STATE OF MICHIGAN

IN THE SUPREME COURT

GERALD MASON and KAREN MASON,

Plaintiffs-Appellees/
Cross Appellants,

Supreme Court No. 138625

v.

Court of Appeal No. 282714

CITY OF MENOMINEE,

Trial Court No. 02-010066-CH

Defendant-Appellant/
Cross Appellee.
_____/

BRIEF OF AMICUS CURIAE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL, MICHIGAN TOWNSHIP ASSOCIATION, COUNTY ROAD ASSOCIATION OF MICHIGAN AND PUBLIC CORPORATION LAW SECTION

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STATEMENT CONCERNING THE JUDGMENT APPEALED FROM AND THE RELIEF SOUGHT

The Menominee Circuit Court erroneously held that public property can be taken from a municipality through the doctrine of acquiescence. The Court of Appeals erroneously affirmed that legal holding in a published opinion issued February 26, 2009. The City of Menominee ("Menominee") has applied for leave to appeal to this Court from the Court of Appeals decision. The Michigan Municipal League, Michigan Municipal League Liability and Property Pool, Michigan Township Association, County Road Association of Michigan and Public Corporation Law Section support Menominee's argument that this Court should grant leave to appeal and should reverse the Court of Appeals decision.

The Court of Appeals opinion appears to be the first ever Michigan appellate decision holding that public land can be taken from a municipality through an acquiescence claim. It is clearly erroneous and will cause material injustice in several respects. The decision plainly misinterprets a statute, MCL 600.5821, the sole purpose of which is to immunize municipalities from attempts to take public land from municipalities through theories of recovery that depend on the expiration of a limitations period, e.g., adverse possession and acquiescence. Indeed, there are several Court of Appeals decisions that explicitly hold or recognize that MCL 600.5821 immunizes municipal corporations from such claims—which the Court of Appeals opinion simply ignored.[1]

[1] The Court of Appeals concurring opinion references one of those opinions, *Adams Outdoor Advertising, Inc v Charter Township of Canton,* 269 Mich App 365, 370; 711 NW2d 391 (2006), which specifically states, "It is . . . undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation." (Ct App concurring Opinion, p 3). Without suggesting that claims of adverse possession and acquiescence are materially distinguishable for purposes of the operation of this statute (they are not), the concurring opinion, like the majority opinion, appears to have simply disagreed with the above-quoted statement of settled Michigan law, and declined to follow it. (*Id*., p 3).

Apart from being clearly erroneous, the Court of Appeals decision will have potentially disastrous consequences. Private parties across the state can now be expected to bring claims against municipalities seeking a declaration that they should be declared the owners of public land on the grounds that the particular municipality "acquiesced" to a particular boundary line. And such claims would be subject to the easiest of standards of proof, preponderance of the evidence. The fact that the majority opinion devotes only one paragraph to the issue of whether a private party can take land from a municipality through acquiescence (despite expending six on the issue of taxable costs) suggests the Court simply did not appreciate the significance of the ruling it was rendering. Neither the concurring opinion nor the majority opinion appears to have thought through the ramifications of holding that municipality-owned property is now subject to transfer of ownership under an acquiescence claim—if not under a claim of adverse possession, too, since the Court's opinion rejects the basis upon which adverse possession claims were previously precluded. At a minimum, the decision now requires municipalities to bring suit against any and all parties that have claimed or might claim possession through acquiescence (and presumably adverse possession) in order to protect their rights. This can be expected to result in a massive increase in real property disputes filed in the State's circuit courts between private parties and municipalities.

If nothing else, this case involves legal principles of major significance to the State's jurisprudence. No one argues otherwise. The Masons certainly do not argue or suggest the absence of jurisprudential importance. In fact the first argument in their response to Menominee's application is a 15-page argument as to why private parties should be allowed to recover land from municipal corporations through acquiescence (which, despite its length, makes very little effort to defend the Court of Appeals' rationale). At a minimum, the creation of a private party right to recover public land from a municipality upon the running of the 15-year

limitations period warrants more than the single paragraph of analysis the Court of Appeals devoted to such a significant issue, particularly given the conflict with other decisions.

QUESTION PRESENTED FOR REVIEW

The Michigan Municipal League, Michigan Municipal League Liability and Property Pool, Michigan Township Association, County Road Association of Michigan and Public Corporation Law Section agree with and rely upon the Statement of Questions Presented set forth in Menominee's Application of Leave to Appeal.

