STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

INTERVENORS WASHENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

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INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS
AND
PROOF OF SERVICE

Intervenors, Washtenaw County Health Department and Washtenaw County Health Officer, Jimena Loveluck (collectively herein the "Health Department"), by their counsel of Record, for their Brief Supporting A Court Order Implementing The Revised Cleanup Standards, state the following:

I. INTRODUCTION

The Health Department is before this Honorable Court with unique standing and with State mandates supporting the relief requested. The Health Department is charged with statutory duties to address the possibilities of contamination -- including the contamination at issue before this Court -- impacting drinking water wells, water supplies and other resources in Washtenaw County.

The Health Department adopts by reference the primary Intervenor Brief, including the Technical Justification Document and the proposed Order for Relief presented to the Court by the Intervenors.

The Health Department advances the following fundamental issues:

- The Health Department requires that the revised "cleanup" standards be fully implemented in accordance with the directives of the State of Michigan.

- The Health Department requires a reliable and complete delineation of the existing contamination impacts for soils, groundwaters and the groundwater/surface water interfaces that exist within Washtenaw County.

- The Health Department requires a complete and stable Prohibition Zone[1] that has suitable and reliable triggers to ensure that the applicable cleanup standards remain in full and reliable compliance near, at and beyond the Prohibition Zone lines. This requires effective and well designed "triggers" to ensure continued compliance. It is illogical to wait until the contamination exceeds acceptable levels to take action to preserve the lines of a completed Prohibition Zone.

- The Health Department requires a full and reliable delineation of the existing contamination plume to ensure that the Health Department has sufficient contamination data to support the statutory duties of the Health Department.

- The Health Department requires ongoing and consistent mass removals of contamination in the source areas, in the soils and the groundwater, within the Prohibition Zone to ensure the stability and consistency of a complete Prohibition Zone. Such removal actions will prohibit the need to expand the

[1] This Court should note there is no Prohibition Zone line in the Western Area. The Health Department requires a completed Prohibition Zone. This requires an Oder of this Court that delineates – fully – the contamination in the Western Areas that also has appropriate monitoring and triggers to detect and prevent the lateral extension of contamination in the Western Area.

Prohibition Zone and, thereby, fully protect the resources outside of the Prohibition Zone.

- The Health Department requires monitoring and plume management to ensure that the Plume does not enlarge in any direction. This requirement supports additional mass removal actions and additional contaminated groundwater capture and treatment. The Health Department cannot effectively perform its duties with plume uncertainty.

- The Health Department requires the establishment of a working process between the Health Department and Gelman wherein Gelman funds the ongoing residential well sampling program for wells known to be and potentially impacted by the 1,4 dioxane plume.

- The Health Department requires the establishment of a workable public information domain wherein the concerned citizens of Washtenaw County can receive and view timely and relevant data concerning the 1,4 dioxane plume.

The positions of the Health Department are both fundamental and reasonable. These positions are advanced, in greater detail, by the primary Intervenor Brief and the Technical Justification Document presented by the Intervenors.

II. LEGAL AUTHORITY AND STANDING

A. The Duty Of The Health Department.

The Health Department is compelled by an independent statutory duty to be involved in the implementation of the new 1,4 dioxane cleanup standards imposed by the State of Michigan. This jurisdiction is concurrent with the State of Michigan and is not impacted by any involvement of the United States Environmental Protection Agency.

1. The Health Department Has A Distinct Interest In Protecting The Public Health of The People Of Washtenaw County.

The Health Department has a distinct interest in the subject of this action because the issues presented impact the public health of Washtenaw County.

a. The Health Department Has a Statutory Duty To Protect the Health of the People of Washtenaw County.

The statutory role of the Health Department is set forth in Michigan's Public Health Code at MCL 333.1101 et. Seq. ("PHC"). The PHC, at MCL 333.2413, states that the local governing entity of a county "shall" provide for a county health department.

> "Except if a district health department is created pursuant to section 2415, **the local governing entity of a county shall provide for a county health department which meets the requirements of this part,** and may appoint a county board of health." (**Exhibit 1** -- MCL 333.2413) (Emphasis Added)

The PHC, at MCL 333.2428, states that a local health department "shall" have a full-time local health officer appointed by the local governing entity. The local health officer shall act as the administrative officer of the board of health and may take actions necessary to carry out the local health department's functions and to protect the "public health". This is the direct and statutory role/duty of Intervening Plaintiff, Jimena Loveluck.

> "(1) **A local health department shall have a full-time local health officer appointed by the local governing entity** or in case of a district health department by the district board of health. The local health officer shall possess professional qualifications for administration of a local health department as prescribed by the department.
>
> (2) **The local health officer shall act as the administrative officer of the board of health and local health department and may take actions and make determinations necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent disease.**" (**Exhibit 1** -- MCL 333.2428) (Emphasis Added)

The PHC, at MCL 333.2433, states that a health department **"shall"** continually and diligently promote the public health including **controlling environmental health hazards**.

> "(1) **A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards;** prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development

of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law." (**Exhibit 1** -- MCL 333.2433) (Emphasis Added)

1. **The Use Of The Term "Shall" within MCL 333.2433 Imposes A Mandatory Statutory Duty.**

The use of the term "shall" within MCL 333.2433 is instructive. According to the Michigan Supreme Court, the use of the word "shall" in a statute requires that courts give the ordinary and accepted meaning to the **mandatory word "shall".** (**Exhibit 2** -- **Browder v. International Fidelity Ins. Co.**, 413 Mich. 603, 612; 321 NW2d 668, 673 (1982).) The Michigan Court of Appeals has similarly ruled that the Legislature's use of the word "shall" indicates that the required action is "**mandatory**" and not permissive. (**Exhibit 3** -- **Perez v. Black Clawson Co.**, Unpublished Opinion Per Curiam of the Court of Appeals, decided [August 28, 2001] (Docket No. 221010).) The plain and unambiguous language set forth in MCL 333.2433 imposes upon the Health Department a mandatory statutory duty to promote the public health and protect the people of Washtenaw County from environmental health hazards. This duty applies here with respect to the water and soil contamination issues presented to this Court.

2. **The Michigan Supreme Court's Opinion in McNeil v. Charlevoix County, 484 Mich. 69, 78; 772 NW2d 18, 23 (2009) Supports the Conclusion that A Health Department Has A Statutory Duty Under MCL 333.2433 to Protect the Public Health.**

The mandatory statutory duty of the Health Department under MCL 333.2433 is resonated by the Michigan Supreme Court and the Michigan Court of Appeals. In **McNeil v. Charlevoix County**, 484 Mich. 69, 78; 772 NW2d 18, 23 (2009), the Michigan Supreme Court examined MCL 333.2433(1) and ruled that it provides for a duty to protect the public health.

> "**However, that does not lessen the general duty and authority of those agencies to protect the public health, MCL 333.2433(1),**" (**Exhibit 4** --

McNeil v. Charlevoix County, 484 Mich. 69, 78; 772 NW2d 18, 23 (2009).) (Emphasis Added)

In the same case, the Michigan Court of Appeals also examined MCL 333.2433(1) and ruled that local health departments are charged with the **duty to continually and diligently endeavor to prevent disease, prolong life and promote the public health**.

> "Part 24 of the PHC authorizes the creation of local health departments such as the NMCHA. See MCL 333.2415 and 333.2421. *HN9* **Pursuant to § 2433 of Part 24, such departments are charged with the duty to continually and diligently endeavor to prevent disease, prolong life, and promote the public health** through organized programs, including prevention and control of environmental [*695] health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law. [MCL **333.2433**(1).]" **(Exhibit 4 -- McNeil v. Charlevoix County**, 275 Mich. App. 686, 694-695; 741 NW2d 27, 32 (2007).)

There is no question that MCL 333.2433(1) imposes a statutory duty on the Health Department to protect the public health. Moreover, this statutory duty to protect the public health must be liberally construed. The PHC, at MCL 333.1111(2), expressly states that the PHC shall be "liberally construed" for the protection of the health, safety, and welfare of the people of this state.

> "(2) **This code shall be liberally construed for the protection of the health, safety, and welfare of the people of this state.**" **(Exhibit 5** -- MCL 333.1111) (Emphasis Added)

The Michigan Supreme Court agrees. According to the Michigan Supreme Court, the preliminary provisions of the PHC at MCL 333.1111(2) require that the PHC -- and each of its subparts -- be liberally construed for the protection of the health, safety, and welfare of the people of the State of Michigan.

> "In fact, the **preliminary provisions of the PHC require that the code and each of its various parts "be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111(2);"** (**Exhibit 4** -- **McNeil** v. **Charlevoix County**, 484 Mich. 69, 78; 772 NW2d 18, 23 (2009).) (Emphasis Added)

MCL 333.2435 provides the Health Department with the power to "advise" other agencies and persons as to the water supply. Again, this is a statutory mandate. This language makes it clear that the jurisdiction is concurrent with other agencies. This same statute allows the Health Department to adopt regulations to safeguard the public health and "prevent" the spread of "sources" of contamination.

> "A local health department may:
>
> **(a)** Engage in research programs and staff professional training programs.
>
> **(b)** **Advise other local agencies and persons as to the location, drainage, water supply, disposal of solid waste, heating, and ventilation of buildings**.
>
> **(c)** **Enter into an agreement, contract, or arrangement with a governmental entity or other person necessary or appropriate to assist the local health department in carrying out its duties and functions unless otherwise prohibited by law**.
>
> **(d)** **Adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination**.
>
> **(e)** Accept gifts, grants, bequests, and other donations for use in performing the local health department's functions. Funds or property accepted shall be used as directed by its donor and in accordance with the law, rules, and procedures of this state and the local governing entity.
>
> **(f)** Sell and convey real estate owned by the local health department.
>
> **(g)** Provide services not inconsistent with this code.
>
> **(h)** Participate in the cost reimbursement program set forth in sections 2471 to 2498.

(i) Perform a delegated function unless otherwise prohibited by law." (**Exhibit 1** -- MCL 333.2435) (Emphasis Added)

b. **The Washtenaw County Rules & Regulations For The Protection Of Groundwater Makes It Clear That The Health Department Has A Unique Duty And Interest In The Protection of The County's Groundwater.**

The Health Department, pursuant to State Statute, has carefully adopted relevant regulations. The Washtenaw County Rules & Regulations, at Section 8:1, state that the Health Officer shall have jurisdiction throughout Washtenaw County to administer and enforce the Washtenaw County Rules & Regulations For The Protection of Groundwater ("Regulations For The Protection Of Groundwater").

> "**The Health Officer shall have jurisdiction throughout Washtenaw County, including all cities, villages, townships, and charter townships, in administration and enforcement of these Rules and Regulations** and any amendments hereafter adopted, unless otherwise specifically herein. All premises affected by these Rules and Regulations shall be subject to inspection by the Health Officer, and the Health **Officer may collect such samples for laboratory examination as s/he deems necessary for the enforcement of these Rules and Regulations.**" (**Exhibit 6** -- Section 8:1) (Emphasis Added)

The Regulations For The Protection of Groundwater, at Section 6:7, specifically state that all potable wells shall be located "not closer than one hundred (100) feet" from any source of contamination. This is a key issue now before this Court.

> "**All potable water wells**, in addition to the requirements of Act 399 of the Public Acts of 1976, shall be located not closer than fifty (50) feet from any septic tank or injection well**, and not closer than one hundred (100) feet from any drainfield or other source of contamination**, and shall be located wholly upon the property served. Isolation distances may be increased by the health Officer when sufficient protection is not provided by the specified isolation distances and shall be increased by the Health Officer where great isolation distances are required by Act 399 of the Public Acts of 1976, as amended. . . ." (**Exhibit 6** -- Section 6:7) (Emphasis Added)

The Regulations For The Protection of Groundwater, at Section 6:4, state that a contaminated potable groundwater water supply system that represents an imminent health hazard, shall be identified with suitable signs and the outlets shall be made inoperable.

> "**A contaminated potable groundwater water supply system that, in the judgment of the Health Officer represents an imminent health hazard, shall be identified with suitable signs at each outlet, or the outlets shall be made inoperable to the satisfaction of the Health Officer**." (**Exhibit 6** -- Section 6:4) (Emphasis Added)

The Regulations For The Protection of Groundwater, at Section 12:1, state that power of inspections includes the right to obtain samples.

> "**Inspection under this Regulation shall include the right to obtain samples** where the Health Officer has reason to believe that there is a likelihood of contamination of surface water, ground water, water supply or other unsanitary conditions. Upon written notice, an owner or occupant of premises where such inspection is sought shall co-operate with the Health Officer or his/her designated representative." (**Exhibit 6** -- Section 12:1) (Emphasis Added)

The Regulations for The Protection of Groundwater provide the Health Department with a unique duty and interest in the protection of the County's groundwater which includes the duty to make sure that potable wells are not located within 100 feet of any source of contamination.

c. MCL 333.2451 Imposes A Mandatory Statutory Duty On the Health Department To Act When There Is An Imminent Danger.

MCL 333.2451 states that, upon a determination that an imminent danger to the health or lives of individuals exists in the area served by the local health department, the local health officer immediately "shall" inform the individuals affected by the imminent danger and issue an order which shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. This makes it necessary for the Health Department

to have and maintain relevant data on sites of known contamination. The Health Department has a duty to act on such issues.

> **"(1) Upon a determination that an imminent danger to the health or lives of individuals exists in the area served by the local health department, the local health officer immediately shall inform the individuals affected by the imminent danger and issue an order which shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the findings of the local health department and require immediate action necessary to avoid, correct, or remove the imminent danger**. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger." (**Exhibit 1** – MCL 333.2451) (Emphasis Added)

d. The Public Health Of Washtenaw County Is At Risk.

1. The MDEQ (now "EGLE") Emergency Rules Executed By The Governor On October 27, 2016 Amplify The Concerns Now Presented To This Court.

Michigan issued new Rules -- by an Emergency Declaration -- regarding the establishment of new cleanup criteria for 1,4 dioxane. The Rules state that they are promulgated by the Department of Environmental Quality (now EGLE) in order to establish a "cleanup criteria" under the remediation provisions of the state law. Thus, the stated goal for the Emergency Rules is "cleanup". As required under the remediation provisions of State Law -- Part 201. The Health Department asserts that this must be the goal and the objective going forward given the identified public health issue.

> "**These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane** under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended." (**Exhibit 7** -- Emergency Rules) (Emphasis Added)

The Rules state that the MDEQ finds that releases of 1,4 dioxane have occurred and pose a threat to "public health" safety, or welfare of its citizens and the environment. This triggers the statutory role of the Health Department as set forth herein.

> "**The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment.**" (**Exhibit 7** -- Emergency Rules) (Emphasis Added)

The Rules affirmatively state that shallow groundwater investigations in the "Ann Arbor area" have detected 1,4 dioxane in the groundwater in close proximity to residential homes. This is a major problem and represents a significant ***public health concern***. This unquestionably triggers the statutory duties of the Health Department. As set forth herein.

> "**Recent shallow groundwater investigations In the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes**. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings." (**Exhibit 7** -- Emergency Rules) (Emphasis Added)

The Rules state that current cleanup criteria for 1,4 dioxane initially established in 2002 are outdated and are not protective of "**public health**" with respect to the drinking water ingestion pathway and the vapor intrusion pathway. Again, this represents a significant public health concern and triggers the mandatory duties of the Health Department.

> "**The *current* cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.**" (**Exhibit 7** -- Emergency Rules) (Emphasis Added)

The Rules then conclude that, because the previous cleanup criteria for 1,4 dioxane are not protective of public health, new rules are demanded and set the residential drinking water cleanup

criterion for dioxane in groundwater at 7.2 parts per billion and the residential vapor intrusion criterion at 29 parts per billion for 1,4 dioxane. These are actionable "cleanup" requirements.

> "**The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health** with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.
>
> **Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.**
>
> **Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion."** (**Exhibit 7** -- Emergency Rules) (Emphasis Added)

The Governor executed the Emergency Rules and concurred in the findings of the Department of Environmental Quality that circumstances creating an emergency have occurred and the "public interest" requires the promulgation of the above rule.

> "Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency **have occurred and the public interest requires the promulgation of the above rule**." (**Exhibit 7** -- Emergency Rules) (Emphasis Added)

The Health Department has a unique interest and a mandatory statutory duty to protect the "public health" of Washtenaw County. By stating that the public health is at risk, the Governor unquestionably triggered the duties of the Health Department as set forth herein.

III. RELIEF REQUESTED

The Health Department requests that this Court take actions and enter Orders as necessary to fully and effectively implement the new cleanup standards. Absent full, complete and continued implementation of these standards, the Health Department cannot effectively comply with its statutory duties as outlined herein.

The actions presented in the primary Brief submitted by the Intervenors are intended to implement the cleanup standards. The actions are fully supported and are intended to ensure the cleanup standards are met and preserved going forward. The Health Department adopts and supports those positions. The Health Department respectfully requests that this Court focus on the word "cleanup" as this Court considers the actions requested.

The Health Department seeks the following:

A. The establishment and the preservation of a defined and complete Prohibition Zone (including the Western Area) that allows the Health Department to make informed and consistent decisions going forward with respect to water wells, water supplies and the protection of other local resources.

B. The establishment of effective triggers that "sound the alarm" if or when unacceptable levels of contamination are approaching the line of the Prohibition Zone. This is a key component. The Health Department cannot wait until the acceptable levels are violated before corrective actions are undertaken. Setting the trigger at the exact value of the cleanup standard makes no sense. The Trigger must function as a real trigger in the true sense of a warning.

C. A complete delineation of the existing contamination that provides an accurate depiction of the plume boundaries. This is essential to the Health Department for decision making purposes on private water wells, new wells and existing water supplies.

D. An increase in source removal. Source removal actions are designed to lessen the gross contamination areas which, in turn, reduce the likelihood contamination will be pushed to migrate to and beyond the lines of the Prohibition Zone. Source removal is consistent with "cleanup" and source removal actions within a complete Prohibition Zone are logical when the goal is to prevent migration of unacceptable contamination to areas beyond the lines of a complete Prohibition Zone.

E. The establishment of a residential well sampling program funded by Gelman and not borne by the taxpayers of Washtenaw County.

F. The establishment of a user friendly and complete database of information that provides all relevant data relating to the 1,4 dioxane contamination plume to keep the citizens and officials of Washtenaw County up to date.

IV. CONCLUSIONS

The Health Department has duties derived and mandated by State law. The fundamental objectives of the Health Department require the complete implementation of the new cleanup standards. All of the actions set forth in the primary Intervenor Brief support the fundamental objectives and statutory directives of the Health Department. Starting at the outer boundary of the Prohibition Zone and working inward, the logic of the Health Departments positions are illuminated and ring clear.

