper application of the law. Even if the City erroneously denied the variance, the mistake may not be actionable. 98 *Am Jur* Trial §107, p 23. "A good faith claim to a colorable legal right, even though the claim ultimately proves to be mistaken, is an absolute defense to this business tort. *Id*, p 37. Here, the Plaintiff provided no evidence that the City's reason for enacting the Ordinance, or the denial of the variance was a sham.

Because the Proprietary Function Exception has not been addressed in the property management or zoning/land-use context, this Court's consideration and refinement of the application of MCL 691.1413 in these circumstances is necessary. The published Court of Appeals' decision should be reconsidered in a manner consistent with these past legal developments, their statutory construction rules set forth in *Ross* and *Smith*, and in harmony with the general municipal enabling provisions in the statutes.

D. Ferndale was not engaged in a proprietary function.

As reflected in *Scheurman v Dept of Transp*, 434 Mich 619, 628; 456 NW2d 66 (1990), this Court applies the "rule of strict statutory construction when interpreting an exception to the immunity act." 434 Mich 619, at 618, citing 3 Sands, Sutherland Statutory Construction (4th ed), §62.01, p 113. The proprietary function provision states:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. MCL 691.1413.

Enforcing zoning and planning regulations and the maintenance and operation, including the leasing of a portion of a public building are statutorily authorized actions and thus constitute governmental functions. MCL 125.584 now 2005 PA 110, effective July 1, 2006; MCL 114.4(e)

(public property management).[5] Such activities are "normally supported by taxes and fees." MCL 691.1413. Thus, by definition, the general activity of enforcing and regulating ordinances and the operation and maintenance of public property cannot be characterized as a proprietary function because these functions are supported by taxes and fees. By definition, these generally authorized activities are excluded from the reach of the Proprietary Function Exception.

Secondly, Plaintiffs read the language of the Proprietary Function Exception too broadly to potentially reference many municipal activities conducted to advance a City's fiscal interests[6]. Applying *Ross*, *Smith*, and *Scheurman* to the current circumstance leads to only one conclusion: those allegations do not trigger liability under the Proprietary Function Exception. Asserting that the City profits from its activity does not address the test and is insufficient to turn an otherwise authorized activity into a Proprietary Function. Rather, MCL 691.1413 provides an objective test. To be operating a proprietary function, the activity must be "conducted primarily for the purpose of producing a pecuniary profit for the governmental agency." MCL 691.1413. The fact that surplus revenue is created, or the revenue is received in the performance of specific activity (even if it exceeds the expense of performing it) does not by itself fulfill the test. Rather, the courts objectively evaluate the characteristics of the activity being performed to discern whether its primary intent is to produce a pecuniary profit for the entity.

In *Russell v Dept of Corrections*, 234 Mich App 135; 592 NW2d 125 (1999), the State's prison system allowed the inmates to work on its farm, produce dairy and meat products, and

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[5] In *Morrison v City of East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003), the city's development plan to convert an old school to a community center was to benefit the general public, and paid for by the city's taxes. Unlike private entities, the city was not subject to its own land-use regulations.

[6] The State recognizes the social desirability of encouraging competition. *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361; 354 NW2d 341 (1984).

then distribute those products throughout the prison system. These activities did not constitute the exercise of a proprietary function because no large-scale commercial enterprise was being operated even though it amply supported the State's obligation to care for the inmates.

In *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679; 558 NW2d 225 (1996), a student gymnast was injured in a non-sport related recreational event with his team after the sporting event had occurred. The court found, and it is well known generally, that this public university's operation of the athletic department and intra-collegiate athletic programs are a governmental function that unquestionably raises significant amounts of revenue. Certain parts of the program generated tremendously large profits. The court found that the general activity being performed did not constitute a property function under MCL 691.1413, even though it generated income and competed with private sources of entertainment, because the revenue was used to turn these governmentally authorized activities into a self-sustaining program overall. Notably, as here, the public colleges undoubtedly competed with private colleges and private sources of sports entertainment. In *Harris*, however, the court reasoned that, because parts of that program were not self-sustaining despite the large sums of revenue and donations, the primary motive could not possibly have been to make a profit. As in the instant case, the plaintiff in *Harris* failed to establish the primary motive was to make a pecuniary profit.