STATEMENT OF FACTS

For the purposes of this brief, The Michigan Municipal League, Michigan Municipal League Liability and Property Pool, Michigan Township Association, County Road Association of Michigan and Public Corporation Law Section accept the factual recitation set forth in Menominee's Application for Leave to Appeal.

STANDARD OF REVIEW

The standard for granting an application for leave to appeal is set forth in MCR 7.302(B). In pertinent part, that sub rule warrants leave to appeal when:

> (3) The issue involves legal principles of major significance to the state's jurisprudence; [or]
>
> * * *
>
> (5) In an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals . . .

The Michigan Municipal League, Michigan Municipal League Liability and Property Pool, Michigan Township Association, County Road Association of Michigan and Public Corporation Law Section agree with the statement of standard of review set forth in Menominee's application. Of particular importance to this amicus brief is the established principle that this Court review lower court's conclusions of law *de novo*. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991).

ARGUMENT I

THIS COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE THE COURT OF APPEALS DECISION IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE AND THE DECISION CONFLICTS WITH ANOTHER DECISION OF THE COURT OF APPEALS.

A. The court of appeals decision is clearly erroneous and will cause material injustice.

The Court of Appeals' holding that private parties can take title to property owned by municipalities under the doctrine of acquiescence is clearly incorrect. The Michigan Legislature has immunized municipalities against claims of acquiescence, just as it immunized municipalities against claims for adverse possession. This has been the law in Michigan at least since 1907 when Michigan joined the majority of states by enacting legislation directly providing that adverse possession was not applicable against public land, as Menominee points out. The Michigan Legislature has continued to immunize municipalities against claims premised on the running of the statute of limitations since then, and presently does so through MCL 600.5821. That section provides as follows:

> (1) Actions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches. However, a person who could have asserted claim to title by adverse possession for more than 15 years is entitled to seek any other equitable relief in an action to determine title to the land.
>
> (2) Actions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations.

These two subsections shield the state and municipal corporations, respectively, from claims to land premised on adverse possession and acquiescence.[2]

Both adverse possession and acquiescence allow a party to claim ownership of land by establishing, among other things, the expiration of a 15-year period of limitation. That limitations period is set forth in MCL 600.5801(4), which is part of Chapter 58 of the Revised Judicature Act, the chapter entitled "Limitation of Action." Chapter 58 also includes section 600.5821. Subsections 600.5821(1) and (2) preclude the running of limitations periods as against the State (subsection (1)) and municipal corporations (subsection (2))—including the limitations period the expiration of which is an element of both an adverse possession claim and an acquiescence claim. That this is the purpose of subsection 5821(1) and (2) is further confirmed by the second sentence in subsection (1), which specifically preserves the rights of an adverse possession plaintiff to seek other equitable relief in an action to determine title to the land despite removal of the right to assert claim to title.

Until the issuance of the Court of Appeals decision at issue, the Court of Appeals had consistently recognized that MCL 600.5821(1) and (2) preclude the bringing of a claim to title under a theory of either adverse possession or acquiescence—because a necessary element of both theories, the running of the limitations period set forth in subsection 5801(4), does not apply in actions where the state is a party or to municipal corporations. In *Adams Outdoor Advertising,*

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[2]. Michigan law recognizes three theories of the doctrine of acquiescence, namely "(1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary." *Sackett v Atyeo,* 217 Mich App 676, 681; 552 NW2d 536 (1996). The Masons seek relief under the theory of acquiescence for the statutory period. This theory holds that "acquiescence to a boundary line may be established where the line is acquiesced in for the statutory period irrespective of whether there has been a bona fide controversy regarding the boundary." *Id.* Under this theory, if the parties acquiesce to the placement of a boundary line for longer than the 15-year statutory period, MCL 600.5801(4) (the period of limitations for actions for the recovery of possession of land), the property owner of record can no longer enforce his title, and the other property owner acquires title by virtue of his possession of the land. *Sackett, supra* at 681-682.

Inc v Charter Township of Canton, 269 Mich App 365, 370; 711 NW2d 391 (2006), the court specifically states, "it is also undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation." See also, *Higgins Lake Prop Owners Ass'n v Gerrish Township,* 255 Mich App 83, 118; 662 NW2d 387, *lv denied* 407 Mich 907 (2003) (citing MCL 600.5821 and *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 647; 528 NW2d 221 (1995) for the proposition that "[g]overnmental entities are generally immune from adverse possession actions"); *Miller v King*, 2008 WL 2744367, *2 (Mich App, 2008) ("[t]he doctrine of acquiescence is unavailable to plaintiff because the beach front at issue abuts a county road and therefore qualifies as governmental property"); *Lammi Enterprises, Inc v Dept of Natural Resources,* 2002 WL 31951243, *3 (Mich App, 2002) ("governmental entities are generally immune from adverse possession actions. MCL 600.5821.") See also the additional authorities so holding cited in Menominee's application for leave to appeal.