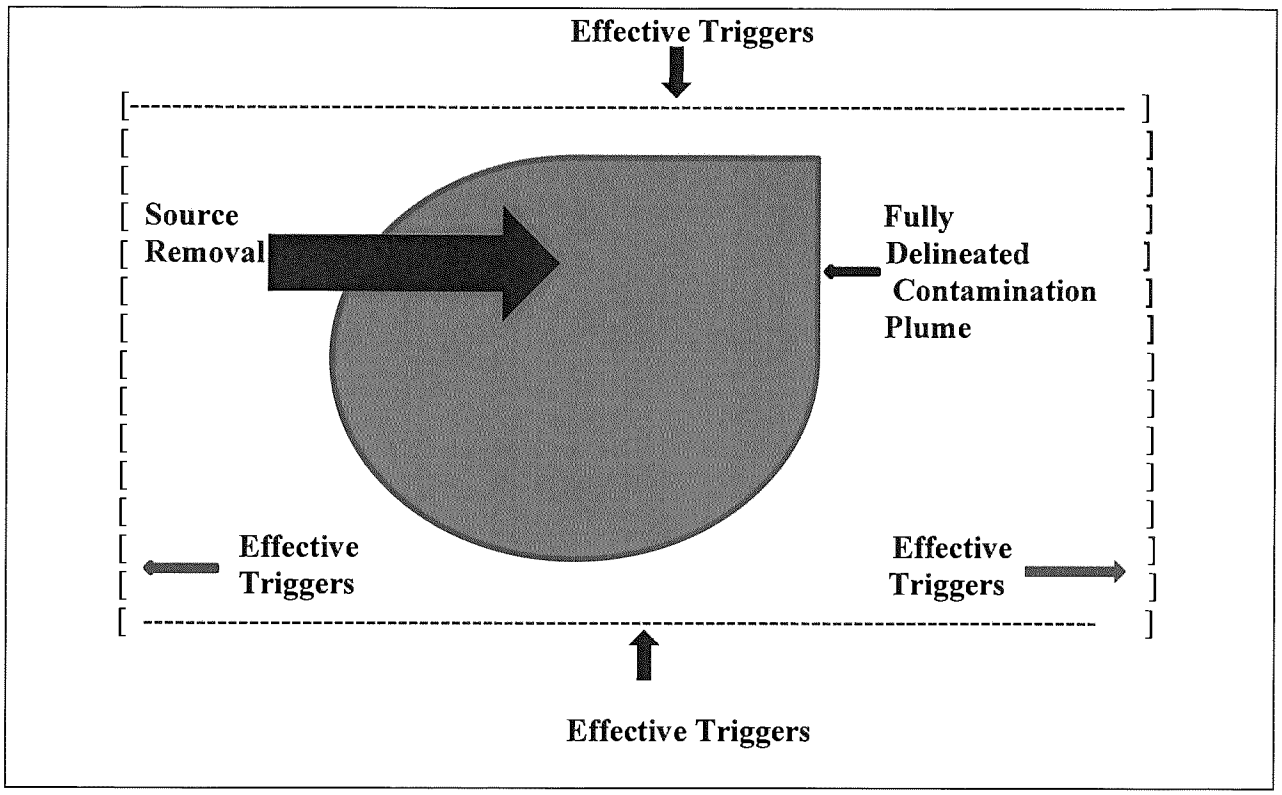
- Define and Stabilize a completed Prohibition Zone including the Western Area.
- Decrease the Prohibition Zone over time.
- Impose meaningful triggers and action plans to protect the Prohibition Zone.
- Achieve an accurate and full delineation of existing contamination and contamination levels, including the Western Area.
- Remove additional contamination within the complete Prohibition Zone and in the source areas to ensure against unacceptable migration.

This contamination issue -- as presented to this Court -- is complex. However, the fundamentals set forth in this Brief are basic and are key to the ongoing role and duties of the Health Department. The Health Department requires source removal, complete delineation of the impacts and a defined line in the sand where the contamination is -- and is not. This is the only way the Health Department can meet the statutory duties imposed upon it. The positions advanced by the Intervenors are carefully designed and presented to achieve these objectives.

The following diagram is instructive and basic.

FULLY DEFINED

PROHIBITION ZONE (THE BOX)



The Intervenors propose a logical and supported Prohibition Zone. As source removal increases and continues, the goal is a shrinking plume and a contracted Prohibition Zone over time. The simplicity of this diagram is presented only to amplify the fundamental requirements of the Health Department. Residential wells and water supplies surround this "Box". The box needs to be protected by effective triggers. The Triggers are established by effective and complete delineation. The Order proposed by the Intervenors supports these objectives.

WHEREFORE, the Health Department respectfully requests that this Honorable Court enter the Order proposed by the Intervenors.

By: **/S/ Robert Charles Davis**
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Dated: April 30, 2021

PROOF OF SERVICE

I served the **Intervenors, Washtenaw County Health Department and Washtenaw County Health Officer Jimena Loveluck's Brief Supporting A Court Order Implementing The Revised Cleanup Standards** upon the attorneys of record and/or parties in this case on **April 30, 2021. I declare the foregoing statement to be true to the best of my information, knowledge and belief.**

- ☐ **U.S. Mail**
- ☐ Hand Delivered
- ☐ Express Mail Private
- ☐ Fax
- ☐ Messenger
- **X Other: E-file**

/s/ William N. Listman
William N. Listman

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

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And

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EXHIBIT #1 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 1

This document is current through Act 8 of the 2021 Regular Legislative Session and E.R.O. 2021-1

§ 333.2413. County health department; county board of health.

Sec. 2413.

Except if a district health department is created pursuant to section 2415, the local governing entity of a county shall provide for a county health department which meets the requirements of this part, and may appoint a county board of health.

History

Pub Acts *1978, No. 368*, Art. 2, Part 24, § 2413, imd eff July 25, 1978, by § 25211(1) eff September 30, 1978.

End of Document

This document is current through Act 8 of the 2021 Regular Legislative Session and E.R.O. 2021-1

§ 333.2428. Local health officer; appointment; qualifications; powers and duties.

Sec. 2428.

(1)A local health department shall have a full-time local health officer appointed by the local governing entity or in case of a district health department by the district board of health. The local health officer shall possess professional qualifications for administration of a local health department as prescribed by the department.

(2) The local health officer shall act as the administrative officer of the board of health and local health department and may take actions and make determinations necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent disease.

History

Pub Acts *1978, No. 368*, Art. 2, Part 24, § 2428, imd eff July 25, 1978, by § 25211(1) eff September 30, 1978.

End of Document

This document is current through Act 8 of the 2021 Regular Legislative Session and E.R.O. 2021-1

§ 333.2433. Local health department; powers and duties generally.

Sec. 2433.

(1)A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law.

(2)A local health department shall:

(a) Implement and enforce laws for which responsibility is vested in the local health department.

(b) Utilize vital and health statistics and provide for epidemiological and other research studies for the purpose of protecting the public health.

(c) Make investigations and inquiries as to:

(i) The causes of disease and especially of epidemics.

(ii) The causes of morbidity and mortality.

(iii) The causes, prevention, and control of environmental health hazards, nuisances, and sources of illness.

(d) Plan, implement, and evaluate health education through the provision of expert technical assistance, or financial support, or both.

(e) Provide or demonstrate the provision of required services as set forth in section 2473(2).

(f) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law.

(g) Plan, implement, and evaluate nutrition services by provision of expert technical assistance or financial support, or both.

(3) This section does not limit the powers or duties of a local health officer otherwise vested by law.

History

MCLS § 333.2433

Pub Acts *1978, No. 368*, Art. 2, Part 24, § 2433, imd eff July 25, 1978, by § 25211(1) eff September 30, 1978.

End of Document

This document is current through Act 8 of the 2021 Regular Legislative Session and E.R.O. 2021-1

§ 333.2435. Local health department; additional powers.

Sec. 2435.

A local health department may:

(a) Engage in research programs and staff professional training programs.

(b) Advise other local agencies and persons as to the location, drainage, water supply, disposal of solid waste, heating, and ventilation of buildings.

(c) Enter into an agreement, contract, or arrangement with a governmental entity or other person necessary or appropriate to assist the local health department in carrying out its duties and functions unless otherwise prohibited by law.

(d) Adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination.

(e) Accept gifts, grants, bequests, and other donations for use in performing the local health department's functions. Funds or property accepted shall be used as directed by its donor and in accordance with the law, rules, and procedures of this state and the local governing entity.

(f) Sell and convey real estate owned by the local health department.

(g) Provide services not inconsistent with this code.

(h) Participate in the cost reimbursement program set forth in sections 2471 to 2498.

(i) Perform a delegated function unless otherwise prohibited by law.

History

Pub Acts *1978, No. 368*, Art. 2, Part 24, § 2435, imd eff July 25, 1978, by § 25211(1) eff September 30, 1978.

MCLS § 333.2435

End of Document

This document is current through Act 8 of the 2021 Regular Legislative Session and E.R.O. 2021-1

§ 333.2451. Imminent danger to health or lives; informing individuals affected; order; noncompliance; petition to restrain condition or practice; "imminent danger" and "person" defined.

Sec. 2451.

(1) Upon a determination that an imminent danger to the health or lives of individuals exists in the area served by the local health department, the local health officer immediately shall inform the individuals affected by the imminent danger and issue an order which shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the findings of the local health department and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.

(2) Upon the failure of a person to comply promptly with an order issued under this section, the local health department may petition a circuit or district court having jurisdiction to restrain a condition or practice which the local health officer determines causes the imminent danger or to require action to avoid, correct, or remove the imminent danger.

(3) As used in this section:

(a)"Imminent danger" means a condition or practice which could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.

(b)"Person" means a person as defined in section 1106 or a governmental entity.

History

Pub Acts *1978, No. 368*, Art. 2, Part 24, § 2451, imd eff July 25, 1978, by § 25211(1) eff September 30, 1978.

End of Document

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

EXHIBIT #2 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 2

Browder v. International Fidelity Ins. Co.

Supreme Court of Michigan

November 10, 1981, Argued ; June 28, 1982, Decided

Docket No. 65520

Reporter
413 Mich. 603 *; 321 N.W.2d 668 **; 1982 Mich. LEXIS 540 ***

WILLODEAN BROWDER, Plaintiff-Appellant, v. INTERNATIONAL FIDELITY INSURANCE COMPANY, a Foreign Corporation, Defendant-Appellee

Prior History: [***1] *98 Mich App 358; 296 NW2d 60 (1980)*.

Disposition: The decisions of the trial court and the Court of Appeals are affirmed.

Syllabus

Willodean Browder brought an action under the dramshop act against James Stein, the owner of the Grapevine Lounge, and his unidentified employee for damages resulting from injuries she suffered while she was a patron of the lounge where she [***2] was shot by the intoxicated employee. The employee was never apprehended. An amendment to the complaint adding the International Fidelity Insurance Company as a defendant was filed more than two years after the shooting. A default judgment entered against Stein was not satisfied because of Stein's bankruptcy. Fidelity moved for accelerated judgment on the ground that the plaintiff's claim against it was barred by the two-year period of limitation provided by the dramshop act. The Wayne Circuit Court, Patrick J. Duggan, J., granted the motion. The Court of Appeals, Bashara, P.J., and D. F. Walsh and T. M. Burns, JJ., affirmed in an opinion per curiam (Docket No. 44868). The plaintiff appeals, claiming that her action against Fidelity is founded in contract and thus is controlled by a six-year period of limitation.

In a unanimous opinion by Justice Williams, the Supreme Court *held*:

The Legislature, in enacting the dramshop act, intended that the act should provide the exclusive remedy for persons injured by a visibly intoxicated person as the result of an unlawful sale of an intoxicating beverage to such person, including actions against a bar owner's surety. Thus an action [***3] brought under the dramshop act against a surety is governed by the act's two-year period of limitation and not by the six-year period for actions in contract.

1. The dramshop act is part of the Michigan Liquor Control Act and was enacted to discourage bars from selling intoxicating beverages to minors or visibly intoxicated persons and to provide for recovery under certain circumstances for persons injured as a result of an illegal sale. The language of the statute, given its ordinary and accepted meaning, indicates that the remedy is exclusive. The act creates a right of action against bar owners and their sureties which was unavailable at

common law and provides a specific action with which to achieve a remedy. The act specifically provides that such actions are subject to a two-year period of limitation.

2. The plaintiff's amended complaint did not state a cause of action in contract, but that theory was argued in the trial court and in a supplemental memorandum of law following the trial. The defendant never objected to the contract theory, and the trial court fully addressed the issue in its opinion. A remand to amend the complaint to conform to the contract theory would [***4] be a mere formality. Thus, under the court rule permitting amendment of a complaint to conform to the evidence, the pleadings are deemed amended.

3. The plaintiff's action against Fidelity on the theory that she was a third-party beneficiary of Fidelity's contract with Stein must fail. The exclusive remedy is provided under the dramshop act, and the two-year period of limitation controls. The plaintiff permitted the period to run and is barred from asserting an action in contract.

Counsel: *Lopatin, Miller, Freedman, Bluestone, Erlich & Rosen* (by *Steven G. Silverman)*, Detroit, Michigan, for plaintiff.

Zemke & Hirschhorn, P.C. (by *Peter J. Lyons)*, Southfield, Michigan, for defendant.

Judges: Williams, J. Coleman, C.J., and Kavanagh, Levin, Fitzgerald, Ryan, and Blair Moody, Jr., JJ., concurred with Williams, J.

Opinion by: WILLIAMS

Opinion

[*605] **[**669]** This dramshop case raises one principal question: may an injured party sue the surety on a bar's liquor bond in contract and enjoy the six-year statute of limitations available to contract actions, or is the injured party limited to the dramshop act's [1] tort action and its two-year period of limitations? There is **[***5]** a subsidiary question whether the plaintiff, having brought the **[**670]** dramshop tort action within two years against the bar and the unknown bar employee and obtained judgment, may, after the expiration of the two years amend her complaint to add a count in contract against the bond's surety on the liquor bond.

To reach the question on the merits, we hold that plaintiff, even after judgment, can amend her complaint to include the surety as a defendant. However, on the merits, we hold that the Legislature in drafting the dramshop act intended to establish a self-contained provision to accomplish its particular objectives and that the tort remedy and two-year statute of limitations provided therein are exclusive. Consequently, a suit in contract enjoying a six-year statute of limitations is not available. We affirm the judgment of the trial court and the Court of Appeals.

I. Facts

In the early hours of November 12, 1973, plaintiff Willodean Browder, while a patron at the **[*606]** **[***6]** Grapevine Lounge in Detroit, was shot in the left leg by an intoxicated employee. The assailant, known only as Shay, was never apprehended. Suit was timely filed on October 15, 1974, against lounge owner James Stein, doing business as the Grapevine Lounge, and the unknown assailant [2] under Michigan's "dramshop

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[1] *MCL 436.22*; MSA 18.993.

[2] The unknown assailant was included in the suit in accordance with the name and retain provision of the dramshop act. *MCL 436.22*; MSA 18.993. Defendant originally argued that plaintiff had not exercised due diligence in attempting to ascertain the identity of the

act". [3] MCL 436.22; MSA 18.993. An amended complaint was filed on March 15, 1976, adding defendant International Fidelity Insurance Company as surety of the Grapevine Lounge's class "C" $ 5,000 liquor bond. A default judgment was entered against defendant Stein and the Grapevine Lounge on April 19, 1977, but, due to defendant's insolvency, has remained unsatisfied. [4] Defendant Fidelity's motion for accelerated judgment was stayed pending a February 1977 bench trial. Wayne Circuit Judge Patrick Duggan, rejecting claims that the dramshop act permits a concurrent common-law action in contract, found plaintiff's action against Fidelity to be barred by the two-year statute of limitations. An order granting defendant accelerated judgment was entered on April 19, 1979. The Court of Appeals affirmed in a per curiam opinion, *98 Mich [*607] App 358; 296 NW2d 60 (1980).* [***7] from which we granted leave. *411 Mich 972 (1981).*

[***8] II. Parties' Arguments

Plaintiff-appellant Browder admits that the action against defendant-appellee Fidelity was not brought prior to the expiration of the dramshop act's two-year period of limitations, but insists that her cause of action is founded in contract and thus is controlled by a six-year statute of limitations. See MCL 600.5807 and 600.5813; MSA 27A.5807 and 27A.5813. The plaintiff states:

"Plaintiff-appellant contends that the Court of Appeals misconstrued the intended nature of plaintiff-appellant's action [**671] against the surety. Plaintiff-appellant asserts that the allegations against defendant-appellee were based on the obligation of the surety to its principal, based on the bond. Plaintiff-appellant's action against defendant-appellee was, therefore, in the nature of a third-party beneficiary action in *contract.* Thus, the two-year statute of limitations does not apply." (Emphasis in original.)

While recognizing that the dramshop act is in derogation of the common law, plaintiff argues that since the act is remedial it should be liberally construed and thereby not be held to provide an exclusive remedy.

Defendant-appellee admits that it would [***9] be liable on the $ 5,000 liquor bond to plaintiff had the amended complaint been filed within two years of the injury, but insists that 1) the Court of Appeals was correct in finding that "the plaintiff's complaint against the defendant surety indicates that the plaintiff was basing liability upon a negligence theory as established under the dramshop act", *98 Mich App 361*, and that therefore plaintiff's action [*608] is barred by the statutory limitation period; 2) even were plaintiff's action well-pled, the cause of action provided in the dramshop act is exclusive; and 3) liability on the bond to the injured party is not derived from any contractual obligation, but is created by the statute.

III. Amendment of the Complaint to Conform to the Evidence

We will first address the issue concerning the pleadings.

A two-count complaint was timely filed on October 15, 1974, against defendants Stein and the unknown assailant for negligence and assault and battery. On March 15, 1976, two years and four months after the shooting, plaintiff amended her complaint to include a third count adding defendant Fidelity.

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assailant. See *Salas v Clements, 399 Mich 103, 110; 247 NW2d 889 (1976).* The trial court found "that plaintiff did exercise due diligence". This issue was not appealed.

[3] The "dramshop act" is actually a subpart of the Liquor Control Act, MCL 436.1 *et seq.*; MSA 18.971 *et seq.*

"The term 'dramshop' is a colloquialism well known to the bench and bar of this state as having reference to provisions in state statutes imposing vicarious civil liability upon a designated class of persons for dispensing liquor under certain prohibited circumstances. In the instant case the term 'dramshop' is colloquially applied to the civil liability provisions of § 22 of the Michigan Liquor Control Act." *Guitar v Bieniek, 402 Mich 152, 157, fn 4; 262 NW2d 9 (1978).*

[4] Defendant Stein and the Grapevine Lounge were adjudicated bankrupt on December 30, 1975.

The Court of Appeals held:

"This Court's review of the plaintiff's complaint **[***10]** against the defendant surety indicates that the plaintiff was basing liability upon a negligence theory as established under the dramshop act. Where the plaintiff has alleged liability based upon the dramshop act, the act's limitation period should govern." *98 Mich App 361*.

We agree that the amended complaint does not allege a cause of action in contract. [5] However, the breach of contract theory was forcefully argued by plaintiff before the trial court and in a supplemental **[*609]** memorandum of law following the trial. Defendant never objected to the inclusion of this contract theory, and the trial judge fully addressed this issue in his opinion.

[*11]** The Michigan General Court Rules permit a complaint to be amended to conform to the evidence. GCR 1963, 118.3, in part, states:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case an amendment of the pleadings to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment."

Plaintiff requests that should this Court find the amended complaint not to allege an action in contract then "in the interest of **[**672]** justice" this case ought to be remanded to the trial court to allow plaintiff to "more specifically plead an action in contract on the bond". A remand for amendment of the complaint would be a mere formality. Since this point has been fully briefed and argued before the lower courts and this Court on the contract theory and in the interest of judicial economy, we deem the pleadings to be amended under GCR 1963, 118.3.

IV. Is the Dramshop Remedy Exclusive?

The principal issue of this case, of course, is whether the dramshop act provides an exclusive **[***12]** cause of action and period of limitations. At the time of injury, the pertinent provisions of the dramshop act were:

"*Every* wife, husband, child, parent, guardian or other *persons who shall be injured* in person or property, **[*610]** means of support or otherwise, *by a visibly intoxicated person by reason of the unlawful selling*, giving or furnishing *to any such persons any intoxicating liquor, and the sale is proven to be a proximate cause of the injury* or death, *shall have a right of action* in his or her name, *against the person who shall by such selling*, or giving of any such liquor *have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury, and the principal and sureties to any bond given under this law shall be liable*, severally and jointly, *with the person or persons selling*, giving or furnishing any spirituous, intoxicating or malt liquors as aforesaid, *and in any action provided for in this section, the plaintiff shall have the right to recover actual damages* in such sum not less than $ 50.00 in each case which the court or jury may determine that intoxication was **[***13]** a proximate cause of the injury or death, *but no surety shall be liable in excess of the amount of the bond required by this act. Any action shall be instituted within 2 years* after the happening of the event and *all factual defenses open to the alleged intoxicated person or minor shall be open and available to the principal and surety*. In case of the death of either party, the action or right of action given in this section shall survive to or against his or her executor or administrator, and in every such action by a husband, wife, child or parent, the general reputation of the relation of husband and wife or parent and child shall be prima facie evidence of

[5] Count III sets forth a cause in negligence, stating that Fidelity "did owe a duty to your plaintiff to see that no intoxicating beverages were [illegally] served upon the premises of defendant" (point 5); defendant breached this duty (point 6); this breach resulted in injuries (point 7); and damages flowed therefrom (points 8-11). Thus a cause of action in tort, rather than contract, was pled.

such relation, and the amount so recovered by either husband or wife or parent and child shall be his or her sole and separate property. *Such damages* together with the costs of suit *shall be recovered in an action of trespass on the case* before any court of competent jurisdiction; and in any case where the parents shall be entitled to any such damages, either the father or mother may sue alone therefor but recovery by one of such parties shall be a bar to suit brought by the other. *No action against a retailer* **[***14]** or wholesaler or anyone covered by this act *or his surety, shall be commenced unless the minor or the alleged intoxicated person is a named defendant in the action and is retained in the [*611] action until the litigation is concluded by trial or settlement.* The bond required by this act shall continue from year to year unless sooner cancelled by the surety. No surety shall cancel any bond except upon 10 days' written notice to the commission." MCL 436.22; MSA 18.993. (Emphasis added.) [6]

The primary purpose of statutory construction is to ascertain and give effect to the intention of the Legislature. The rules of construction established by the courts over the years "serve but as guides to assist the courts in determining such intent with a greater degree of certainty". **[**673]** *Grand Rapids v Crocker, 219 Mich 178, 182; 189 NW [***15] 221 (1922)*. Accord, *Dussia v Monroe County Employees Retirement System, 386 Mich 244, 248; 191 NW2d 307 (1971)*. A basic rule of statutory construction is that where the Legislature uses certain and unambiguous language, the plain meaning of the statute must be followed. *Crocker, supra, 182*; *Dussia, supra, 248*. See 2A Sands, Sutherland Statutory Construction (4th ed), §§ 46.01 and 46.04, pp 48-49 and 54-55.