In contrast, in *Coleman v Kootsillas*, *supra*, this Court found one of the few, if not the only, recognized operations constituting a Proprietary Function under MCL 691.1413 since *Ross, supra*. The *Coleman* decision explained that the protection of immunity is lost under the proprietary function only when the activity was intended primarily to make a profit as evidenced by outward, objective considerations such as whether there was enough revenue generated to finance and advance unrelated governmental activities. In *Coleman*, the operation of the

landfill generated such significant revenue that essentially rebuilt the municipal offices. Its operation was nationally recognized in the media and featured during the *Sixty Minutes* news program, which officials openly admitted at that time, was intended to make substantial profits. Most importantly though, the *Coleman* Court noted that the nature of this landfill was not local, but the city accepted and disposed of garbage from local and foreign, private and public, corporations. The nature of that enterprise was the same as a large commercial, private enterprise taking on an identity of its own. Contrary to *Coleman*, the leasing of a portion of a public building or property does not equate with this "commercial" landfill enterprise.

Moreover, this Court in *Coleman* noted that the *Coleman* decision was not intended to "change the way the courts interpreted the exceptions to governmental immunity" – narrowly! 465 Mich 615, at 613-614. Thus, Plaintiffs' theory that the Proprietary Function Exception is triggered because Ferndale acted with an improper, self-serving motive to tortiously interfere with Wolfs' prospective business interest in denying its variance should not be characterized as the performance of a Proprietary Function. Expanding this Exception here would permit the imposition of liability in a much broader manner and, at a minimum, subject public entities to continual defense against non-stop accusations of improper, self-serving motives, a theory abandoned in *Ross, supra*, 420 Mich at 612-621. Plaintiff's theory would again reintroduce "subjective" elements into what has been a simple objective test. The result would change the crystal clear understanding of this Court's rules established in *Ross* and *Smith.*

Furthermore, no precedent precludes a municipal entity from advancing it fiscal interests. Public entities are permitted to invest public funds until they are needed for current requirements or for investment toward public employee pensions. 1963 Const, art 9, §18. Public entities regularly lease portions, meeting rooms, and auditoriums for private gatherings, which advances the public purpose of supporting the municipal government and defraying the

cost of its building operations. See 47 ALR 3d §19, Power of Municipal Corporation to Lease or Sublet Property, citing *Brown v Wildwood Volunteer Fire Co No 1*, 288 NJ Super 556; 550 A2d 520 (1988), (City leased property for a recording studio and used the profits to pay fire company expenses, and obtain capital improvements). Likewise, in Michigan, legal authority exists to support the right to lease all or a portion of public property. *Big Prairie Tp v Big Prairie Tp Grange*, 286 Mich 268, 271; 282 NW 143 (1938). There, the township leased an unused portion of its hall. The township had the authority to enter into that lease, and are presumed the officers acted legally in signing the lease. *Id,* citing *American etc Foamite Ind v Clifford*, 267 Mich 326; 255 NW 596 (1934)[7].

Lastly, public policy supports smart fiscal management of municipal resources, especially under the shrinking financial revenue sources facing every municipality in the State of Michigan. The law under the governmental immunity doctrine would slide backwards down the slippery slope and into the muddy waters of expanding tort liability if every time a municipality's operations benefit the general public and its operations, it is subject to tort liability. The Courts should not merely look whether a municipal action results in fiscal benefits. Rather, the courts should focus on the general activity of the entity being performed even if that activity ultimately became a successful endeavor, or is later deemed a mistake.

II. THE TERM "PROPERTY DAMAGE" UNDER THE PROPRIETARY EXCEPTION, MCL 691.1413, SHOULD BE DEFINED CONSISTENT WITH THE MICHIGAN COURT OF APPEALS' DECISION BASED UPON THE COMMON UNDERSTANDING IN A DICTIONARY THAT PROPERTY IS "TANGIBLE."