The Court of Appeals majority opinion ignores all of these decisions and this well settled legal principle.[3] The Court of Appeals' analysis is as follows:

> While subsection 1 applies to "[a]ctions for the recovery of any land where the state is a party," subsection 2 applies to "[a]ctions brought by any municipal corporations...." It is evident from the language employed in subsection 1 that the Legislature could have made subsection 2 applicable in all cases brought by or against a municipality. The Legislature, however, chose not to do so. Further, interpreting subsection 2 to apply to any case in which a

[3] The concurring opinion recognized *Adams, surpa*, but seems to criticize it:

> Without citation of authority, this Court states, "it is . . . undisputed that MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation."

The concurring opinion seems to believe that that statement in *Adams* was dicta, and simply ignores all the other decisions that have recognized the settled law that governmental entities are immune from adverse possession actions. The concurring opinion, like the majority opinion, made no reference to the reason why claims of adverse possession (and acquiescence claims as well) cannot succeed as against municipal corporations, namely that the running of the 15-year limitations period cannot be established.

> municipality is a party would render the words "brought by" in subsection 2 nugatory. Finally, an acquiescence claim involves a limitations period. *Kipka v. Fountain,* 198 Mich.App 435, 438-439; 499 NW2d 363 (1993). The term "periods of limitations" in MCL 600.5821(2) renders that provision applicable to claims asserting acquiescence for the statutory period. Thus, because the language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property, it does not preclude plaintiffs' claim.

This analysis reveals that the Court of Appeals appears to have simply misunderstood the reason why MCL 600.5821 immunizes both the state and municipal corporations against adverse possession and acquiescence claims. The state and municipal corporations are protected from such claims not because the statute explicitly prohibits the filing of an adverse possession or acquiescence claim. They are protected because both the state and municipal corporations are relieved of limitations periods by the statute. The state (and parties suing the state for the recovery of land) is protected by subsection (1); municipal corporations are protected by subsection (2).

The court misinterpreted the purpose of the Legislature's use in subsection (2) of the phrase "brought by any municipal corporations" as opposed to the phrase "where any municipal corporations are a party." The fact that the Legislature "chose not to" make subsection (2) applicable in cases brought against a municipality has nothing to do with the reason that subsection insulates municipalities from adverse possession and acquiescence claims. The source of the protection against such claims is the right of the municipal corporation to sue to recover property unencumbered by limitations periods—not the right of a private party to do so.[4]

[4] In any event, the likely reason the Legislature limited subsection (2) to claims brought by municipal corporations, rather than all claims involving them, is that there can be no such thing as an action brought "against" a municipality "for the *recovery of the possession* of any *public highway, street, alley, or any other public ground*"—unless the plaintiff is also a municipal corporation (or the state). By definition, a private party could never bring an action for the recovery of the possession of a public highway, street, alley, or any other public ground; such

The use of the phrase "brought by" rather than a phrase purporting to extend subsection (2) to all cases involving a municipal corporation is, therefore, of no significance. Indeed, the manner in which the Legislature drafted subsection (2) is a particularly efficient way to embody its intent that no claim for the recovery of the possession of any public highway, street, alley, or any other public ground that requires as an element the running of a statute of limitations can be brought against a municipal corporation.[5]

There is also no basis for distinguishing between claims of acquiescence and adverse possession in this context. Both limitations-based acquiescence claims and adverse possession claims are premised on the same limitations period—from the same statute, MCL 600.5801(4). The protection afforded to municipalities against adverse possession claims by subsection (2), which this Court has repeatedly found to exist, applies to acquiescence claims for the exact same reason. Significantly, subsection (2) does not specifically identify either "acquiescence" or "adverse possession" as a claim from which municipal corporations are insulated by that subsection. This subsection merely prevents the running of the limitations period. That fact alone precludes an adverse possession claim and an acquiescence claim for the exact same reason. There is no conceivable basis for drawing a distinction. And, as Menominee has pointed

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land, by definition, belongs only to public entities. Interestingly, the Masons acknowledge and even emphasize the difference between the phrases "recovery of any land" used in subsection (1) and "recovery of the possession of any public . . . ground" used in subsection (2). (Mason's Opposition to Application for Leave to Appeal, p 34). They also acknowledge that the natural meaning of the word "recovery" in this context is to "get back" or "regain." (*Id.*) The Legislature's use of this language clearly indicates the Legislature's understanding that the only parties who would have occasion to bring an action for "recovery of the possession" of public ground (other than the State, which is dealt with in subsection (1)) are municipal corporations.