The dramshop act is part of the Michigan Liquor Control Act, *MCL 436.1 et seq.*; MSA 18.971 *et seq.*, whose overall object, as defined by the title to the act, is to provide "for the control of the alcoholic beverage traffic within the state of Michigan".

Upon examination of the dramshop act, it becomes clear that the particular objective of the Legislature in enacting it was to discourage bars from selling intoxicating beverages to minors or visibly intoxicated persons and to provide for recovery under certain circumstances by those injured **[*612]** as a result of the illegal sale of intoxicating liquor.

As the emphasized portions of the statute demonstrate, the Legislature used clear and unambiguous language. The Legislature obviously intended the cause **[***16]** of action and the period of limitations provided in the dramshop act to be the exclusive cause of action and exclusive period of limitations for the following combination of reasons:

(1) The Legislature said that the damages provided "*shall* be recovered in an action of trespass on the case". A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may" unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole. See *Smith v School Dist No 6, Fractional, Amber Twp, 241 Mich 366, 369; 217 NW 15 (1928)*. Thus, the presumption is that "shall" is mandatory. [7] Neither the plain meaning of the statute as a whole or in any part indicates that "shall be recovered in an action of trespass on the case" is not mandatory. Indeed, as the discussion below indicates, the intention was quite the contrary.

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[6] The act was amended by 1980 PA 351. See *MCL 436.22(5)*; MSA 18.993(5). The changes were not substantive in nature and would not affect the holding in this case.

[7] See 2A Sands, Sutherland Statutory Construction (4th ed), § 57.03, pp 415-416. Accord *Jersey City v State Board of Tax Appeals, 133 NJL 202, 209; 43 A2d 799 (1945)*. *Cf. State Highway Comm v Vanderkloot, 392 Mich 159, 180; 220 NW2d 416 (1974)* (popular and common understanding of the word "shall" denotes mandatoriness; where supporting language is unequivocal, this Court has uniformly held that "shall" is mandatory).

[***17] (2) The Legislature has *created* a new and noncommon-law remedy and has provided that a particular cause of action shall be used. The act reads: "Every * * * person * * * who shall be injured * * * by a visibly intoxicated person by reason of [*613] the unlawfully selling * * * to any such persons * * * *shall* have a right of action * * * against the person who shall by such selling * * * have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to such injury, and the principal and sureties to any bond given under this law shall be liable * * * with the person or persons selling * * * liquors * * *, and * * * the plaintiff shall have the right to recover actual *damages* * * * but no surety shall be liable in excess of the amount of the bond required by this act * * *. * * * *Such damages* * * * shall be recovered in an action of trespass on the case". First of all, it is clear that this is a new remedy because it is not against the intoxicated person who causes the ultimate injury but against the bar owner who sold intoxicating liquor to a minor or a visibly intoxicated person. [**674] There was no such [***18] common-law remedy. [8] Likewise, it is a new remedy to have a cause of action on the bond. Second, the Legislature has specifically provided that the new cause of action to recover actual damages against the bar owner and to the amount of the bond against the sureties shall be an action in trespass on the case. In sum, the Legislature fashioned a new remedy and provided a specific action with which to achieve that remedy. In other [*614] words, the Legislature has designated a particular remedy for a new and particular right.

[***19] (3) The Legislature has here created a carefully crafted and self-contained measure to try to control, in a fair and reasonable manner, the flow of liquor traffic by establishing civil liability for injuries resulting from illegal liquor sales. The careful balancing of the new remedy and the new liability is indicated by the following factors. On the one hand, the injured party is protected by a new and non-common-law remedy against a person not otherwise liable, the bar owner. In addition, the bar owner has to be bonded, and both the bond principal and sureties are liable, the sureties to the extent of the bond. This reasonably assures the plaintiff of recovery against a financially responsible person or persons. On the other hand, the bar owner and those liable on the bond, who themselves did not commit, and may not have been aware of the commission of, the tort, are protected from stale claims which they might find particularly difficult to investigate.

Furthermore, the Legislature has carefully considered and reconsidered the dramshop act to keep it internally balanced. As we have seen, the first adjustment was to add a specific two-year period of limitations where none [***20] had existed before. Compare 1958 PA 152, § 22(2) *with* 1933 PA 8, § 22 [1948 CL 436.22(2); MSA 18.993(2)]. Then the Legislature enacted a provision requiring that the bond automatically continue from year to year unless the Liquor Control Commission is given ten days' written notice by the surety of its intent to cancel the bond. 1961 PA 224. In 1972, several changes were made. Originally, the act provided for exemplary damages, 1933 PA 8, § 22, but this apparently tilted the act too far in favor of the [*615] claimant, so the Legislature modified the act to provide only for actual damages. The requirement of proximate causation was specifically added as was the provision giving the principal and surety all factual defenses which the intoxicated person or minor possessed. Finally the intricate balance was kept

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[8] 45 Am Jur 2d, Intoxicating Liquors, § 553, pp 852-853; 48 CJS, Intoxicating Liquors, § 430, p 139; Anno: *Right of action at common law for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drugs to another*, 75 ALR2d 833, 835. This was certainly true of Michigan common law. *Manuel v Weitzman*, 386 Mich 157, 163; 191 NW2d 474 (1971); *Gray v Blackman*, 30 Mich App 212, 213; 186 NW2d 76 (1971). See *Brockway v Patterson*, 72 Mich 122, 125; 40 NW 192 (1888). Accord *Megge v United States*, 344 F2d 31, 32 (CA 6, 1965). *Cf. Waynick v Chicago's Last Dep't Store*, 269 F2d 322 (CA 7, 1959) (recovery allowed based on the Michigan common-law rule that there is no right without a remedy *and* an Illinois statute outlawing the sale of alcoholic beverages to a visibly intoxicated person in order to prevent a vacuum in the law).

by requiring the plaintiff to name and maintain the intoxicated person who actually committed the injury as a defendant. 1972 PA 196, § 22(2). This, of course, is to avoid possible collusion between the plaintiff and the one who caused the injury. *Cf. Salas v Clements, 399 Mich 103, 110; 247 NW2d 889 (1976)*. In short, the Legislature has carefully **[***21]** created a self-contained package which has its own built-in checks and balances, among which are included a specified cause of action and period of limitations.

(4) The Legislature provided a particular period of limitation in these words: "Any action shall be instituted within 2 years". The "shall" here is mandatory for the **[**675]** same reasons discussed for the cause of action in reasons (1) and (3). Therefore, under the plain and ordinary meaning of the statute, in order to recover for injuries incurred in a factual situation giving rise to the legislatively created and balanced remedy of the dramshop act, the lawsuit must be brought within two years. Accord, *Jones v Bourrie, 369 Mich 473, 476; 120 NW2d 236 (1963)* (dramshop two-year period of limitations takes precedence over three-year period of limitation for common-law negligence action).

In summary, we find that the Legislature intended the dramshop act to be a complete and self-contained solution to a social problem not adequately addressed at common law. The plain and unambiguous language, together with the built-in **[*616]** checks and balances adopted by the Legislature to finely hone the rights and obligations **[***22]** of the parties under the act, lead to only one conclusion: the Legislature intended the statutory action of trespass on the case to be the exclusive remedy and "any action" arising under dramshop-related facts to be instituted within two years. [9]

V. Conclusion

Therefore, plaintiff's action under a common-law third-party beneficiary theory must fail. **[***23]** As this Court unanimously held in *Jones, supra, 476-477*:

"Plaintiff herein, for unknown reasons, permitted the statutory period to run. He cannot now assert an action to exist at common law. Plaintiff's remedy is under the [dramshop] statute * * * and he failed to timely exercise it. To allow now an action, based on a common-law remedy, would be to permit circumvention of the statute and to assert a nonexistent remedy beyond that provided by the legislature."

The decision of the trial court dismissing plaintiff's cause of action and the judgment of the Court of Appeals are affirmed. No costs, a public question being involved.

End of Document

[9] Plaintiff's argument that since the dramshop act is remedial in nature it should be liberally construed is not controlling. While the dramshop act is remedial in nature and should be liberally construed, *Podbielski v Argyle Bowl, Inc, 392 Mich 380, 384-385; 220 NW2d 397 (1974)*; *LaBlue v Specker, 358 Mich 558, 568; 100 NW2d 445 (1960)*; *Eddy v Courtright, 91 Mich 264, 267; 51 NW 887 (1892)*, we cannot read into the statute that which is not there. "In the statute now before us, the language admits of but one construction. No doubt can arise as to its meaning. It must therefore be its own interpreter." *Bidwell v Whitaker, 1 Mich 469, 479 (1850)*.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

EXHIBIT #3 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 3

PEREZ v. BLACK CLAWSON CO.

Court of Appeals of Michigan

August 28, 2001, Decided

No. 221010, No. 221075

Reporter
2001 Mich. App. LEXIS 2603 *; 2001 WL 985823

GILBERT PEREZ, Plaintiff-Appellee, and TRAVELERS INSURANCE COMPANY, Intervening Plaintiff-Appellee, v BLACK CLAWSON COMPANY, Defendant/Cross-Plaintiff/Third-Party Plaintiff, and SORENSON PAPERBOARD COMPANY, Defendant/Cross-Defendant, and BIG M PAPERBOARD, INC., Defendant-Appellant, and MERRITT SORENSON and SIMPLEX PAPER COMPANY, Third-Party Defendants. GILBERT PEREZ, Plaintiff-Appellee, and TRAVELERS INSURANCE COMPANY, Intervening Plaintiff-Appellee, v BIG M PAPERBOARD, INC., Defendant-Appellant, and SIMPLEX PAPER COMPANY, TORONTO PAPERBOARD, INC., and SORENSON PAPERBOARD COMPANY, Defendants.

Notice: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: No. ***221010***, Lenawee Circuit Court. LC No. 93-005782-NO.

No. 221075, Lenawee Circuit Court. LC No. 94-006317-NO.

Disposition: Affirmed in part, reversed and remanded in part.

Judges: Before: Jansen, P.J., and Collins and Cooper, JJ.

Opinion

PER CURIAM.

Defendant, Big M Paperboard, Inc., [1] appeals as of right from an order entering judgment in favor of plaintiff, Gilbert Perez, following a jury trial on plaintiff's negligence claim. The jury awarded plaintiff $ 195,000 for past economic damages, $ 5,000 for past non-economic damages, $ 61,000 for future medical expenses, $ 90,000 for future wage loss, and $ 90,000 for future non-economic damages. The total damages awarded by the jurors were $ 441,000. After subtracting $ 227,500 that plaintiff received in previous settlements, the trial court adjusted the remaining damages to present value and judgment was entered in favor of plaintiff and against defendant for $ 139,843.44 plus costs. We affirm the judgment for plaintiff, but remand to the trial court for entry of an amended order of judgment consistent [*2] with this opinion.

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[1] Defendant, Big M Paperboard, Inc., and plaintiff, Gilbert Perez, are the only parties participating in this appeal, and hereinafter will be referred to as defendant and plaintiff respectively.

This case arose from plaintiff's workplace injury on a paper-cutting and rewinding machine ("machine"), which was previously owned and modified by defendant. Although defendant no longer owned the machine or the paper mill where the machine was located at the time of plaintiff's injury, and plaintiff was employed by the successive owner of the machine and mill at the time of his injury, plaintiff alleged that his injuries resulted from the modifications made to the machine by defendant.

Defendant first contends that the trial court abused its discretion when it permitted the introduction of expert testimony on the federal occupational safety and health act standards ("OSHA"), *29 USC 651 et seq.*, and the Michigan occupational safety and health act standards ("MIOSHA"), *MCL 408.1001 [*3] et seq.*, pertaining to paper-cutting machines. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *Chmielewski v Xermac, Inc, 457 Mich 593, 613-614; 580 NW2d 817 (1998)*. We will find an abuse of discretion "'only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made.'" *Berryman v K Mart Corp, 193 Mich App 88, 98; 483 NW2d 642 (1992)*, quoting *Gore v Raines & Block, 189 Mich App 729, 737; 473 NW2d 813 (1991)*.

Evidence is relevant when it "'has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *MRE 401*; *Dep't of Transportation v Van Elslander, 460 Mich 127, 129; 594 NW2d 841 (1999)*, quoting *Yates v Keane, 184 Mich App 80, 82; 457 NW2d 693 (1990)*. The violation of safety regulations, such as OSHA and MIOSHA, may be admissible as evidence of the standard of care. *Co-Jo, Inc v Strand, 226 Mich App 108, 115; [*4] 572 NW2d 251 (1998)*, citing *Beals v Walker, 416 Mich 469, 481; 331 NW2d 700 (1982)*.

In this case, plaintiff had to prove the following elements by a preponderance of the evidence: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; (3) defendant's breach of this duty caused plaintiff's injuries; and (4) plaintiff suffered damages as a result of defendant's breach of this duty. *Case v Consumers Power Co, 463 Mich 1, 6; 615 NW2d 17 (2000)*. Plaintiff's theory of negligence was that defendant's modifications to the machine were unreasonably dangerous and caused plaintiff's injuries.

Admiral Ben Lehman, a consulting engineer and a former Navy Admiral, who offered expert testimony on the machine, testified to the American National Standards Institute ("ANSI") safety standards governing the machine. Lehman further testified that the OSHA and MIOSHA standards applicable to slitter knives were identical to the ANSI standard.

The safety standard regulations were relevant to aid the jurors in determining what standard of care defendant owed plaintiff and whether defendant breached the standard of care. **[*5]** Specifically, OSHA and MIOSHA regulations were relevant to show how a reasonably prudent mill owner would have modified a paper-cutting machine. Accordingly, we are satisfied that the trial court did not abuse its discretion when it admitted testimony on the OSHA and MIOSHA regulations.

Defendant next contends that the trial court erred in adopting plaintiff's interpretation of *MCL 600.6306* because *MCL 600.6306* unambiguously required the trial court to reduce the future damages to present cash value before subtracting the previous settlements received by plaintiff. We agree. Questions of statutory interpretation are questions of law which we review de novo. *Cheron, Inc v Don Jones, Inc, 244 Mich App 212, 215-216; 625 NW2d 93 (2000)*.

The relevant version of *MCL 600.6306* [2] states in

[2] *MCL 600.6306* was amended in 1995, and the amendments became

pertinent part:

> Sec. 6306. (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. The order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following **[*6]** judgment amounts:
> * * *
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
> (d) All future medical and other health care costs reduced to gross present cash value.
> (e) All future noneconomic damages reduced to gross present cash value.
> * * *
> (3) If there is an individual who was released from liability pursuant to section 2925d, the total judgment amount shall be reduced, as provided in subsection (5), by an amount equal to the amount of the settlement between the plaintiff and that individual.
> (4) If the plaintiff was assigned a percentage of fault pursuant to section 6304, the total judgment amount shall be reduced, as provided in subsection (5), by an amount equal to the percentage of plaintiff's fault. (5) When reducing the judgment amount as provided in subsections (3) and (4), the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

The relevant version of *MCL 600.2925d* **[*7]** [3] states in pertinent part:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons liable in tort for the same injury or same wrongful death:
> * * *
> (b) It reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of consideration paid for it, whichever amount is greater.

When reviewing questions of statutory construction, our primary purpose is to ascertain and give effect to the Legislature's intent. *Nawrocki v Macomb Co Road Comm, 463 Mich 143, 159; 615 NW2d 711 (2000)*. We must first examine the plain language of the statute. *Id.* When the plain language of the statute is clear, judicial construction is neither permitted nor required. *Sun Valley Foods Co v Ward, 460 Mich 230, 236*; 596 NW3d 119 (1999). The Legislature's use of the word "'shall' indicates that the required action is mandatory, not permissive, unless this interpretation 'would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole.'" *Kosmyna v Botsford Community Hospital, 238 Mich App 694, 699; [*8] 607 NW2d 134 (2000)*, quoting *Browder v Int'l Fidelity Ins Co, 413 Mich 603, 612; 321 NW2d 668 (1982)*.

By its express terms, *MCL 600.6306(1)(c)-(e)* mandates that a trial court shall first reduce any future damages awarded by the trier of fact to gross present value before reducing the amount of judgment by the amount of the settlement the plaintiff received **[*9]** from other parties as directed in (3) and before performing the proportionate reduction between future and past damages specified in (5). Because the plain language of *MCL 600.6306* is clear and unambiguous, further judicial construction is neither necessary nor permitted. *Sun Valley Foods, supra at 236*. Moreover, the use of the word "shall" in *MCL 600.6306* indicates that the trial court was

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effective in March 1996. PA 1995, No 161, § 1. Plaintiff's case against defendant was filed in October 1994; therefore, the pre-1995 version of *MCL 600.6306* governs this case.

[3] *MCL 600.2925d* was amended in 1995, and the amendments became effective in March 1996. PA 1995, No 161, § 1. Plaintiff's case against defendant was filed in October 1994; therefore, the pre-1995 version of *MCL 600.2925d* governs this case.

required to follow the order specified in the statute when entering an order of judgment for plaintiff and that the trial court did not possess the discretion to adopt a different interpretation of *MCL 600.6306*. *Kosmyna, supra at 699*. As such, we conclude that the trial court erred when it found that *MCL 600.6306* was ambiguous and conferred discretion upon it to determine when to reduce the future damages to present cash value.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins

/s/ Jessica R. Cooper

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

EXHIBIT #4 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 4

McNeil v. Charlevoix County

Supreme Court of Michigan

July 21, 2009, Decided

No. 134437

Reporter
484 Mich. 69 *; 772 N.W.2d 18 **; 2009 Mich. LEXIS 1572 ***; 29 I.E.R. Cas. (BNA) 876; 158 Lab. Cas. (CCH) P60,842

KENT A. MCNEIL, FRANKLIN E. FISHER, and ROGER GRIFFIN, Plaintiffs, and SCOTT WAY and JEFF LEGATO, Plaintiffs-Appellants, v CHARLEVOIX COUNTY and NORTHWEST MICHIGAN COMMUNITY HEALTH AGENCY, Defendants-Appellees.

Prior History: *McNeil v. Charlevoix County, 275 Mich. App. 686, 741 N.W.2d 27, 2007 Mich. App. LEXIS 1465 (2007)*

Disposition: [***1] Affirmed.

Judges: Chief Justice: Marilyn Kelly. Justices: Michael F. Cavanagh, Elizabeth A. Weaver, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, Diane M. Hathaway. CAVANAGH, J. (concurring). MARKMAN, J. (concurring in part and dissenting in part).

Opinion by: Elizabeth A. Weaver

Opinion

[*72] [**20] BEFORE THE ENTIRE BENCH

WEAVER, J.