Assuming for purposes of argument only that Ferndale's activities fall within the Proprietary Function Exception, its recovery is expressly limited to "bodily injury or property damage." MCL 691.1413. The term "property damage" was not defined, so the lower appellate

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[7] *Kemp v Stradley*, 134 Mich 676; 97 NW 14 (1903), (leasing a portion of a docket or wharf is permissible.); *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972), (lease a stadium).

court appropriately consulted the dictionary for its definition. After all, the language, words, or phrases "are accorded their plain and ordinary meaning." *Wolf v Ferndale*, 269 Mich App 265, 271; 713 NW2d 274 (2005). *Wolf* relied on this definition:

> The definition of "property" includes "ownership; right of possession, enjoyment, or disposal, [especially] of something tangible." *Random House Webster's College Dictionary* (1997).

The Amici suggest that this common understanding of property should apply because it is consistent with the rules of statutory construction previously relied upon to define the scope of the governmental immunity doctrine. The Amici submit that the Court of Appeals' failure to accept the plain meaning of this definition and its reliance upon the legal dictionary's explanation of "property" resulted in an overly broad construction inconsistent with the common understanding of the word. Plaintiffs' legal definitions and authorities provide a more technical understanding of the term "property damage," which is only relevant in unrelated legal contexts involving a broader, abstract, view of property such as the "bundle of rights," representing abstract or intangible rights of use attendant to the ownership of property when the owner is deprived of all use of the property. *Frericks, supra*, or a physical invasion of property. MCL 691.1416-1419. It is not consistent with the purpose of the GTLA to "limit" liability, and avoid applying Constitutional themes to the tort context.

Nonetheless, many of these more abstract concepts relate back to a "tangible" piece of real or personal property. Unquestionably, no physical damage to the Plaintiff's real property occurred. Plaintiffs have not asserted an "invasion" of their property or that the regulation and construction of the communication tower on public property deprived the Plaintiff's of all use of their property. Thus, Amici assert that the City's and State's proposal to interpret the term "property damages" narrowly as damage to physical property is absolutely consistent with past precedent and the common understanding of "property damage."

Amici recognize that prior statutory construction of the terms outlining the scope of damages under the GTLA has not occurred since the pre-*Ross* decision in *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982). The *Endykiewicz* decision considered the scope of damages under the highway exception, which required "each governmental agency having jurisdiction over the highway" to "maintain the highway in reasonable repair." It specifically provides for damages as follows:

> Any person *sustaining bodily injury or damage to his property* by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the *damages suffered by him* or her from such governmental agency. (emphasis added). MCL 691.1402.

In *Endykiewicz*, the plaintiff's decedent died as a result of injuries sustained in an automobile accident that purportedly was caused by a lack of maintenance of the roadway. The Plaintiff's spouse sued under the highway exception on her own behalf and on behalf of her husband's estate under the wrongful death act, MCL 600.2922. The *Endykiewicz'* Court construed the highway exception liability in harmony with the wrongful death act, "which exists as the sole vehicle for the recovery of damages occasioned by death." *Endykiewicz*, 414 Mich at 383. The statutory language addressing the damages under the highway exception was construed to permit persons, other than the person actually injured, to sue the state for damages occurring as a result of defective highways that culminates in the death of a loved one. *Endykiewicz*, 414 Mich at 391-392.

The *Endykiewicz* 1982 decision expanded the scope of the highway exception to allow additional plaintiffs to recover beyond the express, limiting language permitting recovery for "injuries suffered by him or her." In doing so, the *Endykiewicz* Court decision followed the now-outdated statutory construction rule that the highway exception damage provision need not be strictly construed as being in derogation of the common law. To the extent that *Endykiewicz*

reasoned that these words were not required to be strictly construed, this Court later modified that holding in footnote 18 of *Scheurman v Dept of Transp*, 434 Mich 619, 628; 456 NW2d 66 (1990), which reads:

> We acknowledge *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982), which states that the highway exception, §2, need not be strictly construed as being in derogation of the common law after the state abrogated its common-law immunity. However, this case is distinguishable.
>
> Endykiewicz interprets the damages sentence of the statute which provides, "[a]ny person sustaining bodily injury or damage to his property . . . may recover the damages suffered by him . . ." The Court said that this sentence was ambiguous, therefore, it should not be interpreted to limit a plaintiff's damages. Thus, the dispositive issue in the case centered on the amount of damages after liability had attached. It offers no insight as to the interpretation of the standard of liability imposed upon a governmental unit. *Id.*, 414 Mich at 382, 324 NW2d 755.
>
> Furthermore, "our purpose is to ascertain and effectuate the legislative intent at the time it passed the act." Reardon, supra, 430 Mich at 407; 424 NW2d 248. At the time the governmental immunity act became effective, the state was still shielded by sovereign immunity. Thus, the Court should have strictly construed the immunity act. To this limited extent, we modify *Endykiewicz*. *Scheurman*, 434 Mich 619, 628.