[5] The court's suggestion that the words "brought by" would be rendered nugatory if subsection (2) is interpreted to apply to any case in which a municipality is a party is simply incorrect. If those two words are removed from the statute, it would be incomprehensible.

out in its application, if anything there is stronger reason to preclude claims of acquiescence because they involve a lesser burden of proof than adverse possession claims.

The Court of Appeals appears to have gotten hung up on the fact that subsection (2) does not technically preclude an adverse possession or an acquiescence claim on its face. What the court failed to realize, however, is that such claims are made impossible by the fact that the statute of limitations does not run against municipal corporations, as the Court of Appeals has previously found on several occasions. While it is true that a private party could technically bring an action against a municipality for recovery of possession of public ground, the municipal corporation would have a perfect defense by countering with an action to recover possession of such property.

Indeed, the practical effect of the Court of Appeals opinion will be one of two things, as Menominee points out. Assuming a counterclaim by a municipality is recognized as an "action" under subsection 5821(2), as it should be, the Court of Appeals will accomplish nothing other than an increase in utterly pointless litigation. Private parties who believe they have acquiescence claims against municipalities can bring them, only to have those claims met with unassailable counterclaims for recovery of possession of whatever public ground is at issue, on the grounds that a limitations-based acquiescence claim cannot succeed. As this Court has held, the law should not require the doing of a futile act. *Modern Globe, Inc v Lake Drive Corp,* 340 Mich 663, 669; 66 NW2d 92 (1954).

If, on the other hand, a counterclaim is deemed not to be an action, this will subject municipalities across the state to acquiescence claims—and claims of adverse possession, since the Court of Appeals' opinion draws no distinction between the two theories, and its reasoning does not allow for any distinction to be drawn. Municipalities can, therefore, be expected to file suits in droves to protect property in any case in which the possibility exists that a private party

could file an acquiescence claim. This would cause material injustice, and undue expense, to put it mildly.

B. The court of appeals decision conflicts with other court of appeals decisions.

A second independent basis for a grant of leave is the fact that the Court of Appeals decision conflicts with several other Court of Appeals decisions. As noted above, that Court has repeatedly held or confirmed that claims to real property based on the running of the limitations period do not lie against governmental entities, including municipal corporations. *See, e.g., Adams Outdoor Advertising,* 269 Mich App at 370 ("MCL 600.5821(2) precludes a party from claiming adverse possession against a municipal corporation."); *Higgins Lake Prop Owners Ass'n,* 255 Mich App at 118, citing MCL 600.5821 and *Goodall, supra* ("[g]overnmental entities are generally immune from adverse possession actions"); *Miller, supra,* at *2 ("[t]he doctrine of acquiescence is unavailable to plaintiff because the beach front at issue abuts a county road and therefore qualifies as governmental property"); *Lammi Enterprises, Inc, supra,* at *3 ("governmental entities are generally immune from adverse possession actions. MCL 600.5821.").

These cases recognized that because statutes of limitations do not run as against governmental entities, claims that have as an element the running of a limitations period cannot be established as against such entities. The Court of Appeals' majority opinion, remarkably, makes no attempt to deal with any of these cases despite issuing a conflicting ruling. Leave to appeal is warranted under MCR 7.302(B) to provide guidance to bench and bar about how to reconcile these conflicting decisions.

Even the Masons do not appear to disagree that the Court of Appeals decision conflicts with prior decisions. The Masons do try to distinguish acquiescence claims from claims of adverse possession for purposes of the effect of MCL 600.5821(2), relying primarily on *Allen v*

City of Mt Morris, 32 Mich App 633; 189 NW2d 120 (1971) (Mason's Opposition to Application, p 28). But *Allen* is inapposite, and the Masons' attempt to draw a material distinction between adverse possession and a limitations period-based acquiescence claim is without merit. *Allen* was decided more than 25 years before the first of the five cases cited above—and, unlike those five cases, before November 1, 1990, the date after which the precedential effect of opinions is controlling under MCR 7.215(J)(1). Setting that aside, *Allen* involved a unique situation where the actual distance on the ground exceeded the measurements on the plat for an alley. In other words, there was literally not enough space to accompany both the plaintiff's land and the public alley as platted. The court did not discuss the effect of MCL 600.5821 at all, and held only that long established occupational lines that were consistent with the plat should not be disturbed on the basis of recent surveys. *Allen, supra,* at 636.