At issue in this case is whether *MCL 333.2441(1)* authorizes a local health department to create, and a county board of commissioners to approve, regulations that control smoking in the workplace. Additionally at issue is whether such a regulation, [*73] providing employees with a private cause of action to seek its enforcement, interferes with Michigan's at-will employment doctrine.

I. The Court of Appeals Decision

The Court of Appeals concluded that the regulation at issue is authorized by statute and was promulgated in a manner consistent with the statutory requirements. Furthermore, the Court of Appeals concluded that the private cause of action created by the regulation fits within public policy exceptions to Michigan's at-will employment doctrine. We agree with the Court of Appeals' conclusions. In affirming, we adopt as our own the Court of Appeals' opinion, *McNeil v Charlevoix Co, 275 Mich App 686; 741 NW2d 27 (2007)* [***2] [1]:

[1] We have eliminated only that portion of the Court of Appeals opinion that addresses the issue of preemption, because we do not believe that a preemption analysis is necessary for the resolution of

In this action for declaratory relief, plaintiffs appeal as of right the trial court's order denying their motion for summary disposition. We affirm.

I. Basic Facts and Procedural History

Defendant Northwest Michigan Community Health Agency (NMCHA) is a multicounty district health department organized by Antrim, Charlevoix, Emmet, and Otsego counties under Part 24 of the Public Health Code (PHC), *MCL 333.2401 et seq.* <1> In purported furtherance of its duty to protect the public health and welfare in its district, the NMCHA promulgated what it entitled the Public Health Indoor Air Regulation of 2005 (the regulation). In addition to **[**21]** prohibiting smoking in all public places, the regulation requires employers who do not wholly prohibit smoking at an enclosed place of employment to designate an NMCHA-approved smoking room, **[*74]** which is required by the regulation to be "a separate enclosed area that is independently ventilated so that smoke does not enter other non-smoking areas of the worksite." The regulation additionally prohibits an employer from discharging, refusing to hire, or otherwise retaliating against an employee for exercising his or her right to the smoke-free environment afforded **[***3]** by the regulation.

After the regulation was approved by each of the four counties, plaintiffs, each of whom resides or operates a business within defendant Charlevoix County, brought this action to invalidate the regulation by judicial declaration that the NMCHA was without authority to promulgate such a regulation and that the regulation itself was preempted by Part 126 of the PHC, *MCL 333.12601 et seq.*, which prohibits smoking in buildings used by the public except in designated areas. In seeking summary disposition on these grounds, plaintiffs argued that nothing in Part 126 of the PHC, which is also known as the Michigan Clean Indoor Air Act (MCIAA), <2> authorizes a local health department to enforce or augment the smoking restrictions set by the MCIAA. Plaintiffs further argued that § 12605 of the MCIAA, *MCL 333.12605*, grants owners and operators of public places the discretion to choose whether to maintain a smoking section or remain smoke-free, and that this discretion to permit smoking in public places constitutes a statutorily conferred right that a local health department cannot annul by regulation. Moreover, plaintiffs argued, where the owner or operator of a public place **[***4]** chooses to have a designated smoking area, *§ 12605* requires only that existing physical barriers and ventilation be used to minimize the toxic effects of smoking. Thus, insofar as the NMCHA regulation requires that smoking be restricted to a separate, enclosed area with independent ventilation, it conflicts with the MCIAA and must be found to be invalid.

Citing this Court's decision in *Michigan Restaurant Ass'n v City of Marquette, 245 Mich App 63; 626 NW2d 418 (2001)*, plaintiffs further asserted that smoking is an issue better suited to regulation on a statewide basis, and that local regulation must therefore yield to the preemptive **[*75]** provisions of the MCIAA. Plaintiffs additionally argued that, to the extent the regulation impinges on the common-law right of an employer to discharge an employee at will, the regulation violates public policy and is void. The trial court, however, disagreed and denied plaintiffs' motion. This appeal followed.

II. Analysis

Plaintiffs assert that the trial court erred in denying their motion for summary disposition. In doing so, plaintiffs again argue that the NMCHA lacked the authority to promulgate regulations restricting smoking and that local regulation **[***5]** was, in any event, preempted by the MCIAA. We disagree.

A. Standard of Review

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the issues before us at this time. We do not disturb the Court of Appeals ruling on that issue.

Resolution of the questions presented on appeal requires the interpretation of statutes, which is a question of law that this Court reviews de novo. See *Michigan Coalition for Responsible Gun Owners v Ferndale, 256 Mich App 401, 405; 662 NW2d 864 (2003)*. When interpreting a statute, this Court's goal is to ascertain and give effect to the **[**22]** intent of the Legislature by applying the plain language of the statute. *Gladych v New Family Homes, Inc, 468 Mich 594, 597; 664 NW2d 705 (2003)*.

B. Overview of the Michigan Clean Indoor Air Act

The MCIAA, enacted in 1986 as Part 126 of the PHC, <3> prohibits smoking "in a public place or at a meeting of a public body, except in a designated smoking area." *MCL 333.12603*. Although seemingly broad in scope, "public place," as defined by the MCIAA, renders the act inapplicable to most private-sector workplaces and public areas that are not themselves enclosed. See *MCL 333.12601(1)(m)*. <4> Also exempt from the requirements of the act are food service establishments, <5> *MCL 333.12603(3)*, private educational facilities "after regularly scheduled school hours," *MCL 333.12603(4)*, and **[***6]** enclosed private rooms or offices **[*76]** occupied exclusively by a smoker, "even if the room or enclosed office may be visited by a nonsmoker," *MCL 333.12601(2)*. Further, the MCIAA expressly does not apply to "a room, hall, or building used for a private function if the seating arrangements are under the control of the sponsor of the function and not under the control of the state or local government agency or the person who owns or operates the room, hall, or building." *MCL 333.12603(2)*.

In all other public places in which smoking is not "prohibited by law," the MCIAA permits a "person who owns or operates a public place" to designate a smoking area. *MCL 333.12605(1)*. <6> In those public places in which an owner or operator elects to designate a smoking area, the act requires that "existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in both smoking and adjacent nonsmoking areas." *MCL 333.12605(1)*. <7> The act further requires that seating within the public place be arranged "to provide, as nearly as practicable, a smoke-free area," *MCL 333.12607(b)*, and that the owner or operator develop, implement, and enforce "a written policy for the separation **[***7]** of smokers and nonsmokers which provides, at a minimum," for a procedure to receive, investigate, and take action on complaints, and that ensures that nonsmokers will be located closest to the source of fresh air and that special consideration will be given to individuals with a hypersensitivity to tobacco smoke, *MCL 333.12605(3)*; see also *MCL 333.12607(c)*.

C. Authority of the NMCHA to Promulgate Smoking Regulations

In challenging the validity of the regulation promulgated by the NMCHA, plaintiffs assert that nothing in Part 126 of the PHC authorizes a local health department to enforce or augment the smoking restrictions set by the MCIAA. <8> Plaintiffs argue that, pursuant to *MCL 333.12613*, implementation and enforcement of the act and rules promulgated thereunder is a power within the exclusive province of the Michigan Department of Community Health. Plaintiffs' argument in this regard, however, is not sustained by the plain language of *§ 12613(2)* of Part 126, **[*77]** which expressly provides that "the department may authorize a local health department to enforce this part and the rules promulgated under this part." *MCL 333.12613(2)*.

Moreover, even if the responsibility for the implementation **[***8]** and enforcement of the restrictions established by Part 126 had been exclusively granted to the Department of Community Health, that **[**23]** would not, by

itself, deny a local health department the authority to promulgate, implement, and enforce similar regulations of its own making. As previously noted, Part 24 of the PHC authorizes the creation of local health departments such as the NMCHA. See *MCL 333.2415* and *333.2421*. Pursuant to *§ 2433* of Part 24, such departments are charged with the duty to

"continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law. [*MCL 333.2433(1)*.]"

The regulation at issue is consistent with these duties and is authorized to be promulgated by the NMCHA under *§§ 2435* and *2441* of Part 24, which provide that a local health department **[***9]** may "[a]dopt regulations to properly safeguard the public health," *MCL 333.2435(d)*, or regulations that "are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department," *MCL 333.2441(1)*. See also *MCL 333.2433(2)(a)* (which provides that a local health department "shall . . . [i]mplement and enforce laws for which responsibility is vested in the local health department"). As argued by defendants, the only limitation placed by the Legislature on the promulgation and adoption of such regulations is that they "be at least as stringent as the standard established by state law applicable to the same or similar subject matter." *MCL 333.2441(1)*. <9> The regulation **[*78]** at issue here, being more restrictive than the standards set by the MCIAA, meets this requirement.

We recognize plaintiffs' argument that, under a plain reading of *§ 2433(1)*, the fulfillment of the duties imposed by that section on local health departments is arguably limited to the institution of programs. The section must, however, be read in context and in light of the purpose of both Part 24 and the PHC in general. See *Macomb Co Prosecuting Attorney v Murphy, 464 Mich 149, 159; 627 NW2d 247 (2001)*. **[***10]** As noted earlier, *MCL 333.2435(d)* expressly grants a local health department authority to "[a]dopt regulations to properly safeguard the public health." Plaintiffs assert that the Legislature has also granted local health departments more specific powers. <10> However, that does not lessen the general duty and authority of those agencies to protect the public health, *MCL 333.2433(1)*, and to adopt and implement regulations for that purpose, *MCL 333.2435(d)* and *333.2441(1)*. In fact, the preliminary provisions of the PHC require that the code and each of its various parts "be liberally construed for the protection of the health, safety, and welfare of the people of this state." *MCL 333.1111(2)*; see also *MCL 333.2401(2)* (stating that the "general definitions and principles of construction" contained in article 1 of the PHC, *MCL 333.1101 et seq.*, are "applicable to all articles in this code"), and *Frens Orchards, Inc v Dayton Twp Bd, 253 Mich App 129, 134-135; 654 NW2d 346 (2002)* (applying the preliminary provisions of the PHC to Part 124 of the code, regulating agricultural labor camps). Because, when so construed, the provisions of Part 24 evince a legislative **[**24]** intent to permit regulation **[***11]** of the kind at issue here, we reject plaintiffs' assertion that the NMCHA was without authority to promulgate the regulation.

* * *

E. Employment at Will

Finally, plaintiffs argue that because the regulation's provision that an employer cannot discharge, refuse to hire, or otherwise retaliate

against a person for exercising [*79] his or her right to a smoke-free environment adversely affects the common-law right of an employer to discharge an employee at will, the NMCHA regulation violates public policy and is therefore void. Again, we disagree.

Plaintiffs correctly argue that, in the absence of a contract providing to the contrary, employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever. *Suchodolski v Michigan Consolidated Gas Co, 412 Mich 692, 694-695; 316 NW2d 710 (1982)*. It is well settled, however, that an employer is not free to discharge an employee at will when the reason for the discharge contravenes public policy. See *id. at 695*.

In *Suchodolski, supra at 695-696*, our Supreme Court provided three examples of public-policy exceptions to an employer's right to discharge an at-will employee under the employment at will doctrine. An at-will [***12] employee's discharge violates public policy if any one of the following occurs: (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty; (2) the employee is discharged for the failure or refusal to violate the law in the course of employment; or (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. *Id.*

Although not itself a legislative enactment or statement, the regulation at issue here provides employees with certain specified rights and was, as required by *MCL 333.2441(1)*, approved for application by the governing bodies of each of the various counties served by the NMCHA. <17> Given these facts, and considering the public policy of minimizing the effects of smoking evinced by the Legislature through its enactment of Part 126 and *§ 12905* of Part 129 of the PHC, the regulation's restriction of the general right to discharge an employee at will is consistent with the exceptions to that doctrine set forth in *Suchodolski*. Accordingly, we reject plaintiffs' claim that the regulation's prohibition in this regard itself violates [***13] public policy and is therefore void.
Affirmed.

<1> Pursuant to *§ 2415* of Part 24, "[t]wo or more counties . . . , by a majority vote of each local governing entity and with approval of the [state] department [of community health], may unite to create a district health department." *MCL 333.2415*.

<2> See *MCL 333.12616*.
<3> See 1986 PA 198, effective January 1, 1987.

<4> *MCL 333.12601(1)(m)(i)* defines "public place" as
"[a]n enclosed, indoor area owned or operated by a state or local governmental agency and used by the general public or serving as a place of work for public employees or a meeting place for a public body, including an office, educational facility, home for the aged, nursing home, county medical care facility, hospice, hospital long-term care unit, auditorium, arena, meeting room, or public conveyance."

Enclosed indoor areas that are not owned or operated by a state or local governmental unit, but are included in the definition of "public place" if used by the general public, include educational facilities, homes for the [**25] aged, nursing homes, county medical care facilities, hospices, hospital long-term care units, auditoriums, arenas, theaters, museums, concert halls, and "[a]ny other [***14] facility during the period of its use for a performance or exhibit of the arts." *MCL 333.12601(1)(m)(ii)(A)-(H)*.

<5> As discussed *infra*, smoking in food

service establishments is nonetheless regulated under Part 129 of the PHC, *MCL 333.12905 et seq*.

<6> Note, however, that the MCIAA places slightly more stringent requirements on two types of facilities: child care and health facilities. In child care facilities or on property under the control of a child care facility, smoking is completely prohibited. *MCL 333.12604*. In health facilities, smoking is allowed only in a designated area that is "enclosed and ventilated or otherwise constructed to ensure a smoke free environment in patient care and common areas." *MCL 333.12604a(2)(b)*. Further, in a health facility, patients may smoke only if a "prohibition on smoking would be detrimental to the patient's treatment as defined by medical conditions identified by the collective health facility medical staff." *MCL 333.12604a(2)(a)*. Patients who are permitted to smoke must, however, be in a separate room from nonsmoking patients. *Id.*

<7> However, "[i]n the case of a public place consisting of a single room, the state or governmental agency or person **[***15]** who owns or operates the single room" is considered to be in compliance with the act "if 1/2 of the room is reserved and posted as a no smoking area." *MCL 333.12605(2)*.

<8> Although the trial court's failure to address the authority of the NMCHA to promulgate the regulation at issue renders the issue unpreserved for review on appeal, *Fast Air, Inc v Knight, 235 Mich App 541, 549; 599 NW2d 489 (1999)*, this Court may review an unpreserved issue if it is one of law and the facts necessary for resolution of the issue have been presented, *Adam v Sylvan Glynn Golf Course, 197 Mich App 95, 98-99; 494 NW2d 791 (1992)*. As presented both below and on appeal, the question whether the NMCHA is authorized to develop regulations restricting smoking presents an issue of statutory interpretation, which is a question of law for which the facts necessary for its resolution are sufficiently present to permit this Court's review. See *Michigan Coalition, supra at 405*.

<9> Unlike Part 24 of the PHC, the regulatory enabling statute at issue in *DABE, Inc v Toledo-Lucas Co Bd of Health, 96 Ohio St 3d 250; 2002 Ohio 4172; 773 NE2d 536 (2002)*, does not contain a similar statement evincing a legislative intent to permit coequal **[***16]** regulation of the public health by a local health department. Thus, we reject plaintiffs' reliance on that case as support for their assertion that the NMCHA was without authority to promulgate the regulation at issue in this case.

<10> See, e.g., *MCL 333.2455*, which permits a local health department to "issue an order to avoid, correct, or remove . . . a building or condition which violates health laws or which the local health officer . . . reasonably believes to be a nuisance, unsanitary condition, or cause of illness."

* * *

<17> *MCL 333.2441(1)* provides, in relevant part, that regulations adopted by a local health agency "shall be approved or disapproved by the local governing entity."

[*82] II. Response to Justice Markman's Partial Concurrence and Partial Dissent

Justice Markman agrees that the workplace smoking regulation at issue is "consistent with *MCL 333.2433(1)*, at least to the extent it is designed **[***17]** to 'prevent disease, [and] prolong life.'" *Post* at 8. Therefore, Justice Markman concludes that the county boards of commissioners acted within their statutory authority when regulating smoking in this particular case. Nevertheless, Justice Markman contends that the anti-retaliation section of this regulation is invalid

because it exceeds the legislative authority granted to the county boards of commissioners and, alternatively, because it contravenes the law of at-will employment in this state.

The anti-retaliation section of this regulation essentially ensures that an employee will not be terminated for asserting rights that were granted by the regulation. The Michigan Constitution provides that "[b]oards of supervisors shall have legislative, administrative and such other powers **[**26]** and duties as provided by law." *Const 1963, art 7, § 8*. The plain language of the PHC itself places a broad duty on local health departments to take necessary actions for preventing and controlling hazards to human health. Contrary to the partial dissent, we believe that the county boards of commissioners possessed the authority to adopt the anti-retaliation section of this regulation.

[*83] The Legislature grants **[***18]** county boards of commissioners the authority to "pass ordinances that relate to county affairs and do not contravene the general laws of this state . . . and pursuant to *section 10b* provide suitable sanctions for the violation of those ordinances." *MCL 46.11(j)*. *Section 10b* provides that county boards of commissioners may impose a sanction of imprisonment for not more than 90 days or a fine of not more than $ 500 for the violation of an ordinance. *MCL 46.10b(1)*. Additionally, through the PHC, the Legislature provides county boards of commissioners with the authority to approve local health department regulations that are "at least as stringent as the standard established by state law . . . ." *MCL 333.2441(1)*.

It is important to note that the Legislature explicitly instructs that the PHC is to be "liberally construed for the protection of the health, safety, and welfare of the people of this state." *MCL 333.1111(2)*. The PHC expressly authorizes local health departments to "adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination." *MCL 333.2435(d)*. In addition, the PHC *mandates* that local health departments "continually **[***19]** and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, *including prevention and control* of environmental health hazards; *prevention and control* of diseases; [and] *prevention and control* of health problems of particularly vulnerable population groups . . . ." *MCL 333.2433(1)* (emphasis added). Furthermore, the PHC expressly directs local health departments to "[i]mplement and enforce laws for which responsibility is vested in the local health department." *MCL 333.2433(2)(a)*.

As Justice Cavanagh correctly points out, county boards of commissioners adopting regulations by majority **[*84]** vote are essentially functioning as local legislative bodies. In this case, the local health department, the NMCHA, created the regulation and submitted it to the boards for approval, just as *MCL 333.2441(1)* requires. The submitted regulation provides for a private cause of action against an employer who discharges an employee for asserting rights created by the regulation.

We have already concluded that the Legislature has not expressly limited the exact manner in which a local health department prevents and controls health hazards within its communities. **[***20]** In fact, local health departments are explicitly directed to take action to safeguard the public health. See *MCL 333.2435(d)*; *MCL 333.2433(1)*; *MCL 333.2433(2)(a)*. We conclude that the anti-retaliation provision of this workplace smoking regulation is another method used by the local health department to prevent and control the health hazards caused by secondhand smoke inhalation.

In *Mack v Detroit, 467 Mich 186, 189; 649 NW2d 47 (2002)*, this Court held that a city charter providing a private cause of action against the city itself for discrimination based on sexual orientation contravenes the government tort liability act and, therefore, such a cause of action will not be recognized. This Court reasoned that "a governmental agency is immune unless the

Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Id. at 195*. [**27] Additionally, this Court noted that exceptions to governmental immunity are narrowly construed. *Id. at 196 n 10*. However, the majority in *Mack* expressly limited its analysis to the city's lack of authority in light of governmental immunity law and declined to address the question whether a city can create a private cause of [***21] action against *nongovernmental* entities. *Id. at 197 n 12, 194 n 6*.

[*85] Justice Markman correctly observes that *Mack* involved a *city's* authority to create a private cause of action, while this particular case involves a *county's* authority to do so. *Post* at 11 n 4. However, we note that in *Mack*, the majority placed weight on the lack of legislative authorization for the city to create a cause of action and the limitations placed on municipalities by the Legislature. *Mack, supra at 195-197*. Here, the Legislature *has* expressly placed the affirmative duty on local health departments to take measures to safeguard human health, *MCL 333.2433(1)*, and authorizes those departments to do so through regulations. *MCL 333.2435(d)*. Again, the Legislature has explicitly instructed that the PHC be liberally construed. *MCL 333.1111(2)*. The regulation imposes smoking restrictions under the stated purpose of protecting "the public health and welfare by regulating smoking in public places and places of employment and recreation in the counties which comprise this multi-county health department." Section 1011 of the regulation states that an employer may not retaliate against any employee, potential employee, [***22] or customer for exercising the right to a healthy work environment provided pursuant to the regulation. Furthermore, § 1012(F) provides that an employee or other private citizen may bring legal action to enforce this right.

