

IN THE SUPREME COURT

*On Appeal from the Michigan Court of Appeals*

JOSEPH LASH,

Plaintiff-Appellee,

v

CITY OF TRAVERSE CITY,

Defendant-Appellant,

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Supreme Court  
Case No. 131632

Court of Appeals  
Case No. 263873

Grand Traverse Circuit Court  
Case No. 04-24067-CL

**BRIEF OF AMICUS CURIAE  
MICHIGAN MUNICIPAL LEAGUE**

**PROOF OF SERVICE**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Statement of the Issues Presented .....	iii
Statement of Facts .....	iv
Argument .....	1
Conclusion .....	7
Proof of Service	

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Cases</u></b>	
<i>Alex v Wildfong</i> , 460 Mich 10; 594 NW2d 469 (1999) .....	4, 6
<i>Mack v City of Detroit</i> , 467 Mich 186; 649 NW2d 47 (2002) .....	6
<i>McDowell v City of Detroit</i> , 264 Mich App 337; 690 NW2d 513 (2005), <i>lv gr</i> 474 Mich 999; 708 NW2d 104 (2006) .....	5
<i>Omelenchuk v City of Warren</i> , 466 Mich 524; 647 NW2d 493 (2002) .....	5, 7
<b><u>Statutes / Court Rules / Other Authorities</u></b>	
MCL 125.536 .....	5
MCL 15.601, <i>et seq</i> .....	2
MCL 15.602 .....	iii
MCL 15.602(1) .....	1
MCL 15.602(2) .....	1, 3
MCL 257.401 .....	4
MCL 333.20965 .....	5, 7
MCL 600.1407 .....	6
MCL 691.1416, <i>et seq</i> .....	7
MCL 691.1401, <i>et seq</i> .....	2, 4
MCL 691.1407(1) .....	6
MCL 691.1407(4) .....	7

## STATEMENT OF THE ISSUES PRESENTED

- I. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT MCL 15.602 CREATED A PRIVATE CAUSE OF ACTION, WHERE THE STATUTE REGULATES TERMS AND CONDITIONS OF PUBLIC EMPLOYMENT BUT CONTAINS NO LANGUAGE DIRECTLY OR IMPLIEDLY CREATING A REMEDY FOR MONEY DAMAGES?
  
- II. IS THE CITY OF TRAVERSE CITY'S REQUIREMENT THAT POLICE OFFICERS RESIDE WITHIN A RADIUS OF 15 MILES OR NO MORE THAN TWENTY ROAD MILES FROM THE NEAREST CITY LIMIT CONSISTENT WITH MCL 15.602?
  
- III. IN THE ALTERNATIVE, SHOULD THE JUDGMENT BE PEREMPTORILY AFFIRMED ON THE GROUND THAT LASH FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT THAT HE SUFFERED ANY DAMAGES AS A RESULT OF THE CITY'S ACTIONS?

## **STATEMENT OF FACTS**

Amicus curiae, the Michigan Municipal League, relies on the Statement of Facts as set forth in the Appellant's Brief filed on behalf of the City of Traverse City.

## ARGUMENT

This appeal raises issues concerning the Legislature's intent when it enacted legislation restricting the right of public employers to prescribe where their employees must reside. Specifically, this Court has agreed to consider the method of calculating "20 miles" from a public employer's nearest boundary, as those terms are used in MCL 15.602(1), and whether the language of the relevant statutory provisions can support the inference of a private cause of action for damages when an error in calculation has occurred. It is respectfully submitted that the Court of Appeals erred in its resolution of these issues and must be reversed.

MCL 15.602(1) states that a public employer "shall not require . . . that a person reside within a specified geographic area or within a specified distance or travel time from his or her place of employment as a condition of employment or promotion by the public employer." However, except as otherwise provided in this section, MCL 15.602(2) does allow public employers to require "that a person reside within a specified distance from the nearest boundary of the public employer", as long as that distance is "20 miles or another specified distance greater than 20 miles." In the case before this Court, the plaintiff complains that the City of Traverse City miscalculated the specified distance when it determined that his property was not within 20 miles of the City's nearest boundary, and he seeks to impose liability and recover money damages from the City due to its miscalculation. Apparently having abandoned his desire for employment with the City, he has sought neither declaratory nor injunctive relief.