The instant case involves materially distinguishable facts, as does most any acquiescence claim. Limitations-based acquiescence claims, including the one in this case, involve an attempt to recover property that clearly belongs to another under the existing records—as opposed to an attempt to establish the actual location of a boundary line in accordance with those records.[6] They can be sustained only if, among other things, the 15-year limitations period has run as against the defendant. Because the same period, from the same statute, applies in both adverse possession and acquiescence claims, the statutory provision that prohibits the running of that period as against municipal corporations precludes a recovery on either theory.

It should also be noted that even if the Court of Appeals decision were consistent with *Allen* or with another case or cases, leave to appeal is no less warranted given its contradiction

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[6] *Hoffman v City of Port Huron,* 102 Mich 417; 60 NW2d 831 (1894), on which the Masons also place heavy reliance (Masons' Opposition, p 24), is distinguishable for the same reason. As the very passage from *Hoffman* quoted in the Masons' response makes clear, the dispute was about collecting "evidence of where the real line should be."

with other decisions. Significantly, neither the majority nor the concurring opinion in the Court of Appeals opinion purported to distinguish the court's decision on the basis of a material difference between adverse possession and acquiescence for purposes of the operation of section 600.5821. In fact, the concurring opinion specifically states that any such distinction "need not be addressed given our finding that MCL 600.5821(2) does not apply in this circumstance." (Concurring Opinion, p 3, n 1). This correct observation lays bare that the Court of Appeals decision conflicts with all of the prior decisions recognizing that claims against municipal corporations based on the running of the limitations period, whether for adverse possession or acquiescence, are precluded by section 600.5821(2).

This Court should grant leave to appeal in light of the clear conflict between the Court of Appeals decision and prior decisions from that Court.

ARGUMENT II

THIS COURT SHOULD GRANT LEAVE TO APPEAL BECAUSE THE ISSUE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO MICHIGAN JURISPRUDENCE

For the first time in at least 100 years, an appellate court in Michigan has explicitly held that statutes of limitations can potentially run as against municipal corporations for purposes of quiet title actions. No elaboration of that fact is needed to convey the jurisprudential significance of this issue. The Michigan Municipal League, Michigan Municipal League Liability and Property Pool, Michigan Township Association, County Road Association of Michigan and Public Corporation Law Section agree with the points Menominee has made in its application regarding the several ways in which the Court of Appeals opinion is expected to cause practical problems.

Publicly owned property is now subject to being transferred to private parties across the state, through claims of acquiescence that have the easiest of burdens of proof. If anything, private persons seeking to quiet title to public land in their favor have an advantage over municipal corporations given the number of people involved on the side of the municipalities over time.

Litigation between municipalities and private parties over real property disputes can be expected to increase exponentially. Even if the Court of Appeals decision does not result in a flood of claims by private parties, it would appear to require municipalities to file suit in any case in which an acquiescence claim might be expected, less the municipality's would-be opponent beat it to the courthouse.

Whether the issue for which Menominee seeks leave to appeal is considered in the abstract or with an eye toward the potential practical ramifications of the Court of Appeals

decision, this case presents a watershed issue of tremendous significance. This Court should grant leave to consider that issue given its jurisprudential importance to the citizens of this State.

RELIEF

WHEREFORE, Amicus Curiae The Michigan Municipal League, Michigan Municipal League Liability and Property Pool, Michigan Township Association, County Road Association of Michigan and Public Corporation Law Section respectfully request this Court to reverse the lower courts, and hold that MCL 600.5821(2) precludes claims of adverse possession and limitations-based acquiescence as against municipal corporations, or grant such other relief as is warranted.

Respectfully submitted,

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DATED: May 26, 2009

STATE OF MICHIGAN

IN THE SUPREME COURT

GERALD MASON and KAREN MASON,

Plaintiffs-Appellees/
Cross Appellants,

Supreme Court No. 138625

v.

Court of Appeal No. 282714

CITY OF MENOMINEE,

Trial Court No. 02-010066-CH

Defendant-Appellant/
Cross Appellee.
_____/

PROOF OF SERVICE

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