While Justice Markman acknowledges the constitutional and statutory authority granted to county boards of commissioners, he alternatively concludes that the private cause of action provision of the regulation at issue is invalid on the basis that it "contravenes the law of at-will employment in this state." *Post* at 10. We, instead, agree with the Court of Appeals that the private cause of action in this particular regulation falls within *Suchodolski's* three examples of public policy exceptions to the common law at-will employment doctrine.

[*86] In *Sucholdolski v Michigan Consolidated Gas Co, 412 Mich 692, 694-695; 316 N.W.2d 710 (1982)*, this Court held that while either party to an employment contract for an indefinite term may generally terminate the employment at any time for any, or no, reason, "some grounds for discharging an employee are so contrary to public policy as to be actionable." Examples of exceptions to Michigan's at-will employment doctrine, as explained [***23] in *Suchodolski*, include "adverse treatment of employees who act in accordance with a statutory right or duty," an employee's "failure or refusal to violate a law in the course of employment," and an employee's "exercise of a right conferred by a well-established legislative enactment." *Id. at 695-696*.

Because the regulation grants employees the right to a smoke-free work environment, the retaliatory discharge of an employee exercising this right would constitute "adverse treatment of employees who act in accordance with a statutory right or duty." *Suchodolski, supra at 695*. Citing *Dudewicz v Norris-Schmid, 443 Mich 68, 80; 503 NW2d 645 (1993)*, Justice Markman argues that if the regulation is enforceable under the Whistleblowers' Protection Act (WPA), *MCL 15.361 et seq.*, then a public policy [**28] claim for its violation is not viable. *Post* at 15 n 8. We first note that *Dudewicz* involved an employee who filed a criminal complaint against a fellow employee and was then discharged. In this case, we are simply concerned with the county's *authority* to adopt the anti-retaliation provision and provide for a private cause of action in order to enforce its regulations, and the WPA does not effectively [***24] negate the authority granted by the Legislature in the PHC. Furthermore, in *Dudewicz* this Court only reviewed

the Court of Appeals' application of *Suchodolski* in light of the first example of exceptions to the at-will employment doctrine. *Id. at 72*.

[*87] Because the private cause of action in the regulation also constitutes the "exercise of a right conferred by a well-established legislative enactment," we disagree with Justice Markman that it is necessary to remand this case in order to consider whether the regulation at issue may be enforced under the WPA. Part 126 of the PHC was clearly enacted by the Legislature in an effort to minimize the toxic effect of smoking. See *MCL 333.12605*. Pursuant to the authority granted by the Legislature, the county boards of commissioners adopted the regulation in an effort to further that same goal. Again, the regulation was adopted by the county boards of commissioners while they were functioning as local legislative bodies and exercising the authority granted to them by the Legislature in the PHC. In addition, the Legislature expressly authorizes a local health department to enforce Part 126, and rules promulgated under it, by any "appropriate action [***25] authorized by law." *MCL 333.12613(2)*. Therefore, we agree with the Court of Appeals' conclusion that the regulation was enacted pursuant to the authority granted by the Legislature in *MCL 333.2433(1)*, and the plain language of *MCL 333.12613(2)* does not limit the enforcement of such regulations to state departments of community health.

II. Conclusion

Given the Legislature's statutory mandates to minimize the toxic effects of smoking on human health, the authority granted in the PHC to local health departments to prevent and control human health hazards and the facts of this particular case, we disagree with the partial concurrence and partial dissent's view that the *Suchodolski* exceptions to the at-will employment doctrine cannot possibly apply here. We, therefore, [*88] adopt the Court of Appeals opinion, which correctly concluded that the NMCHA and the local boards of commissioners were authorized to enact the regulation.

Affirmed.

Elizabeth A. Weaver

Marilyn Kelly

Michael F. Cavanagh

Diane M. Hathaway

Concur by: Michael F. Cavanagh; Stephen J. Markman (In Part)

Concur

CAVANAGH, J. (*concurring*).

I concur in full with the majority opinion, including its conclusion that the Clean Indoor Air Regulation (CIAR) should [***26] be upheld. I would hold that the CIAR, including §§ 1010(F), 1011, and 1012(F), is within the scope of the authority delegated by the state constitution and the applicable statutes to the Northwest Michigan Community Health Agency (NMCHA) and the county boards of commissioners. I further agree that the non-retaliation provision of the CIAR, § 1011, falls within the public-policy exception to the common-law at-will employment doctrine. I write separately in order to clarify my views on the proper application of *Suchodolski v Michigan Consolidated Gas Co, 412 Mich 692; 316 NW2d 710 (1982)*, to this case and to further respond to Justice Markman's opinion.

[**29] I. NON-RETALIATION PROVISION

A. *SUCHODOLSKI* ANALYSIS

This Court asked the parties to address whether the non-retaliation provision in the CIAR, § 1011, is consistent with *Suchodolski*. *McNeil v Charlevoix Co, 482 Mich 1014, 1014-1015; 759 N.W.2d 644*

(2008). [1] I think that § 1011 of the CIAR falls squarely within *Suchodolski's* first example **[*89]** of a public policy creating an exception to the general rule of at-will employment.

Under the common law, there is a general rule of at-will employment, meaning that "[i]n general, in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski, 412 Mich at 694-695*. As discussed in the majority opinion, *Suchodolski* recognized that, under the common law, there is an exception to the general at-will rule when the basis for termination is contrary to public policy. *Id. at 695*. *Suchodolski* stated that "an exception has been recognized to [the common-law at-will employment] rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id.* In addition to explaining the general public-policy exception, *Suchodolski* provided three examples of public policies that fall within the exception. *Id. at 695-696*. [2]

I would hold that § 1011 of the CIAR falls within the first example provided in *Suchodolski* of a public policy that creates an exception to the general rule of at-will employment. The first *Suchodolski* example is an explicit legislative statement that prohibits the discharge of an employee in retaliation for that employee's acting in accordance with a legally recognized right or duty. *Suchodolski, 412 Mich at 695*. This is precisely what § 1011 is. Section § 1011 provides that "[n]o person or employer shall discharge, refuse to hire or in any **[*90]** manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this regulation." The county boards of commissioners that organized the NMCHA adopted the CIAR by a majority vote. They are local legislative bodies and were exercising the legislative power granted to them by the constitution and statutes of our state. [3] Thus, the CIAR qualifies as a legislative statement. Further, an employee's right to a smoke-free environment is a legally recognized right under **[***29]** the CIAR. [4] Finally, the CIAR **[**30]** explicitly prohibits discharging an employee in retaliation for that employee's exercise of a legally recognized right. Therefore, I would hold that § 1011 of the CIAR falls within *Suchodolski's* first example of a public policy that constitutes an exception to the common-law at-will employment doctrine. [5]

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[1] Section 1011 of the CIAR reads: "No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, **[***27]** applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this regulation."

[2] As discussed here, I think that § 1011 of the CIAR falls within at least the first *Suchodolski* example. But even if it did **[***28]** not, I would hold that it is within the general public-policy exception.

[3] See *Const 1963, art 7, § 8*; *MCL 46.11*; *MCL 333.2441(1)*.

[4] *Suchodolski* referred to protection for employees acting in accordance with a "statutory" right or duty, but, in the context of the purpose of the exception, there is no reason to differentiate a legally recognized right or duty created by a state statute and a legally recognized right or duty created by local law. See also *Gale v Oakland Co Bd of Supervisors, 260 Mich. 399, 404; 245 N.W. 363 (1932)*, stating that "[a]n act passed by [the county board of commissioners] pursuant to authority delegated or conferred by the legislature has the same force as a statute passed by the legislature itself." (Quotation marks and citation omitted.)

[5] This analysis is not inconsistent with *Dudewicz v Norris-Schmid, 443 Mich 68, 78-80; 503 NW2d 645 (1993)*. *Dudewicz* held that the Whistleblowers' Protection Act (WPA) **[***30]** preempted a claim under the public-policy exception to the at-will employment rule because the WPA provides an exclusive remedy for a violation of its non-retaliation provision. *Dudewicz, 443 Mich at 78-80*. Therefore, *Dudewicz* limits the first *Suchodolski* example of a public-policy exception to the at-will employment rule only where a legislative enactment has not only explicitly prohibited the discharge of an employee acting in accordance with a statutory right or duty, but also provided an exclusive remedy for violation of that explicit prohibition. Accord *Humenny v Genex Corp, 390 F3d 901, 907- 908 (CA 6, 2004)* (stating that because *Dudewicz* limited *Suchodolski's* public-policy exception "by holding that 'as a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative,'" when applying the public-policy exception, the Court should first determine whether there is "a well-established legislative enactment

that addresses the particular conduct at issue," and then, if there is, address whether the statute "provides a remedy to plaintiffs who allege violations of the statute"). To the extent that *Vagts v Perry Drug Stores, 204 Mich App 481, 485; 516 NW2d 102 (1994)*, [***31] held otherwise, I would overrule it.

Justice Markman asserts that I have misread *Dudewicz*, but I respectfully submit that my reading of *Dudewicz* is the understanding advanced by the *Dudewicz* Court, as evidenced by the opinion as a whole, and the Court of Appeals cases relied on in *Dudewicz*. Justice Markman argues that *Dudewicz* excludes application of the public-policy exception in all instances where a statute or regulation "prohibits discharge in retaliation for the conduct at issue." *Post* at 15 n 8. To support this proposition, he relies on the statement in *Dudewicz* that "'[a] public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue.'" *Post* at 15 n 8, quoting *Dudewicz, 443 Mich at 80*. That statement supports Justice Markman's argument if read standing alone, but in my judgment the context of the opinion shows that the Court intended to limit the public-policy exception only in instances in which a legislative enactment both provides an anti-retaliation provision and also creates an exclusive remedy. *Dudewicz* holds that the Court of Appeals "should have found that any public policy [***32] claim was preempted by the application of the WPA," reasoning that "as a general rule, the remedies provided by statute for violation of a right having no common-law counterpart are exclusive, not cumulative," and because there was no common-law counterpart to the WPA, "[t]he remedies provided by the WPA . . . are exclusive . . . ." *Id.* at 78-79. The Court thus concluded that "because the WPA provides relief to [the plaintiff] for reporting his fellow employee's illegal activity, his public policy claim is not sustainable." *Id.* at 80. In other words, *Dudewicz* held that where the WPA applies, the public-policy exception to the common-law at-will employment doctrine is preempted because the party was afforded relief by the WPA's exclusive statutory remedy. This reasoning does not suggest that a non-retaliation provision in a legislative enactment would, standing alone, preempt a public-policy claim if the legislative enactment either did not provide a remedy or if the remedy provided was not exclusive.

Further, this understanding of the public-policy exception is the same understanding presented in the Court of Appeals cases cited for support in *Dudewicz*, including the cases to which [***33] the Court of Appeals limited the public-policy exception. See *Dudewicz, 443 Mich at 79-80*. For example, in one of those cases, *Ohlsen v DST Industries, Inc, 111 Mich App 580, 586; 314 NW2d 699 (1981)*, the Court stated that the public-policy exception "carve[s] out an exception to the general rule that either party may terminate an employment at will for any reason or no reason by providing the discharged employee a remedy *where none is provided under the statute*." (Quotation marks omitted; emphasis added.) The Court held that the plaintiff in that case could not state a claim under the public-policy exception, reasoning that

> retaliatory discharges are expressly prohibited under the [applicable] statute, and, in addition, a remedy is provided to an employee who claims a violation of the statute. Therefore, unlike the plaintiff in [an earlier case applying the public-policy exception], *the plaintiff in the present case has a remedy provided by the statute under which he is suing.*
>
> The [earlier] decision does not extend to this case where the statute involved prohibits retaliatory discharge *and provides an exclusive remedy*. [*Ohlsen, 111 Mich App at 585-586* (emphasis added; quotation marks [***34] omitted).]

Under the proper reading of *Dudewicz*, it is clear that it is generally inapplicable here because the CIAR does not necessarily create an exclusive remedial scheme that preempts applicable common-law claims, if such claims exist. As a comparison, the WPA includes a non-retaliation provision and also a remedial scheme that creates a cause of action for damages or injunctive relief, grants jurisdiction to the appropriate court, enumerates the burden of proof, and expressly provides remedies. *MCL 15.363* and *15.364*. As discussed in Part II of this opinion, I do not think that it is appropriate for this Court to decide now to what extent §§ 1010(F) and 1012(F) of the CIAR affect the availability of any private remedies, so it is unclear at this point whether the CIAR creates a private remedy or whether that remedy could be deemed exclusive. If those questions were properly before a court, and that court determined that the CIAR *does* create a cause of action with private remedies, and further determined that the boards of commissioners intended such remedies to be exclusive, then, under *Dudewicz*, the public-policy exception would not apply. I would further note that there are circumstances [***35] under which § 1011 of the CIAR would be preempted by the WPA and in those cases, under *Dudewicz*, the public-policy exception to the general rule of at-will employment would not apply.

[*93] [**31] B. RESPONSE TO JUSTICE MARKMAN'S PARTIAL CONCURRENCE AND PARTIAL DISSENT

Justice Markman would hold that § 1011 of the CIAR does not fall within the public-policy exception recognized in *Suchodolski* because he "would not extend the *Suchodolski* exceptions beyond the limits of *statewide* public policy," particularly where the local regulation is "more restrictive or burdensome than our default statewide public policy." *Post* at 18. I disagree because I think that, like other validly enacted laws in Michigan, an otherwise valid local law can be part of *Suchodolski's* public-policy exception.

To begin with, local laws are *part* of the state's law and policies, so it is difficult to evaluate them distinctly from statewide policy. Justice Markman states that "while the regulation does reflect the

public policy of the four counties that enacted it, it cannot, in my judgment, be fairly said to reflect the public policy of the state of Michigan." *Post* at 18. But, as a state, Michigan has a policy of delegating authority **[***36]** to county boards of commissioners to act in matters "that relate to county affairs," as long as the local regulations do not contravene statewide law. MCL 46.11(j); see also Const 1963, art 7, § 34. [6] This, in effect, creates a default scheme of interwoven local and state regulation in areas where local legislative bodies are authorized to act. So long as local laws are within the scope of authority delegated to local legislative bodies by the Legislature and otherwise valid, then local laws are part of the state's legal and public-policy framework and reflect the Legislature's choice to enable overlapping state and local regulation of that subject area. [7]

[*94] **[**32]** The Legislature has even more specifically identified public health as an area in which state and local regulation is needed. The Legislature expressly authorized boards of commissioners, in conjunction with local health departments, to adopt standards "at least as stringent as the standard established by state law" in order to regulate **[***38]** as "necessary and appropriate" to carry out the statutory *duties* of the local health departments to "continually and diligently endeavor to prevent disease [and] prolong life." MCL 333.2441(1) and 333.2433(1). As the majority opinion concludes, the CIAR falls within this authority. Therefore, the Legislature has specifically contemplated that there may be a patchwork of regulation across the state in this area. [8]

[*95] In light of the interwoven nature of state and local policies in Michigan, in my judgment, validly enacted local laws are part of *Suchodolski's* public-policy exception. The purpose of the public-policy exception is to prevent an employer from discharging an employee on a basis that is contrary to public policy. Suchodolski, 412 Mich at 695. *Suchodolski* **[***39]** provides that a public policy can be established, at a minimum, by an explicit or implicit legislative policy. See id. at 695-696. The CIAR is an explicit legislative policy. *Suchodolski* did not distinguish between statewide and local laws or statewide and local legislative bodies. Instead, *Suchodolski* repeatedly referred to public policies that are "legislative statements," a "legislative expression of policy," and a "legislative enactment," without qualification. [9] Id. at 695-696. *Suchodolski* did recognize some limits to the public-policy exception, but none applies where, as

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[6] See Part II(A) of this opinion.

[7] Justice Markman argues that it would be bad policy to allow local governments to create non-retaliation provisions because "it is considerably more burdensome" to employers, "given that all 83 counties could theoretically adopt varying local public policies." *Post* at 18. This outcome is the result of the Legislature's decision to permit state and local regulation in this area, however, and it is up to the Legislature to determine whether the benefits of local regulation outweigh the costs of a lack **[***37]** of statewide uniformity. Justice Markman states that this position "fails to consider that the Legislature has already done just that by having indicated that a county is only allowed to enact ordinances that '*do not contravene the general laws of this state.*'" *Post* at 18 n 11, quoting MCL 46.10b. I think that Justice Markman is missing my point. Obviously, he and I have differing views about whether the CIAR contravenes the general laws of the state, but I cannot see how his concern that varying local regulations could be "burdensome" to employers is relevant to that discussion. Regardless of whether the CIAR contravenes the law of the state for a different reason, it does not do so merely by virtue of the fact that it is a local regulation, given that the state has an explicit policy of permitting a patchwork of local regulation in many areas of law.

[8] For this reason, I also disagree with Justice Markman's statement that because the CIAR is more restrictive than the Michigan Clean Indoor Air Act (MCIAA), the CIAR does not "reflect the public policy of the state of Michigan." *Post* at 18. To the extent that CIAR is more restrictive than the MCIAA, but not preempted by the MCIAA, it reflects the state policy to allow interwoven state and local laws in the area of public health.

[9] Justice Markman agrees that a county board of commissioners "is a legislative body" and that the CIAR "constitutes the 'law' in the four counties," but nonetheless concludes that the *Suchodolski* public policy exception was not intended to include laws enacted by county boards because a county board is not "the Legislature" and county laws are not statewide law. *Post* at 17-18. But *Suchodolski* does not provide a basis for this distinction. The few cases and statutes to which *Suchodolski* refers do involve laws adopted by the statewide Legislature, but nothing in the opinion indicates that it finds that to be significant.

here, the policy was enacted by a legislative body and was intended to directly confer rights on employees. [10] I do not think it serves the [**33] purposes of the public-policy exception to create another limitation excluding laws enacted by local legislative bodies because, in the counties where the CIAR has been enacted, it is part of the governing law of the region and an employer is bound to [*96] follow it. It would be contrary to law for an employer to fire an employee on grounds contrary to the CIAR, and it is therefore consistent with the purposes of the public-policy exception to include local laws in the public-policy [***40] exception. Therefore, I would not exclude laws enacted by local legislative bodies from the public-policy exception to the general rule of at-will employment.

II. PRIVATE CAUSE OF ACTION

This Court also asked the parties to address whether the boards of commissioners had the [***41] authority to adopt §§ 1010(F) and 1012(F) of the CIAR, which create private causes of action. [11] *McNeil, 482 Mich at 1014-1015*. I agree with the majority opinion's conclusion that §§ 1010(F) and 1012(F) are valid because they are within the authority of the boards of commissioners and do not contravene the general laws of the state.

As Justice Markman stated, the Michigan Constitution provides that county boards of commissioners have only those legislative, administrative, and other powers granted to them by law. *Const 1963, art 7, § 8*. The scope of authority delegated to boards of commissioners by law, however, is very broad. To begin with, the constitution provides that the powers granted to counties by the constitution and by law "shall be liberally construed in their favor" and "shall include those fairly implied and not prohibited by this constitution." *Const 1963, art 7, § 34*. [***42] Further, the Legislature very broadly granted boards of commissioners the power to "pass [*97] ordinances that relate to county affairs and do not contravene the general laws of this state . . . ." *MCL 46.11(j)*.

In light of *article 7, §§ 8* and *34*, of the Michigan Constitution, and *MCL 46.11(j)*, this Court must address two questions in order to determine whether §§ 1010(F) and 1012(F) of the CIAR are within the powers delegated to boards of commissioners: (1) whether the laws enabling boards of commissioners to enact regulations adopted by local health departments fairly imply the power to create a private right of enforcement and, if so, (2) whether doing so otherwise contravenes the general laws of the state or is prohibited by law.