The second notable difference between the current precedent and the *Endykiewicz* Court's analysis is that *Endykiewicz* relied upon the Legislature's silence to evidence of its intent not to exclude loss of companionship damages. Thus, it reasoned, the Legislative's silence evidenced an intent to put the public entity on "equal footing with the private tort-feasor." 434 Mich, at 323. That ruling, however, ignored the special role of the public sector. The *Endykiewicz* decision improvidently declined to follow the legislative intent based on State defendant's invitation to rely on the plain meaning of the statute:

> The damages recoverable under this statute are said to be limited to those "suffered by" the person who directly sustained bodily injury, in this case, the decedent. Damages for loss of decedent's companionship and society do not fall within the category of damages "suffered by" the injured person and therefore are not recoverable from the state under its limited waiver of tort immunity, according to defendant. Also, defendant posits that the highway liability statute is not subject to judicial interpretation because its restrictive language is clear

> and unambiguous. Pursuing a different tack, defendant agrees with the Court of Appeals that the language of this statute must be strictly construed. 434 Mich 383-384.

Instead, the decision in *Endykiewicz*, relying on the statutory rule to read statutes in harmony whenever possible, expanded the scope of available plaintiffs based upon the Legislature's silence. The *Endykiewicz* Court explained that its conclusion that damages for loss of companionship and society may be recovered was the result of its application of accepted principles of statutory interpretation, its balancing of the Sate's policies, and consideration of supportive case law. 434 Mich 377, 384. It unwisely reasoned that this result was consistent with the GTLA's public policy because it would not increase the actual number of lawsuits, only the number of plaintiffs entitled to recover.

Now, the decision in *Endykiewicz* is both suspect and outdated. Its rationale conflicts with subsequent legal developments and the current judiciary's analytical approach strictly construing the plain meaning of the words in the GTLA. The *Endykiewicz* Court failed to construe the terms of that exception narrowly. Moreover, the *Endykiewicz* analysis could be thought to conflict with the judicial approach now disfavoring use of the Legislative Acquiescence Doctrine. As this Court explained in *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), the doctrine of legislative acquiescence is not recognized in this State for the sensible reason that "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence." See *Paige v City of Sterling Heights*, 476 Mich 495, 516-518; 720 NW2d 219 (2006), for a recent discussion of the differing views on this statutory tool.

Yet, to the extent that *Endykiewicz* is in any way instructive in this case, it would be to demonstrate the severe changes in the legal developments and analysis since its time. It does not support a claim that the words "property damage" include other words such as lost profits,

economic or consequential business damages under MCL 691.1413. But even if the *Endykiewicz* result is sound under current precedent, its analysis can be distinguished from the issues in this case. Unlike *Endykiewicz*, the wrongful death act is not involved, personal injury resulting in death is not involved, and the term "property damage" is not at issue. For those reasons, *Endykiewicz,* and its analysis should not be persuasive in this Court's task.

In all fairness, however, Amici acknowledge that *Endykiewicz* was considered and recently relied upon during the recent series of cases interpreting the damage provision in motor vehicle exception to governmental immunity, MCL 691.1405.[8] In *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274; 705 NW2d 136 (2005), the motor vehicle exception was found not to support a claim for the plaintiff wife of the injured motorist rear-ended by a municipal hydraulic excavator. The wife received no direct, physical injuries, and her husband did not die as a result of the injuries he sustained. But, although her husband did survive, he was likely to permanently suffer from these injuries. His wife, also a named plaintiff on her own behalf, claimed "damages" from the loss of the normal marital companionship and services from the date of her husband's physical injuries into the future. The appellate court, however, recognizing loss of consortium as a separate cause of action, concluded that those damages were not "bodily injury or property damages," as those terms are commonly understood. The *Wesche* decision precluded recovery for a person not physically injured but claiming a loss-of-consortium claim. 267 Mich App 274, at 279-280.