One of the questions before this Court is whether, when it enacted MCL 15.601, *et seq.*, the Legislature intended to create a private cause of action whereby a person could recover damages from a public employer as a result of its miscalculation of the “specified distance” when considering the person for employment or promotion. A second question concerns the appropriate method of calculating the “specified distance”. As “public employers,” the members of the Michigan Municipal League are interested in the proper interpretation of this legislation and support the City of Traverse City’s argument that this Court reverse the opinions of the Michigan Court of Appeals. These opinions have misconstrued the legislation and legislative intent, and have combined to create a situation where governmental entities will be forced to engage in what may be difficult calculations of “radial” distance that are inconsistent with their need to ensure the availability of their emergency work force, while exposing them to tort liability without affirmative legislative expressions which either create a private cause of action for damages or waive the immunity otherwise available to the entities under MCL 691.1401, *et seq.*

As evident by this Court’s grant of leave, a serious question has been raised concerning the method of calculating a distance of 20 miles from the public employer’s nearest boundary. A majority of the Court of Appeals concluded that the appropriate method was to measure the distance in a straight line – “as the crow flies” – even if the only practical way to travel that distance places the residence many more than 20 miles, and hours away, from the nearest boundary. The calculation of this straight line from the residence to the nearest boundary can become a complicated inquiry, requiring the

accurate selection of “the nearest boundary,” which boundary may fall in the middle of a field, wooded area, or lake, increasing the difficulty of determining the end point of the line and obtaining an accurate measurement. This calculation will impose a significant burden on all public employers throughout the State of Michigan. Moreover, this calculation invites differences of opinion concerning appropriate starting and ending points. It is respectfully suggested that an interpretation requiring a calculation of “road miles” is not only both reasonable and consistent with the legislative objective, but such calculation would be both easier and more certain. Whether viewed from the perspective of the employee/applicant who seeks to comply with the “specified distance” requirement, or from the perspective of the public employer who will be called upon to justify its determination of distance, ease of calculation and certainty are important factors to be considered when resolving the ambiguity presented in MCL 15.602(2). Obviously, the more difficult the calculation, the more chance there is of a miscalculation, whether by the employee/applicant when choosing which property to purchase or rent, or by the public employer when considering an employment application or potential promotion.

Further, the detrimental effect of calculating the specified distance by reference to radial miles has been compounded by the opinions which also infer a legislative intent to create a private cause of action, including the imposition of liability for damages, as a consequence of even good faith miscalculations. As the City of Traverse City has cogently argued, the law does not support such an inference, and this Court should so hold.



In the face of legislative silence, and without any legislative guidance as to its parameters, the majority of the Court of Appeals inferred a legislative intent to create a cause of action that did not exist at common law. However, this holding raises several, thus far unanswered, questions. Since recognition of an actionable duty to accurately calculate the “specified distance” from the nearest boundary falls outside the scope of any recognized common law cause of action, and in addition to inferring a legislative intent to create a cause of action, the courts would also need to infer the parameters of that cause of action: What is the standard of care? Is there to be absolute liability for an erroneous calculation? What defenses are available? Is there a “good faith” exception? How would one establish the absence of “good faith”, or, possibly, the presence of malice? Must plaintiff demonstrate that he or she would have been hired or promoted in the absence of the miscalculation before any damages could be considered? Neither the Legislature nor the Court of Appeals has provided answers to these questions.

Finally, and of enormous significance, what about the public employers’ governmental immunity from tort liability? Although it may sometimes be appropriate to infer the existence of a cause of action in the face of legislative silence, case law will not support the inference of a silent legislative intent to waive the immunity of governmental agencies. Rather, case law demonstrates that even the express imposition of a duty on a governmental agency does not equate with the waiving of its immunity under MCL 691.1401, *et seq.* See, *e.g.*, *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999) [The Owner’s Civil Liability Act, MCL 257.401, even as applicable to vehicles owned by a

governmental agency, did not constitute an exception to governmental immunity]; *Omelenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493 (2002) [Governmental immunity provides a defense to liability asserted against a City for the cause of action set forth in the Emergency Medical Services Act, MCL 333.20965]; and *McDowell v City of Detroit*, 264 Mich App 337, 359-361; 690 NW2d 513 (2005), *lv gr* 474 Mich 999; 708 NW2d 104 (2006) [Governmental immunity applies to defeat liability asserted for a violation of the housing code, MCL 125.536]. In *McDowell, supra*, the Court of Appeals held that a question of fact existed as to the City's violation of its duties under the housing code, but explained:

However, our inquiry does not end there. As we concluded above, defendants' operation of the Brewster-Douglas Housing Project constitutes a governmental function. MCL 125.657(b). As such, defendants argued below and again on appeal that plaintiff cannot sustain a claim for violation of the housing code against defendants because it is barred by the operation of governmental immunity. As we observed above, there are only five statutory exceptions to governmental immunity, none of which apply here.

While the housing code itself, specifically MCL 125.536, creates a cause of action by an occupant of a dwelling against the owner for damages, injunctive relief, or other relief for violation of the code, defendants were engaged in "the exercise or discharge of a governmental function," namely the operation of low-income housing projects, as specifically contemplated by MCL 691.1407(1). Therefore, without an applicable exception to governmental immunity, plaintiff's claim fails and summary disposition should have been granted under MCR 2.116(C)(7). \* \* \*

(264 Mich App, 360-361)

Where there is no language creating a cause of action premised on the violation of a statutory responsibility, it is even clearer that there is nothing from which to infer the intent to waive immunity. To the extent that the Court of Appeals held otherwise in the

case at bar, it conflicts with the above-cited precedent. Accordingly, the inference of a private cause of action in tort is meaningless, as it will be defeated by the governmental immunity enjoyed by the putative defendants.<sup>1</sup>

Moreover, consideration of the terms of the Governmental Tort Liability Act (GTLA), itself, compels this conclusion. Consider the language of MCL 691.1407(1) which sets forth the general immunity from tort liability available to governmental agencies, and specifically provides that this immunity is applicable “except as otherwise provided *in this act*.” (Emphasis added) As repeatedly noted in virtually every opinion construing the GTLA, the act does “otherwise provide” in only a limited number of statutory exceptions.<sup>2</sup> Policy choices concerning the scope of the tort immunity available to governmental entities and individuals is made in the context of the GTLA, and not in other, more general, statutes. The Legislature has specifically demonstrated that focus on the GTLA when, for example, it has amended the GTLA to add exceptions to tort immunity that had not previously existed, including the public hospital exception and

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<sup>1</sup> In this regard, see also, *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002), where the Court considered the implications of the governmental immunity defense in a case where plaintiff argued that certain provisions of a city charter created a private cause of action for damages. “We hold that regardless of whether the charter provides a private cause of action against the city for sexual orientation discrimination, such a cause of action would contravene the governmental tort liability act (GTLA), MCL 600.1407. Accordingly, we do not accept plaintiff’s invitation to recognize such a cause of action.” *Mack, supra*, at 190.

<sup>2</sup> Indeed, there is case precedent to suggest that there are *no* statutory exceptions to the tort immunity provided by the GTLA beyond those specifically set forth therein. See, e.g, *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999).

sewage disposal system events. MCL 691.1407(4) and MCL 691.1416, *et seq.* While other statutes may limit the nature of a governmental defendant's potential liability, it is the GTLA that sets forth the parameters of the governmental immunity applicable to the limited tort liability that might otherwise be available.<sup>3</sup> Any expansion or contraction of that immunity is made within the GTLA, itself. For this reason alone, no private cause of action for damages against governmental entities may be inferred in this case.

### CONCLUSION

It is respectfully submitted that this Court should enter an Order reversing the Court of Appeals.

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<sup>3</sup> See, *e.g.*, *Omelenchuk, supra*, regarding the immunity provided for the limited liability set forth in the Emergency Medical Services Act, MCL 333.20965.

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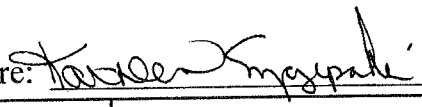
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**PROOF OF SERVICE**

**Proof of Service:** I certify that a copy of this brief was served on the following attorneys of record or pro per parties by  regular mail or  personal service at the addresses shown below.

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