First, in my judgment, §§ 1010(F) and 1012(F) are within the authority delegated to boards of commissioners because the power to create a private right of action is fairly implied by the relevant law delegating authority to boards of commissioners. The state constitution provides that laws concerning counties should be liberally construed in their favor and shall be construed to include "those [powers] fairly implied and not prohibited by this constitution." *Const 1963, art 7, § 34*. [***43] As noted, the constitution and state statutes give boards of commissioners broad authority to exercise their legislative power by adopting ordinances that relate to county affairs. The power to create a private cause of action is within the legislative power. See *Mintz v Jacob, 163 Mich 280, 283; 128 NW 211 (1910)*. [12]

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[10] The limits provided in *Suchodolski* were that a public policy cannot be established by the code of ethics of a private association and that a right cannot be inferred from extensive regulation if the regulation is not "directed at conferring rights on the employees." *Suchodolski, 412 Mich at 696-697*.

[11] Section 1010(F) of the CIAR states that "[n]otwithstanding any other provisions of this regulation, a private citizen may bring legal action to enforce this regulation." Section 1012(F) states that "[n]otwithstanding any other provisions of this regulation, a private citizen may bring legal action to enforce this regulation."

[12] See also, generally, *Gardner v Wood, 429 Mich 290, 301; 414 NW2d 706 (1987)*. I further note that, in Michigan, the ability to create a private cause of action is also within the authority of the courts. *Id.*

Therefore, in [**34] my judgment, the power to create a private cause of action is fairly implied from the broad grant of legislative power given to boards of commissioners in this area.

[*98] Justice Markman argues that we should infer that MCL 46.10b was intended to limit boards of commissioners' power in a manner that would prevent the creation of a private cause of action. As Justice Markman noted, MCL 46.11(j) provides that boards of commissioners may adopt sanctions pursuant to MCL 46.10b for violations of ordinances adopted under MCL 46.11(j). [13] Justice Markman would hold that this limits the ability of boards of commissioners to adopt sanctions not included in MCL 46.10b, [***44] at least when boards of commissioners are acting solely under powers authorized in MCL 46.11(j). To the extent that MCL 46.11(j) can be read to limit the authority of boards of commissioners, however, I do not think that §§ 1010(F) and 1012(F) of the CIAR necessarily conflict with this limit given that they do not expressly create any additional penalties beyond those applicable for violation of the statute. [14] Sections 1010(F) and 1012(F) only state that "a private citizen may bring legal action to enforce this regulation"; they do not necessarily limit or enhance the extent to which remedies are available. [15] Therefore, [*99] as the only question currently before this Court is whether the boards of commissioners may create a private cause of action to enforce the CIAR, and not what remedies may be available through the private cause of action, I do not think that MCL 46.10b limits the power of the boards of commissioners to adopt §§ 1010(F) and 1012(F).

Second, I do not think that §§ 1010(F) and 1012(F) of the CIAR contravene [***46] the laws of the state. The authority of boards of commissioners to create private rights of action is limited to the extent that doing so would contravene statewide law since, under article 7, § 8, of the state constitution, boards of commissioners only have the powers granted to them by law and, under MCL 46.11(j), they cannot adopt ordinances that are contrary to Michigan's general laws. Justice Markman argues that the provisions of the CIAR creating private causes of action are contrary to the general laws of the state because they are inconsistent with MCL 46.10b and therefore do not fall within *Suchodolski's* public-policy exception to the common-law at-will employment doctrine. As discussed, I think that §§ 1010(F) and 1012(F) are at [**35] least facially valid and thus, at least to the extent this Court is reviewing these sections today, may fall within *Suchodolski's* public-policy exception and do not necessarily contravene the general laws of the state.

III. CONCLUSION

For the reasons discussed here, I concur with the majority opinion and conclude that the CIAR, including §§ 1010(F), 1011, and 1012(F), should be upheld.

Michael F. Cavanagh

Marilyn Kelly

Dissent by: Stephen J. Markman (In Part)

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[13] The sanctions permitted by § 10b include imprisonment for a period of not more than 90 days or a fine of not more than $ 500. Notably, the Public Health Code authorizes additional penalties for violation of regulations that, like the CIAR, [***45] are also promulgated under the authority of the Public Health Code. See MCL 333.2441(2) and 333.2461.

[14] The penalties that may be imposed for violations of the CIAR are provided in § 1012(B) and (C) of the CIAR.

[15] Notably, the question of whether boards of commissioners could create a private cause of action against a private entity for a private remedy, such as damages, is not before us. The question whether a court could or should imply a cause of action for a private remedy from the CIAR is also not before us. I do not think it is necessary or appropriate for this Court to address these issues today given that the Court concludes that the CIAR is at least facially valid and this is a declaratory action. Although Michigan's court rule permitting declaratory actions, MCR 2.605, should be broadly construed, there are still limitations to the scope of a declaratory action. See Allstate Ins Co v Hayes, 442 Mich 56, 65-66; 499 NW2d 743 (1993). I think it is beyond the scope of this declaratory action for the Court to pontificate regarding the remedies available to future private litigants who are not parties to this case.

Dissent

[*100] MARKMAN, [***47] J. (*concurring in part and dissenting in part*).

This case involves an indoor-air regulation proposed by Northwest Michigan Community Health Agency (NMCHA) (a four-county district health department) that, pursuant to MCL 333.2441(1), became effective after it was approved by the corresponding four county boards of commissioners. The first part of the regulation imposes a broad ban on smoking in public and private workplaces, including business vehicles occupied by more than one person, and requires any business (excluding restaurants) that provides a designated smoking area to do so in a separate enclosed area that is independently ventilated. The second part of the regulation prohibits an employer from taking an adverse employment action against a person who asserts the right to a smoke-free environment, and creates a private right of action by such person against his or her employer.

After this regulation was approved, plaintiff business owners in the affected counties filed an action for declaratory relief, arguing that the NMCHA lacked the authority to enact such a regulation and that the regulation was preempted by the less restrictive Michigan Clean Indoor Air Act, MCL 333.12601 et seq. [***48] Plaintiffs also argued that the regulation was invalid because it impinged on an employer's common-law right to discharge an at-will employee. Plaintiffs' motion for summary disposition was denied by the trial court, and they appealed.

The Court of Appeals upheld the regulation in a published opinion. McNeil v Charlevoix Co, 275 Mich App 686; 741 NW2d 27 (2007). The Court concluded that the NMCHA possessed the authority to adopt the regulation and that the regulation was not preempted [*101] by the Michigan Clean Indoor Air Act. The Court also held that the regulation's restriction on an employer's general right to discharge an at-will employee did not violate Michigan's "at-will" employment doctrine because it fell within exceptions to that doctrine set forth in Suchodolski v Michigan Consolidated Gas Co, 412 Mich 692, 694-695; 316 NW2d 710 (1982).

We granted leave to appeal and asked the parties to brief

> (1) whether the local health department or the county board of commissioners, the entity vested with final authorization of the regulation, MCL 333.2441(1), can create a right or private cause of action against a private entity that alters Michigan's at-will employment doctrine; (2) whether [***49] the right or private cause of action created by Clean Indoor Air Regulation § 1001 [sic: 1011] falls within the exceptions set forth in Suchodolski v Michigan Consolidated Gas Co, 412 Mich 692, 316 N.W.2d 710 (1982), to Michigan's at-will employment doctrine; and (3) whether the exceptions to Michigan's employment at-will doctrine set forth in *Suchodolski* on the basis of "public policy" are consistent with this Court's decision in Terrien v Zwit, 467 Mich 56 [648 NW2d 602] (2002). [482 Mich. 1014, 759 N.W.2d 644 (2008).]

[**36] In addition, I separately requested the parties to brief "whether, under relevant legal and constitutional principles, MCL 333.2441(1) properly delegates authority to Charlevoix County and the [NMCHA] to promulgate the regulations at issue in this case." *Id.*

Rather than writing an opinion of its own addressing the issues we asked the parties to brief, the majority has adopted the Court of Appeals opinion verbatim (except that the preemption analysis has been excluded). As a result, the majority opinion only peremptorily addresses the first and third issues that we specifically asked the parties to brief in response to the Court of Appeals

opinion.

[*102] I concur with the majority's conclusion that the four [***50] county boards of commissioners acting in conjunction with the NMCHA possessed the authority to adopt that part of the clean indoor air regulation that restricts smoking and that such regulation is not preempted by the Michigan Clean Indoor Air Act. I dissent, however, from the conclusion that the part of the regulation that creates a private cause of action against employers is valid. Rather, I would hold that a county board of commissioners cannot create a private cause of action against a private entity that alters Michigan's at-will employment doctrine. I also dissent from the conclusion that the part of the regulation that restricts smoking fits within one of the *Suchodolski* exceptions to at-will employment. I would not extend the *Suchodolski* exceptions to the at-will employment doctrine to the circumstances of this case.

I. NON-DELEGATION

The parties were asked to brief whether the regulation was enacted pursuant to a proper delegation of legislative authority. As explained in *Taylor v Gate Pharmaceuticals, 468 Mich. 1, 10; 658 N.W.2d 127 (2003)*, and *Blue Cross & Blue Shield v Governor, 422 Mich 1, 51-55; 367 NW2d 1 (1985)*, the Legislature may not delegate its legislative power to [***51] the executive branch. The Legislature may, however, delegate a task to an executive branch agency if it provides "sufficient standards." *Taylor, supra at 10 n 9*. Such accompanying standards are essentially viewed as transforming an improper delegation of legislative power into a proper exercise of executive power. See *BCBSM, supra at 51*.

The regulation at issue here was adopted pursuant to *MCL 333.2441(1)*, which provides in relevant part:

> [*103] A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department. The regulations shall be approved or disapproved by the local governing entity. The regulations shall become effective 45 days after approval by the local health department's governing entity or at a time specified by the local health department's governing entity. The regulations shall be at least as stringent as the standard established by state law applicable to the same or similar subject matter. [1]

Plaintiffs contend that this provision does not include sufficient legislative standards or guidance for the enactment of regulations and thus amounts to an improper delegation of legislative authority. I believe that the non-delegation doctrine is ultimately inapplicable in this case. This is because the provision specifies that: [**37] "[t]he regulations shall be approved or disapproved by the local governing entity," and the regulation only becomes effective "after approval" by the governing entity. That is, a local health department regulation does not become effective *unless* it is approved by the local governing entity, which in this case is the county boards of commissioners. Thus, the provision contemplates a two-step process: first, the local health department proposes a regulation and, second, the local governing entity approves the regulation. Only then does the regulation take effect. When the elected county boards of commissioners approved this regulation, they were acting pursuant to their *own* legislative powers as the governing entities of their respective local jurisdictions. The non-delegation doctrine does not apply [***53] to the proper exercise of legislative power by a legislative body. [*104] See *Bendix Safety Restraints Group v City of Troy, 215 Mich App 289; 544 NW2d 481 (1996)*, adopting the dissent from *Marposs Corp v City of Troy, 204 Mich App 156; 514 NW2d 202 (1994)* (holding that

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[1] This provision is part of the Public Health Code, as is the Michigan Clean Indoor Air Act. Accordingly, *MCL 333.2441(1)* authorizes regulations addressing any matter that comes within the [***52] Public Health Code and is not limited to smoking regulations.

actions taken by a city council pursuant to a statute do not violate the non-delegation doctrine because a city council exercises legislative, not executive, power). Thus, when the elected and accountable boards of commissioners approved the regulation, notwithstanding that the regulation originated with the unelected and unaccountable health departments, they were exercising their own legislative powers and were unaffected by the non-delegation doctrine.

Therefore, I believe that the principal question here is not whether the regulation was enacted pursuant to an improper delegation of legislative authority, but whether the county boards of commissioners, acting in conjunction with the NMCHA, possessed the legislative authority to adopt the regulation.

II. AUTHORITY

Plaintiffs argued below that the NMCHA lacked the authority to adopt the regulation because its smoking restrictions are stricter than those permitted under the **[***54]** Michigan Clean Indoor Air Act. [2] The trial court and the Court of Appeals disagreed, and I concur with those courts' conclusions, although on the basis of a different rationale.

[*105] In the course of concluding that the NMCHA and the county boards of commissioners possessed the authority to enact the regulation, the Court of Appeals cited among other things: (1) *MCL 333.2433(1)*, which charges that local health departments "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs"; (2) *MCL 333.2435(d)*, which provides that a local health department may "[a]dopt regulations to properly safeguard the public health"; and (3) *MCL 333.2441(1)*, which authorizes the adoption of regulations that "are **[***55]** necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department." After additionally noting that *MCL 333.1111(2)* provides that the Public Health Code is to be "liberally construed for the protection of the health, safety, and welfare of the people of this state," the Court of Appeals concluded that these statutes evinced a legislative intent to permit the instant regulation.

I agree with the Court of Appeals that the boards of commissioners, acting in conjunction **[**38]** with the NMCHA, possessed the authority to adopt the part of the regulation that restricts smoking. *MCL 333.2435(d)* specifically provides that a local health department may adopt "regulations to properly safeguard the public health . . . ." This provision granted the authority to adopt the part of the clean indoor air regulation that restricts smoking. *MCL 333.2441(1)* further provides that a local health department "may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department," and protecting the public's health, including through the implementation of an anti-smoking regulation if that is **[***56]** a local health department's determination, would clearly seem to be a responsibility **[*106]** vested in such departments. And, the regulation is consistent with *MCL 333.2433(1)*, at least to the extent it is designed to "prevent disease, [and] prolong life." The only limitation that the Legislature placed on the promulgation of such a regulation by a local health department, and the corresponding board of commissioners, is that it "be at least as stringent as the standard established by state law applicable to the same or similar subject matter." *MCL 333.2441(1)*. The regulation of smoking here is clearly more stringent than the Michigan Clean Indoor Air Act and thus satisfies this limitation. [3]

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[2] *MCL 333.2441(1)* specifically states that a local health department regulation "shall become effective 45 days after approval by the local health department's governing entity . . . . " Given that the regulation would have no effect unless the county boards of commissioners had approved it, we are effectively reviewing a county regulation, notwithstanding the fact that the regulation may have originated in a local health department.

[3] The parties agree that the regulation restricts smoking in a greater range of public and private places than the Michigan Clean Indoor Air Act. For example, the regulation applies to business vehicles

III. PRIVATE CAUSE OF ACTION

Section 1011 of the regulation provides that "no person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment, or customer because such employee, applicant, or customer exercises any right to a smoke-free environment afforded by the regulation." Section 1010(F) provides that a "private citizen may bring legal action to enforce this regulation." And § 1012(F) provides that "an employee or a private citizen may bring legal action to enforce this regulation." The lower courts implicitly concluded that the private cause of action created by this regulation is valid. I respectfully disagree and would hold **[*107]** that a county board of commissioners cannot create a private cause of action that is in contravention of Michigan's "at-will" employment doctrine.

The majority concludes that the local health department acting in conjunction with the county board of commissioners can **[***58]** create a right or private cause of action against a private entity that alters Michigan's at-will doctrine. The majority also concludes that the private cause of action created by the regulation is encompassed by the *Suchodolski* exceptions to the at-will doctrine.

"Boards of supervisors shall have legislative, administrative and such other powers and duties as provided by law." *Const 1963, art 7, § 8*. Local governments, including counties, have no inherent authority to enact laws or to promulgate regulations because they are governments of limited powers acting pursuant to delegated **[**39]** authority. *City of Kalamazoo v Titus, 208 Mich 252, 262; 175 NW 480 (1919)*, quoting 1 Cooley, Constitutional Limitations (7th ed), pp 163, 264 ff. A county board of commissioners may not exercise a power not vested in it by statute. *Pittsfield School Dist No 9 v Washtenaw Co Bd of Sup, 341 Mich 388, 398; 67 NW2d 165 (1954)*. A county can exercise only such authority as is expressly or impliedly granted by a superior level of government, and always subject to such restrictions as are annexed to the grant. *Id.*

The Legislature granted authority in *MCL 46.11(j)* to county boards of commissioners to

> pass ordinances **[***59]** that relate to county affairs and *do not contravene the general laws of this state* or interfere with the local affairs of a township, city, or village within the limits of the county, and pursuant to *section 10b* provide suitable sanctions for the violation of those ordinances. [Emphasis added.]

[*108] *Section 10b*, *MCL 46.10b*, authorizes a county board of commissioners to make a violation of an ordinance an infraction that subjects an offender to imprisonment for not more than 90 days or a fine of not more than $ 500. A county board of commissioners is also authorized to approve a local health department regulation that is "at least as stringent as the standard established by state law." *MCL 333.2441(1)*.

In my judgment, the part of the regulation that allows an employee to bring a legal action to enforce the regulation is beyond the authority of a county board of commissioners to enact. This is because it contravenes the law of at-will employment in this state. The general rule is that "in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason." *Suchodolski, supra at 694-695*. **[***60]** See also *Rood v Gen Dynamics Corp, 444 Mich 107, 116; 507 NW2d 591 (1993)*.

The instant regulation would limit an employer's ability to terminate an at-will employee by creating a new private cause of action by any employee

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occupied by more than one person whereas the state statute does not. The regulation also imposes greater obligations on businesses than the state statute. For example, *MCL 333.12605(1)* provides that if an owner designates a smoking area, "existing physical barriers and ventilation systems shall be used **[***57]** to minimize the toxic effect of smoke in both smoking and adjacent nonsmoking areas." In contrast, § 1008(6) of the regulation requires a separate enclosed area that is "independently ventilated" if an owner designates a smoking area.

against his employer for wrongful discharge for asserting a right "afforded by the regulation." Thus, the regulation contravenes the general law of this state, the at-will employment doctrine, and the county boards of commissioners simply do not possess the authority to act in such disregard. [4]

[*109] **[**40]** Moreover, the fact that MCL 46.10b **[***62]** authorizes a county board to enact an ordinance and to provide for a fine of no more than $ 500 or imprisonment of no more than 90 days lends further support to the conclusion that the creation of a private cause of action for the violation of an ordinance is beyond the powers of a county board. [5] This is because the express mention of one thing in a statute generally implies the exclusion of similar things. Pittsfield Charter Twp v Washtenaw Co, 468 Mich 702, 712; 664 NW2d 193 (2003). That is, the listing of *allowable* sanctions for the violation of a local **[*110]** ordinance implies that non-listed sanctions are *not allowable*. See, e.g., Saginaw Co v John Sexton Corp of Michigan, 232 Mich App 202, 225; 591 NW2d 52 (1998), which invalidated the penalty provisions of a county ordinance because they exceeded the $ 500 limit set forth in MCL 46.10b(1). Thus, even if the regulation did not contravene the general rule of at-will employment, which I believe it does, I would nonetheless conclude that a county board may not create a private cause of action against a private entity simply because they have not been given the authority to do so. [6]

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[4] While MCL 333.2441(1) *does* authorize a county board of commissioners to approve a health department regulation that is "at least as strict as state law," it does *not* at the same time countermand the general limitation in MCL 46.11(j) that a county board may not act in derogation of the general laws of this state in non-health related areas. The at-will employment doctrine is obviously a fundamental aspect of the employment law of this state. The Legislature did not confer authority upon county boards to enact regulations contrary to Michigan's at-will employment doctrine. Contrary to Justice Cavanagh's suggestion, *ante* at 8 n 7, I do not contend that the regulation contravenes **[***61]** the general laws of this state merely because it is a local regulation.

The majority briefly discusses Mack v Detroit, 467 Mich 186, 189; 649 NW2d 47 (2002), and correctly notes that *Mack* declined to address whether a city can create a private cause of action against a non-governmental entity. But, *Mack* merely states that it "does not address whether a city can create rights, protect against discrimination, or create a cause of action against a nongovernmental entity." Id. at 197 n 12 (emphasis omitted). Such language hardly suggests that a county, in contravention of the laws of this state, can create a new private cause of action against an individual or business.

Similarly, the majority states several times that the county boards in enacting the instant regulation were acting as local "legislative bodies." I agree and have so stated. See, e.g., *infra* at 21 ("a county board . . . is a legislative body"). But the issue here is only whether the anti-retaliation portion of the regulation *exceeds the authority* given to the boards by the Legislature. The majority devotes its efforts to an undisputed point, when there is a disputed point that merits analysis.