Shortly after, in *Kik v Sbraccia ("Kik I")*, 268 Mich App 690; 708 NW2d 766 (2005), vacated in part in 268 Mich App 801 (2005), and reversing *Wesche v Mecosta Co Rd Comm*,

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[8] Governmental agencies shall be liable for bodily injury and property damage resulting from negligence operation by any officer, agent or employee of a governmental agency, of a motor vehicle of which the governmental agency is owner . . .

Part III, *supra,* the question of whether the damage provision in the motor vehicle exception,[9] and the gross negligence of the individual employee provision,[10] permitted damages for loss of consortium and companionship was addressed. There, the pregnant plaintiff, who was being transported to the hospital in a municipal ambulance, was injured when it lost control and overturned in a ditch. As a result of the accident, she went into labor and prematurely delivered her baby. The child died as a result of the injuries sustained in the accident. In Part III of *Kik I,* the court addressed the husband's loss of consortium claim against the public, medical, and municipal entities, not the individual employees. The case was subsequently reviewed en banc due to the potential conflict between *Kik I* and *Wesche.* In its *Kik II en banc* decision, the majority explained the ruling in *Kik I,* which it adopted by reference below:

> In *Wesche,* a panel of this Court held that because loss of consortium claims do not encompass bodily injury or property damage, they are not included in the motor vehicle exception to governmental immunity. *Wesche, supra* at 278-279. Therefore, this Court affirmed the trial court's ruling that the plaintiff wife's loss of consortium claim was barred by governmental immunity. *Id.* at 279-280. In *Kik I,* this Court held that the panel's decision in *Wesche, supra,* was inapplicable to wrongful death cases, *Kik I, supra* at 706-707, 712 n 42; therefore, *Wesche* did not apply to plaintiffs' claim for loss of society and companionship for the death of their daughter. However, the panel in *Kik I* concluded that the claim for loss of consortium brought by plaintiff husband against defendants Kinross Charter Township and Kinross Charter Township EMS (but not Sbraccia, the driver of the ambulance, individually), relating to the injuries suffered by plaintiff wife in the accident, did fall squarely within the scope of *Wesche. Id.* at 707. In *Kik I,* the panel opined "that *Wesche* was incorrectly decided" and stated that "were we not obligated by MCR 7.215(J) to follow *Wesche,* we would reach a different conclusion[.]" *Id.* at 711. However, because it was constrained to do so by MCR 7.215(J), this Court followed *Wesche* and reversed the trial court's denial of summary disposition regarding plaintiff husband's claim for loss of consortium arising out of his wife's injuries and remanded the matter to the trial court for entry of summary disposition in favor of defendant township and the township's EMS on that claim. *Id.* at 711-712. *Kik v Sbraccia, (Kik II),* ___ Mich App ___ #256419, decided October 10, 2006, pp 1-2).

Conversely, the dissent in *Kik II,* in the hearing en banc stated in pertinent part:

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[9] MCL 691.1405.

[10] MCL 691.1407(2)(c).

> As noted in *Wesche*, since at least 1960, loss of consortium has been construed as a separate cause of action in Michigan. *Wesche supra* at 279, citing *Wessels v Garden Way, Inc,* 263 Mich App 642, 648; 689 NW2d 526 (2004). However, "'[a] claim of loss of consortium is derivative and recovery is contingent upon the injured spouse's recovery of damages for the injury.' " *Id.*, quoting *Berryman v K Mart Corp,* 193 Mich App 88, 94; 483 NW2d 642 (1992). *Thus, loss-of-consortium claims do not encompass bodily injury or property damage, but other damages deriving from the spouse's injury.* None of claims asserted by plaintiff Robert Kik against the Township defendants arise from his bodily injury or property damage, but rather are derivative claims arising from plaintiff Rebecca Kik's injuries. Therefore, because the governmental immunity exception provided in MCL 691.1405, under a narrow construction, does not apply to plaintiff Robert Kik's loss-of-consortium claims, we would conclude that the trial court did not err in granting the Township defendants' motion for partial summary disposition. *Emphasis added.* (*Id,* p 3). *Kik II,* ___ Mich App ___, #256941, decided October 10, 2006, dissent, p 2.