[5] Justice Cavanagh contends in his concurrence that a **[***63]** county board of commissioner's power to create a private right of action is "fairly implied by the relevant law delegating authority to boards of commissioners." *Ante* at 11. I disagree. Counties have no inherent authority, being governments of limited powers. Pittsfield School Dist No 9, supra at 398. The power to create a private cause of action is not expressly given, and such power is impliedly denied, to counties, as explained earlier, given that they are only expressly allowed to enact ordinances that provide for up to 90 days in a jail and up to a $ 500 fine.

[6] Justice Cavanagh states that §§ 1010(F) and 1012(F) "do not necessarily contravene the general laws of this state." *Ante* at 14. He rejects my argument that the limits on sanctions a board of commissioners may adopt found in MCL 46.10b (a fine of no more than $ 500 or imprisonment of no more than 90 days) imply the absence of authority to create a private cause of action. Justice Cavanagh asserts that these limitations do not conflict with §§ 1010(F) and 1012(F) because these sections "do not expressly create any additional penalties beyond those applicable for violation" of the regulation and thus do "not necessarily . . **[***64]** . enhance the extent to which remedies are available." *Ante* at 12-13. I disagree. Sections 1010(F) and 1012(F) authorize a private party to bring a legal action against a business. Justice Cavanagh is apparently suggesting that a judge, as a result of such a civil action, would only be able to impose a remedy consistent with MCL 46.10b(1), although this is nowhere made clear in either Justice Cavanagh's statement or in §§ 1010(F) and 1012(F) themselves. Indeed, given that incarceration of up to 90 days would not even be possible in a civil lawsuit, it is by no means obvious why these regulations could be said to "incorporate" the sanctions of MCL 46.10b(1). Moreover, how clear is it that the trial court would not have available traditional civil remedies under §§ 1010(F) and 1012(F), such as injunctive or equitable relief? There is simply no basis in either the opinion of this Court or in the laws themselves to suggest that what Justice Cavanagh asserts has any basis whatsoever. Perhaps what is most significant is the reality that a fine under MCL 46.10b(1) would be payable to the *county* while a civil judgment issued under §§ 1010(F) and 1012(F) would be payable to the *plaintiff*. This

[*111] [**41] IV. *SUCHODOLSKI*

The majority holds that the smoking restriction of the regulation was encompassed within the *Suchodolski* "public policy" exceptions to Michigan's at-will employment doctrine. I reject this conclusion and also would not extend these exceptions to include regulations that do not apply statewide.

In *Suchodolski*, this Court recognized exceptions to the at-will doctrine "based on the principle that [***66] some grounds for discharging an employee are so contrary to public policy as to be actionable." *Id. at 695*. [7] The Court cited as the circumstances in which such exceptions would apply those involving: (1) "adverse treatment of employees who act in accordance with a statutory right or duty," (2) an employee's "failure or refusal to violate a law in the course of employment," or (3) an "employee's exercise of a right conferred by a well-established [*112] legislative enactment." *Suchodolski, supra at 695-696*. Importantly, in *Dudewicz v Norris Schmid, Inc, 443 Mich 68, 80; 503 NW2d 645 (1993)*, [8] the Court [**42] limited

[***65] incentive for private citizens to sue, in combination with the fact that such a lawsuit could be brought by *any* private citizen, or by *many* private citizens, could easily be viewed as creating a substantially more onerous burden on an individual business, and therefore a substantially more effective remedy for a violation of the statute, than the possibility only of being charged with an ordinance violation by a local prosecutor who almost certainly will be burdened by the need to address more serious criminal violations. For this reason, I believe that the authorization of a private lawsuit, *in addition* to the relief provided under *MCL 46.10b(1)*, can fairly be said to expand the available remedies for a violation of the statute and thereby contravene the general laws of this state.

[7] We asked the parties to brief whether the *Suchodolski* exceptions are consistent with this Court's decision in *Terrien v Zwit, 467 Mich 56; 648 NW2d 602 (2002)*. *Suchodolski* used the following terms to identify public policy: "a statutory right or duty," "a law," and a "well-established legislative enactment." *Suchodolski, supra at 695-696*. In *Terrien*, this Court indicated that in determining public policy the focus of [***67] the judiciary must ultimately be on the policies that, in fact, have been adopted by the public through our various legal processes, and that are reflected in our state and federal constitutions, our statutes, the common law, and administrative rules and regulations. *Terrien, supra at 67 n 11*. I believe the *Suchodolski* exceptions are compatible with *Terrien* because both cases indicate that "public policy" is to be discerned, not in the personal attitudes of judges, but in objective and verifiable sources of the law.

[8] *Dudewicz* was overruled in part on other grounds by *Brown v Detroit Mayor, 478 Mich 589; 734 NW2d 514 (2007)*. The majority fails adequately to address *Dudewicz*. First, the majority says the non-retaliation portion of the regulation does not violate Michigan's at-will employment doctrine because it fits within the *Suchodolski* exceptions, but then it contradictorily argues that *Dudewicz* is irrelevant because the WPA does not negate the authority granted by the Legislature. See *ante* at 15. Under *Dudewicz*, if the regulation is enforceable under the WPA then a *Suchodolski* public policy claim does not exist. While Justice Cavanagh reads *Dudewicz* differently than I do, he nonetheless [***68] recognizes that "there are circumstances under which § 1011 of the CIAR would be preempted by the WPA and in those cases, under *Dudewicz*, the public-policy exception to the general rule of at-will employment would not apply." *Ante* at 6 n 5.

However, Justice Cavanagh contends that *Dudewicz* is "generally inapplicable here because the CIAR does not create an exclusive remedial scheme that preempts applicable common-law claims, if such claims exist" and that "*Dudewicz* limits the first *Suchodolski* example of a public-policy exception to the at-will employment rule only where a legislative enactment has not only explicitly prohibited the discharge of an employee acting in accordance with a statutory right or duty, but also provided an exclusive remedy for violation of that explicit prohibition." *Ante* at 4-6 n 5. Finally, he indicates that he would overrule the Court of Appeals opinion in *Vagts v Perry Drug Stores, Inc, 204 Mich App 481; 516 NW2d 102 (1994)*, to the extent it holds otherwise. *Ante* at 4 n 5. I believe that Justice Cavanagh has misread *Dudewicz*. The key part of that case states:

> In those cases in which Michigan courts have sustained a public policy claim, the statutes involved [***69] did not specifically proscribe retaliatory discharge. Where the statutes involved did proscribe such discharges, however, Michigan courts have consistently denied a public policy claim. . . . A public policy claim is sustainable, then, only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue. As a result, because the WPA provides relief to Dudewicz for reporting his fellow employee's illegal activity, his public policy claim is not sustainable. [*Id. at 79-80*.]

Section 1011 specifically proscribes a retaliatory discharge against an employee if an employee "exercises any right to a smoke-free environment afforded by the regulation." Accordingly, under *Dudewicz*, the *Suchodolski* exceptions do not apply because there is no need for a public policy exception if a statute, or, as here, a regulation, prohibits discharge in retaliation for the conduct at issue. While I do not believe those parts of the regulation that create a private cause of action are valid, Justice Cavanagh and the majority take a different view. If valid, they provide all the remedy that is needed and no cumulative *Suchodolski* exception exists under *Dudewicz*. [***70] And, even though I would hold those parts of the

[*113] *Suchodolski*, stating that a public policy claim is only [*114] sustainable when there is no statutory prohibition against discharge in retaliation for the conduct at issue. [9]

The majority holds that "'the regulation's restriction of the general right to discharge an employee at will is consistent with the exceptions to that doctrine set forth in *Suchodolski*.'" *Ante* at 11. [10] I [**43] disagree for [*115] two reasons. First, I would not extend the *Suchodolski* exceptions to include a local regulation that conflicts with our statewide public policy. The *Suchodolski* exceptions refer to a "statutory right or duty," a "law," and "well-established legislative enactment[s]." The instant regulation at issue is not a statute, and it is not a "well-established legislative enactment." Nor is a county board "the Legislature," although [***73] it is a legislative body. While the regulation constitutes the "law" in the four counties, it does not constitute the "law" in

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regulation prohibiting a retaliatory discharge invalid, it is still possible, indeed likely, that those parts of the regulation promising an employee a smoke-free environment may be enforceable pursuant to the WPA. Finally, Justice Cavanagh's citation of *Humenny v Genex Corp, 390 F3d 901 (CA 6, 2004)*, in support of his claim that *Dudewicz* only limits the first *Suchodolski* exception when the statute [or regulation] provides "an exclusive remedy for violation of that explicit prohibition," is inapt. The actual holding of *Humenny* is that the first issue that must be addressed in considering a public policy claim is whether the plaintiff has identified a well-established legislative enactment that addresses the particular conduct at issue. *Id. at 907*. This is correct. *Humenny* also stated that if the cited statute (or regulation) does not address the particular conduct at issue, there is no need to reach the question whether the statute "provides a remedy to plaintiffs." *Id.* Again, this is correct. And, I note that *Humenny* used the phrase "provides a remedy," not "provides *an exclusive* remedy." There simply is no language in *Humenny* that [***71] purports to hold that that *Dudewicz* only limits the first *Suchodolski* exception when the statute (or regulation) provides "an *exclusive* remedy for violation of that explicit prohibition." *Ante* at 4 n 5 (emphasis added). To reiterate, *Dudewicz* limits the first *Suchodolski* exception whenever the cited statute (or regulation) provides a remedy of its own. *Dudewicz, supra at 80*. This is because a public policy remedy is obviously not needed when the cited statute or regulation provides a remedy of its own. Justice Cavanagh's citation of *Ohlsen v DST Industries, Inc, 111 Mich App 580, 586; 314 NW2d 699 (1981)*, does not support his claim that a cumulative "public policy" claim is allowable where the applicable statute supplies a non-exclusive remedy. While *Ohlsen* observed that the remedy provided by the statute was exclusive, this is a far cry from saying that it would nonetheless have allowed a cumulative public policy claim if the statute had provided for a non-exclusive remedy. Finally, *Dudewicz* noted that remedies provided by a statute for violation of a right having no common-law counterpart are generally exclusive, not cumulative. *Dudewicz, supra at 78*. There can be no dispute that [***72] the common law did not provide a right to a smoke-free work environment. Thus, the remedies available under §§ 1010(F) and 1012(F) are properly characterized as exclusive, and even under Justice Cavanagh's reading of *Dudewicz*, a public policy claim is barred.

[9] See also *Clifford v Cactus Drilling Corp, 419 Mich 356; 353 NW2d 469 (1984)*, in which this Court held that a public policy exception claim did not exist where an employer fired an employee for missing work on account of a work-related injury for which workers' compensation benefits had been paid.

[10] Justice Cavanagh concludes that the regulation fits within the first *Suchodolski* exception, for adverse treatment of employees who act "in accordance with a legally recognized right or duty." *Ante* at 3. However, I would point out that the Court of Appeals in *Vagts, supra* at 485, stated that *Dudewicz* "probably eliminated the first of the three grounds identified in *Suchodolski*." As I will discuss later, to the extent the regulation may be [***75] enforceable through the Whistleblowers' Protection Act (WPA), *MCL 15.361 et seq.*, this is correct. That is, if the WPA prohibits discharge in retaliation for the conduct at issue, *Suchodolski* does not even apply by the terms of *Dudewicz*. See also *Shuttleworth v Riverside Osteopathic Hosp, 191 Mich App 25, 27-28; 477 NW2d 453 (1991)*, which held that the WPA is the "exclusive remedy" available to an employee terminated for reporting to any public body a violation of any law or regulation of this state, a political subdivision, or the United States. Indeed, I note that Justice Cavanagh agrees that if the regulation is enforceable through the WPA, a "public policy" claim would not be allowed. *Ante* at 6 n 5. The majority states that the WPA does not negate the authority granted by the Legislature in the Public Health Code. *Ante* at 22. But, I have not argued that it does. Rather, I have argued that Public Health Code does not countermand the general limitation of *MCL 46.11(j)* on a county board to act in derogation of the general laws of this state in non-health related areas. See note 4 of this opinion.

The majority also states that the Legislature has authorized local health departments [***76] to enforce Part 126 and rules promulgated under it by any "appropriate action authorized by law." *Ante* at 16, quoting *MCL 333.12613(2)*. This is true, but we are reviewing a local regulation that allows *a private citizen* to file a lawsuit. Given that county boards are only statutorily authorized to enact ordinances that include a fine of up to $ 500 and a term in jail of up to 90 days, *MCL 46.10b*, and that fact that the express mention of one thing in a statute generally implies the exclusion of similar things, a statute authorizing a local health department to enforce a regulation hardly constitutes authority for that board, acting in conjunction with a county board, to authorize a *private citizen*, rather than the health board, to enforce a regulation through a private lawsuit.

any other Michigan counties, much less in all the other Michigan counties. Moreover, the public policy reflected in the regulation is stricter than the public policy established by our Legislature in the Michigan Indoor Clean Air Act and that now applies in all other counties. That is, while the regulation does reflect the public policy of the four counties that enacted it, it cannot, in my judgment, be fairly said to reflect the public policy of the state of Michigan. I would not extend the *Suchodolski* exceptions beyond the limits of *statewide* public policy, at the very least where a local regulation is more restrictive or burdensome than our default statewide public policy. It is one thing for a private employer to be legally accountable for a wrongful discharge that violates a statewide public policy as in *Suchodolski*, but it is considerably more burdensome to subject employers to wrongful discharge lawsuits for a termination that arguably only violates a local public policy, given that all **[*116]** 83 counties could theoretically adopt varying local public policies. **[***74]** [11] Justice **[**44]** Cavanagh contends that under *Suchodolski* "there is no reason to differentiate a legally recognized right or duty created by a state statute and a legally recognized right or duty created by local law." *Ante* at 4 n 4. I disagree. Indeed, the use of the modifier "well-established" in *Suchodolski* in describing the kind of "legislative enactment" that would serve as the foundation for its third exception further indicates that *Suchodolski* itself was attempting to draw distinctions between types of legislative enactments, possibly in order to ensure the kind of notice that would be much more effectively communicated to an employer doing business in multiple counties throughout the state by a statewide statute than by a local regulation. [12]

Second, each *Suchodolski* exception requires a valid "statutory right or duty," a "law," or a "well-established legislative enactment" before it is applicable. As previously explained, that part of the regulation that purports to create a private cause of action against private entities is invalid because it exceeds the authority that MCL 46.11(j) grants a county board. Thus, I do not join the majority in its exercise of this Court's common-law **[*117]** powers to extend the exceptions of *Suchodolski* to local regulations. [13]

Anticipating that this Court might conclude that the private cause of action provisions of the regulation is invalid, defendants point out that the regulation has a severability **[***79]** clause [14] and argue that even if that part of the regulation that restricts an employer's general "at will" authority to discharge an employee is invalid, the remaining part of the regulation that restricts smoking would still be

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[11] Justice Cavanagh contends that "it is up to the Legislature to determine whether the benefits of local regulation outweigh the costs of a lack of statewide uniformity." *Ante* at 7 n 7. However, he fails to consider that the Legislature has already done just that by having indicated that a county is only allowed to enact ordinances that "*do not contravene the general laws of this state.*" MCL 46.10b.

[12] *Suchodolski* **[***77]** cited two cases as examples of situations in which a plaintiff had been terminated in violation of a "well established" legislative enactment: *Sventko v Kroger Co*, 69 Mich App 644; 245 NW2d 151 (1976), and *Hrab v Hayes-Albion Corp*, 103 Mich App 90; 302 NW2d 606 (1981). Both of these cases involved workers' compensation claims. There are few statutes that are as well established and known to employers as our Workers' Compensation Disability Act, MCL 418.401 et seq.

[13] Const 1963, art 3, § 7, provides: "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended **[***78]** or repealed." As noted in *Placek v Sterling Hts*, 405 Mich 638, 656-657; 275 NW2d 511 (1979), this Court may develop the common law through its decisions. Justice Cavanagh states that he would not "exclude laws enacted by local legislative bodies from the public-policy exception . . . ." *Ante* at 10. I believe it is more accurate to describe the majority as extending *Suchodolski* to encompass local regulations. Justice Cavanagh acknowledges that the cases and statutes cited in *Suchodolski* included laws adopted by our Legislature, but claims nothing in the opinion indicates the Court found that to be significant. *Ante* at 9 n 9. I disagree. *Suchodolski* only identified statewide laws, and that Court's use of the words "well-established legislative enactment[s]" strongly suggests it was concerned with notice issues. This discussion, I believe, fairly communicates that local regulations would rarely be characterized as constituting "well-established legislative enactment[s]" in the same manner as statewide enactments.

[14] Section 1016 of the regulation provides that if any provision, clause, sentence, or paragraph of the regulation shall be held invalid, such invalidity shall not affect the other provisions of the regulation and the provisions of the regulation that are declared invalid shall be severable.

enforceable pursuant to the Whistleblowers' Protection Act (WPA), MCL 15.361 et seq., because the regulation comes within the WPA's prohibition against discriminating against an employee for reporting a violation of a regulation promulgated by a political subdivision of the state.

MCL 15.362 provides:

> **[*118]** **[**45]** An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of *a law or regulation or rule promulgated* ***[***80]*** *pursuant to law of this state, a political subdivision of this state*, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [Emphasis added.]

Defendants argue that the regulation here clearly comes within the "law or regulation or rule promulgated pursuant to a law of this state, [or] a political subdivision of this state" language in the WPA. Thus, defendants contend that the regulation may be enforced by a plaintiff under the WPA. Because this argument was not considered by the trial court or the Court of Appeals, I would remand to the Court of Appeals to consider this issue in the first instance. If defendants are correct that the regulation is enforceable under the WPA, then the *Dudewicz* limitation, to wit, that a public policy claim is only sustainable when there is no applicable statutory prohibition against discharge in retaliation for the conduct at issue, would apply because the WPA would constitute an applicable statutory prohibition against discharge in retaliation for the conduct at **[***81]** issue.

Finally, to the extent that plaintiffs' arguments suggest that the part of the regulation that restricts smoking more stringently than the Michigan Clean Indoor Air Act is "unwise" and results in "bad policy," these concerns must be addressed to the Legislature or the county boards of commissioners. *People v Kirby, 440 Mich 485, 493-494; 487 NW2d 404 (1992)*. See also **[*119]** *Halloran v Bhan, 470 Mich 572, 579; 683 NW2d 129 (2004)*. Plaintiffs, of course, are also free to pursue remedies through the electoral and political processes. [15]

V. CONCLUSION

I agree with the majority that the NMCHA, acting in conjunction with the local boards of commissioners, possesses the authority to enact that part of the regulation that restricts smoking "at least as stringently" as the Michigan Clean Air Act, and this regulation is not preempted by the Michigan Clean Indoor Air **[***82]** Act. I dissent, however, from the majority's implicit ruling that the part of the regulation that creates a private cause of action against private employers is valid. I would hold instead that MCL 46.11(j) precludes a county board of commissioners from creating a private cause of action against a private entity that alters Michigan's "at-will" employment doctrine. I also dissent from the conclusion that the part of the regulation that restricts smoking fits within one of the *Suchodolski* exceptions to "at-will" employment, and I would not extend the *Suchodolski* exceptions to include local regulations, at the very least where such regulations conflict with statewide public policy. Finally, I would remand to the Court of Appeals to consider in the first instance whether an **[**46]** employee could file a cause of action under the WPA to enforce his or her rights under the part of the regulation that restricts smoking.

Stephen J. Markman

Maura D. Corrigan

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[15] Indeed, we are advised that Charlevoix County, though it did not formally withdraw its ratification of the regulation, recently decided *not* to enforce the regulation. I do not know for certain, but I presume, that some or much of the impetus for this decision was a function of political and other related activities in that county.

Robert P. Young, Jr.

End of Document

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

EXHIBIT #5 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 5

This document is current through Act 8 of the 2021 Regular Legislative Session and E.R.O. 2021-1

§ 333.1111. Intent and construction of code.

Sec. 1111.

(1) This code is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency.

(2) This code shall be liberally construed for the protection of the health, safety, and welfare of the people of this state.