The Amici encourage this Court to follow the dissent's analysis and reasoning by adopting the narrow construction of the Exception exemplified in *Wesche's* interpretation of the damage provision. Amici propose that the narrowing of the available plaintiffs and damages is consistent with purpose and the public policy of the GTLA to limit liability exposure for public entities. Moreover, the strict construction rule of statutory interpretation enunciated in *Ross* and *Smith* should be applied to the damage provision of these exceptions. Logically, it follows that if the intent and purpose is to narrowly construe the Exception to restrict liability, then the restriction of damages or the number of plaintiffs that can recover is consistent with that intent at the time of its enactment. The questions of whether liability will attach, or be extended, and the amount of damages available to address a liability exposure should be similarly decided if the GTLA is intended to limit the municipality's risk. Thus, the development and refinement of the scope of damages available under the Proprietary Function Exception should encompass the "changing activities and needs of governmental and it people." *Ross*, 420 Mich at 609-610. This Court should construe liability damages narrowly as that term is commonly understood to include physical "property damage."

Plaintiffs' case law supports Defendants' position. In *Peter Bill & Assoc, Inc v Mich Dept*

of Nat Resources, 93 Mich App 724, 733; 287 NW2d 334 (1980), plaintiff alleged that the DNR tortiously inferred with its efforts to obtain salvage steel at the bottom of Lake Huron. The measure of that loss was based on the physical value of the remaining steel actually lost as the basic measure of damages. In other words, *Peter Bill* supports the City's position that the measure of damages has to be quantified in a physical, not abstract way. Notably, in *Coleman, supra*, the damage was a physical, bodily injury under a premise liability theory.

Second, Plaintiffs' reliance on general statute of limitations provision for claims lacks any logical nexus to the more specific damage provision in the more specific provision of the GTLA. MCL 691.1413. The more specific immunity statute controls. *Ballard v Ypsilanti*, 457 Mich 564, 573-574, 577 NW2d 890 (1998), (GTLA language controls over Recreational Land Use Act).

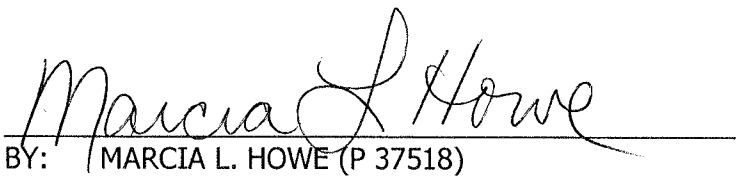
Here, too, this Court should construe the term "property damage" under the Proprietary Function Exception consistently with the past developments that broadened the scope of immunity and narrowly construed its terms. Contrary to the analysis in *Endykiewicz*, a decision that may need revisiting, the term "property damage" under MCL 691.1413 is unambiguous and connotes a tangible injury to physical property. The wording of the Proprietary Function Exception does not expressly include abstract economic damages, lost profits, consequential damages, damages from loss of business, or damages from the tort, or an interference with prospective business or contracts. The provision does not provide damages for the loss of "property rights." Instead, "property damage" is commonly understood as damages to "some tangible" property.

RELIEF REQUESTED

Wherefore, the Michigan Municipal League, the Michigan Municipal Risk Management Authority, and the Michigan Township Association, respectfully request that this Court accept its Brief and reverse the Michigan Court of Appeals' decision in this matter for the reasons stated in their Brief.

Respectfully Submitted,

JOHNSON, ROSATI, LABARGE,
ASELTYNE & FIELD, P.C.



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Dated: October 27, 2006

STATE OF MICHIGAN

IN THE SUPREME COURT

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST and LAURENCE G. WOLF, as trustee and individually,

Plaintiffs-Appellees,

v

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER and THOMAS W. BARWIN,

Defendants-Appellants.

Supreme Court No. 130748

Court of Appeals No. 262721

Lower Court No. 03-051450-CK

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

MARY VELLENGA, being first duly sworn, states that on the 27th day of October, 2006, she served the Brief Amicus Curiae and a copy of this Proof of Service, by first class mail, upon:

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Mary Vellenga

MARY VELLENGA

Subscribed and sworn to before me
this 27th day of October, 2006.

ANGELA M. MUELLER, Notary Public
Wayne County, Michigan
My commission expires: 9/4/07