History

Pub Acts *1978, No. 368*, Art. 1, Part 11, § 1111, imd eff July 25, 1978, by § 25211(1) eff September 30, 1978.

End of Document

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

EXHIBIT #6 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 6

A RESOLUTION ADOPTING PROPOSED AMENDMENTS TO THE COUNTY WELL REGULATION

WASHTENAW COUNTY BOARD OF COMMISSIONERS
February 4, 2004

WHEREAS, Washtenaw County Environmental Health Department is charged with assuring groundwater drinking water wells are safe; and

WHEREAS, the current County Well Regulation does not address factors that may impact the safety of drinking water from individual wells; and

WHEREAS, Washtenaw County Environmental Health has proposed amendments to provide further assurances that appropriate steps are taken to ensure safe water; and

WHEREAS, these amendments are protective of groundwater and public health; and

WHEREAS, this matter has been reviewed by Corporation Counsel, the Finance Department, the County Administrator's Office and the Ways & Means Committee

NOW THEREFORE BE IT RESOLVED that the Washtenaw County Board of Commissioners hereby adopts the amendments to the Washtenaw County Rules and Regulation for the Protection of Groundwater, as attached hereto and made a part hereof

BE IT FURTHER RESOLVED that the Board of Commissioners hereby directs the County Clerk to publish the Washtenaw County Rules and Regulations for the Protection of Groundwater in the newspaper of general circulation

COMMISSIONER	Y	N	A	COMMISSIONER	Y	N	A	COMMISSIONER	Y	N	A
Armentrout	X			Irwin	X			Sizemore	X		
Bergman	X			Kern	X			Solowczuk	X		
Brackenbury	X			Peterson	X			Yekulis	X		
Gunn	X			Prater	X						

CLERK/REGISTER'S CERTIFICATE - CERTIFIED COPY **ROLL CALL VOTE: TOTALS** **11 0 0**

STATE OF MICHIGAN)

COUNTY OF WASHTENAW)ss.

I, Peggy M. Haines, Clerk/Register of said County of Washtenaw and Clerk of Circuit Court for said County, do hereby certify that the foregoing is a true and accurate copy of a resolution adopted by the Washtenaw County Board of Commissioners at a session held at the County Administration Building in the City of Ann Arbor, Michigan, on February 4 2004, as it appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Ann Arbor, this 5th day of February, 2004.

PEGGY M. HAINES, Clerk/Register

BY:_____

Deputy Clerk

Res. No. 04-0029

WASHTENAW COUNTY RULES & REGULATIONS

FOR THE

PROTECTION OF GROUNDWATER

PREAMBLE

Recognizing that the supply of safe potable water is fundamental to individual, public and community health; further recognizing that public groundwater supply facilities installed and operated in a proper manner are necessary for safeguarding public health; still further recognizing the need to isolate and protect individual wells furnishing water for human consumption from sewage or other sources of pollution; and insofar as possible, to prevent the contamination of groundwater resources and supplies, or the creation of conditions menacing the public health, these Rules and Regulations governing groundwater are hereby established under authority of the State of Michigan's Public Health Code, Act 368 of the Public Acts of 1978, State of Michigan, MCL 333.1101 et seq. as amended.

PURPOSE

It is the purpose of this Regulation to assure that the construction and abandonment of wells is conducted in such a manner that the groundwater of this County will not be contaminated or polluted, and that water obtained from wells will be suitable for beneficial use and will not jeopardize the health, safety or welfare of the people of this County or the environment.

Article I Definitions

Sec. 1:1 "Approved" means acceptable for intended use as judged by the Health Officer utilizing public health laws, rules, regulations, and technical data.

Sec. 1:2 "Contaminant" means a biological, chemical, physical, or radiological constituent in water that is or may become injurious to the public health, safety, or welfare or to the environment.

Sec. 1:3 "Contamination" means an impairment of the quality of water to a degree that creates a hazard, or may create a hazard, to the public health through poisoning or through spread of disease, or otherwise affects the aesthetic quality of the groundwater.

Sec. 1:4 "Department" means the Washtenaw County Department of Public Health.

Sec. 1:5 "Drainfield" means that part of an on-site sewage system that provides for the infiltration of sewage below the ground surface.

Sec. 1.6 "Emergency basis" means a circumstance where a well driller or homeowner is unable to obtain a well permit from the Department due to the office being closed and that an undue hardship would likely result if drilling the well was delayed until the office was open.

Sec. 1:7 "Groundwater" means the water in the zone of saturation that fills all of the pore spaces of the subsurface geologic material.

Sec. 1:8 "Health Officer" means the Director of the Washtenaw County Department of Public Health or his/her designated representative who shall be a Registered Sanitarian or who is under the supervision of a Registered Sanitarian.

Sec. 1:9 "Imminent health hazard" means a condition that in the judgment of the Health Officer exists that may require immediate action to prevent endangering the health of the public.

Sec. 1:10 "Maintenance" means, but shall not be limited to, repair or replacement of a pump, well screen, pressure tank, piping, wiring, controls, or treatment device that is part of a well.

Sec. 1:11 "Municipality" means a city, village, township, county, district or other public body created by, or pursuant to, State law or any combination of such units acting cooperatively or jointly.

Sec. 1:12 "Owner" means a person who holds, or at the time of construction who held, a legal, equitable or possessory interest of any kind in a well or in the property on which the well system is located, including, but not limited to, a trust, vendor, vendee, lessor, or lessee. However, owner does not include a person or a regulated financial institution who, without participation in the operation of the well, is acting in a fiduciary capacity or who holds indicia of ownership primarily to protect the person's or the regulated financial institution's security interest in the well or the property on which it is located. This exclusion does not apply to a grantor, beneficiary, remainderman, or other person who could directly or indirectly benefit financially from the exclusion other than by the receipt of payment of fees and expenses related to the administration of a trust.

Sec. 1:13 "PHAC/EAB" means Public Health Advisory Committee / Environmental Appeals Board.

Sec. 1:14 "Person" means an individual, partnership, cooperative, association, private corporation, personal representative, receiver, trustee, assignee, governmental entity or any other legal entity.

Sec. 1:15 "Potable water" means water that is free of contaminants in concentrations that may cause disease or harmful physiological effects, is safe for human consumption and meets the State drinking water standards set forth in Michigan's Safe Drinking Water Act 399 of the Public Acts of 1976, as amended, (MCL 325.1001 et seq.) as it now exists or may be amended in the future.

Sec. 1:16 "Public nuisance," when applied to a well, means any well that threatens to impair the quality of groundwater or otherwise jeopardize the health and safety of the public or the environment.

Sec. 1:17 "Test or exploratory hole" means an excavation, or direct push used for determining the nature of underground geological or hydrological conditions, by direct observation, or by any other means.

Sec. 1:18 Wells

1. "Well" means an excavation and an integrated system of pumps, pipes, controls, reservoirs, and mechanical devices used for the purpose of injecting into or extracting water or other fluids from below the ground surface or for making tests or observations of underground conditions, or for any other similar purpose.
2. Wells include, but are not limited to:
    a. "Abandoned water well" means any of the following:
        i. A well that has its use permanently discontinued.

ii. A well that is in such disrepair that its continued use for the purpose of obtaining groundwater is impractical.

iii. A well that has been left with the drilling uncompleted.

iv. A well that is a threat to groundwater resources.

v. A well that is or may be a health or safety hazard.

b. "Community water well" means a public water supply that provides year-round service to not fewer than fifteen (15) living units or which regularly provides year-round service to not fewer than twenty-five (25) residents.

c. "Extraction well" means any well used to extract water for treatment or other processes.

d. "Heat exchange well" means a well for the purpose of utilizing the geothermal properties of earth formations for heating or air conditioning.

e. "Individual domestic well" means a water well used to supply water for domestic needs of an individual residence.

3. "Industrial well" means a well that is used to supply water for industrial processes, fire protection, or similar nonpotable uses.

4. "Injection well" means any well used to inject water or other fluids into the groundwater.

5. "Irrigation well" means a well that is used to provide water for plants, livestock, or other agricultural processes.

6. "Monitoring well" means any well installed for the purpose of observing/monitoring the conditions of a water-bearing aquifer to determine the quality of groundwater or concentration of contaminants in underground waters.

7. "Non-community well" means a water system that provides water for drinking or household purposes to twenty-five (25) or more persons for at least sixty (60) days per year or has fifteen (15) or more service connections. (A few examples are schools, restaurants, churches, campgrounds and highway rest stops with their own water supplies.)
8. "Purge well" means wells used for the purpose of extracting and treating water from a contaminated aquifer.
9. "Test well" means a well that is used to obtain information on groundwater quantity, quality, or aquifer characteristics for the purpose of designing or operating a water supply well.
10. "Water supply well" means a well that is used to provide potable water for drinking or domestic purposes.
11. Wells, for the purpose of this regulation shall not include:
    a. Oil and gas wells constructed under the jurisdiction of the Michigan Department of Environmental Quality (MDEQ), except those wells converted to use as water wells; or
    b. Wells used for the purpose of:
        i. Providing community water supplies under the jurisdiction of MDEQ,
        ii. Dewatering wells less than twenty-five (25) feet in depth during construction,
        iii. Stabilizing hillsides or earth embankments,

iv. Wells less than twenty-five (25) feet in depth used to lower the water tables for construction purposes.

c. The following excavations:

i. Holes or excavations for drainfield soil evaluation tests,

ii. Drill holes for seismic exploration where such drill holes are less than twenty-five (25) feet in depth.

Article II Well Permit Requirements

Sec. 2:1 No person shall construct or drill any well unless a permit has first been issued by the Health Officer authorizing such installation and construction of the well, provided: (1) a permit shall not be required for maintenance of a well, and (2) an existing well may be replaced on an emergency basis prior to receiving a permit in the event its intended use is for a residence that is occupied and a repair cannot be made. In such instances the permit must be applied for within twenty-four (24) hours of the next business day. If the emergency well replacement is not in compliance with the other requirements of this Regulation upon Department review, the well will be required to be relocated or otherwise modified to be in compliance. (3) A single permit will be required for all direct-push geoprobe type wells installed on a legally described property boundary.

Sec. 2:2 Application for a permit shall be made by the property owner(s) or his/her authorized representative on forms provided by the Health Officer. The application for a permit shall be accompanied by the appropriate service fee designated by the Washtenaw County Board of Commissioners, and plans showing locations of pertinent features of the

proposed well, including sewage disposal systems or works carrying or containing sewage, potential sources of contamination, property description, and any other necessary data that may be required by the Health Officer. The permit shall be valid only for the property described in the application for the permit.

Sec. 2:3 A permit for the drilling of a well shall become void twelve (12) months from the date of issuance. If the drilling of a well has not been completed within the twelve (12) month period, a new permit shall be required. The well driller or individual(s) drilling a well shall have a copy of the permit including the plot plan accessible on site during the drilling operation. A permit may be re-activated within three (3) years of the permit issuance date and will be assessed fifty (50%) per cent of the permit fee for re-activation.

Sec. 2:4 No municipality shall issue a building permit where a well is necessary or otherwise allow construction to commence on any land where an approved public or private water supply is not available until a well permit has been issued by the Health Officer.

Sec. 2:5 A permit for a well shall be denied in writing by the Health Officer for one or more of the following reasons:

a. A potable water well where the property dimensions are too small for the required isolation distances specified in Sec 6:7 and a variance is not warranted.

b. The installation of the system, in the opinion of the Health Officer, would create a dangerous condition, public nuisance, or potentially contaminate the groundwater. Agricultural structures that are built to the US

Department of Agriculture compliance with the generally accepted agricultural and management practices (GAAMPs) shall not be considered a public nuisance.

c. The submitted information is not in compliance with the provisions of these Rules and Regulations

Article III Construction Requirements

Sec. 3:1 All wells are subject to inspection by the Health Officer and all construction work and pump installations shall be approved by the Health Officer. Inspection and approval shall be limited to the general layout and functional aspects. Inspections of such systems when required shall be promptly made following notification.

Sec. 3:2 Prior to the installation of any well, an application shall be filed with the Health Officer accompanied by a site plan indicating the proposed location of the well, its intended use, the nearest source of contamination within 100 hundred (100) feet, and prominent features of the property. When applying for a non-potable well permit for such use as a monitoring or dewatering well, the name, address and telephone number of the consultant(s) or engineer and property owner shall be provided along with the anticipated diameter and depth of the well.

Sec. 3:3 No person shall construct or drill any well unless a permit has first been issued by the Health Officer authorizing such installation and construction except as authorized under Sec. 2.1

Sec. 3:4 The Health Officer shall be notified by the permit holder or well driller by fax or by another mutually-agreed upon format prior to the beginning of the installation and construction of the well.

Sec. 3:5 The Health Officer may, upon presentation of proper identification, at any and all reasonable times, enter any and all places, property, enclosures and structures where well drilling and construction has taken place for the purpose of making examinations and investigations to determine whether any provision of this Regulation is being violated. The Health Officer may require that each completion, modification, or abandonment operation be inspected prior to any further work.

Sec. 3.6 A registered well driller may request an inspection by the Department of any well drilled.

Article IV Plugging Abandoned Wells

Sec. 4:1 A well shall be considered abandoned and shall be plugged in accordance with this regulation when:

- It has been replaced with a new well, or
- It has been out of service for more than twelve (12) months, or
- When the structure it is serving has been connected to a municipal supply;

provided however, a well may continue in use if the well is registered with the Department for its intended use, there is a complete separation from any municipal supply, and the well remains in working condition.

Sec. 4.2: When it is determined a well is abandoned, it shall be plugged in accordance with the following:

a. Potable water supply: An abandoned well or dry hole shall be plugged by a well drilling contractor who is registered pursuant to the provisions of Part 127 of PA 368 (Groundwater Quality Control Act) of 1978.

b. Dewatering wells shall be plugged by a registered de-watering well driller in accordance with Part 127 of PA 368 of 1978, Section 4 utilizing methods specified within Section 4, Rules #261 – 268.

c. Other non-potable water wells may be abandoned under the supervision of a registered well driller, professional engineer, certified professional geologist or a registered sanitarian knowledgeable of well plugging procedures.

Sec. 4:3 A pump, a drop pipe, a packer, other equipment, debris, or obstructions shall be removed from the well, if possible, before plugging.

Sec. 4:4 An abandoned well or dry hole (other than dewatering wells) shall be plugged as follows:

a. Well or dry hole that terminates in overburden shall be plugged by filling with any of the following materials:

(i) Neat cement.

(ii) Concrete grout.

(iii) Bentonite chips.

(iv) Bentonite pellets.

(v) Bentonite grout.

b. A section of a well or dry hole that is in bedrock shall be plugged by filling with neat cement or concrete grout from the bottom of the well or dry hole to not less than twenty (20) feet above the top of the bedrock or to the ground surface. The section of the well from twenty (20) feet above the bedrock to the ground surface shall be plugged in accordance with the provisions of subdivision (a) of this subrule.

c. Gravel, sand, stone aggregate, or other materials that are acceptable to the Department may be used for plugging that portion of a well that penetrates lost circulation zones, such as gravel or cavernous, creviced, or fractured bedrock.

Sec. 4:5 The flow from an abandoned flowing well shall be stopped by plugging the well with neat cement or concrete grout.

Sec. 4:6 Abandoned wells that discharge subterranean gases shall be plugged with neat cement or concrete grout.

Sec. 4:7 Abandoned well or dry hole plugging materials shall be placed as follows:

a. Bentonite chips or bentonite pellets shall be poured slowly into the top of the well or dry hole to prevent bridging in the casing or borehole. Fine bentonite particles that accumulate in the shipping container shall not be used. The plugging operation shall continue until the bentonite chips or bentonite pellets appear at the ground surface. Upon completion of the plugging operation, water shall be placed into the casing or borehole to promote expansion of the bentonite above the static water level.

b. Neat cement, concrete grout, or bentonite grout shall be placed through a tremie pipe from the bottom of the well or dry hole to the ground surface.

c. Other materials and methods may be used if the materials and methods proposed to be used will plug the abandoned well or dry hole to prevent them from acting as a channel for contamination or the escape of subterranean gases and if prior approval is given by a Health Officer.

Sec. 4:8 A large diameter dug well or crock well shall be plugged pursuant to the provisions stated above or may be plugged as follows:

a. A layer of bentonite chips or bentonite pellets that is not less than six (6) inches thick shall be placed at the bottom of the well. The remainder of the well shall be plugged by placing clean soil backfill in layers that are not more than ten (10) feet thick, with a layer of bentonite chips or bentonite pellets that is not less than six (6) inches thick placed on top of each clean soil backfill layer. Dry granular bentonite may be used in place of, or in combination with, bentonite chips or bentonite pellets, and neat cement or concrete grout may be poured if the well has been dewatered before plugging.

b. The uppermost section of concrete crock or tile or the upper three (3) feet of stone, brick, or other curbing material that supports the well bore shall be removed. Before backfilling the well up to the ground surface, a layer of bentonite chips or bentonite pellets that is not less than six (6) inches thick shall be placed.

Article V Records

Sec. 5:1 Within sixty (60) days of the date of completion of a well, a well drilling contractor shall furnish the well owner with one (1) copy and the Health Officer with two (2) copies of a well log that contains the information required on the form furnished by the director. The Health Officer shall send one (1) copy of the well log to the Michigan Department of Environmental Quality within thirty (30) days after the Health Officer receives the copies of the well log. A well drilling contractor shall retain a copy of the well log.

Sec. 5:2 A well drilling contractor shall record the geologic material types and thicknesses penetrated during the drilling process. The record shall be available for inspection during well drilling.

Sec. 5:3 Within sixty (60) days after plugging an abandoned well or dry hole, the person who performed the plugging operation shall provide the Department or Local Health Department with two (2) copies of a report that sets forth all of the following information:

a. The well owner's name.

b. The location of the well.

c. The well depth.

d. The well diameter.

e. The plugging procedure.

f. The plugging material.

g. The amount of plugging material used. Standard forms for the report shall be provided by the Department.

h. In lieu of reporting quarter section/ quarter section/ quarter section in identifying the location of wells, GPS coordinates may be submitted provided that within two (2) years of adoption of this Regulation, all well locations must be identified utilizing latitude and longitude coordinates.

Sec. 5:4 When an abandoned well is plugged where a replacement well will be or has been constructed, the plugging information may be recorded on the well log that is submitted for the replacement well. Information on several abandoned wells or dry holes within a single parcel may be submitted on a single well log form if the geologic materials and plugging methods are similar.

Sec. 5:5 A well log shall be signed by a registered well drilling contractor.

Sec. 5:6 Monitoring well test results may be requested by the Department. When so requested, the results shall be submitted in a mutually agreeable format within thirty (30) days of request.

Article VI Potable Water Supply Requirements

Sec. 6:1 It shall be unlawful for any person to occupy, or to permit to be occupied, any premise in Washtenaw County not equipped with an adequate supply of potable water as determined by the Health Officer or the municipality supplying the water. A potable well in existence at the time of adoption of these Regulations may be continued and maintained in service without the approval of the Health Officer as long as satisfactory performance is maintained, the water remains potable and the system use is not changed so that it becomes a public water supply as regulated by Act 399 of the Public Acts of 1976, as amended.

Sec. 6:2 These Rules and Regulations shall apply to all non-community and private groundwater supplies within Washtenaw County. Requirements with respect to water well and/or pumping equipment installations or water well abandonment procedures shall include those requirements as set forth in Part 127, Act 368 of the Public Acts of 1978, and Act 399 of the Public Acts of 1976 and all rules and regulations and amendments applicable thereto.

Sec. 6:3 Water supplies intended for human consumption that are not potable shall be treated by methods approved by the Michigan Department of Environmental Quality or the Washtenaw County Health Officer. If the water is not made potable, said water supply and/or well shall be properly abandoned to protect the water-bearing formation against contamination, or identified at each outlet that it is unfit for human consumption.

Sec. 6:4 A contaminated potable groundwater water supply system that, in the judgment of the Health Officer represents an imminent health hazard, shall be identified with suitable signs at each outlet, or the outlets shall be made inoperable to the satisfaction of the Health Officer.

Sec. 6:5 All wells intended for human consumption shall conform to the minimum construction requirements of these Rules and Regulations whenever a new building is being constructed, a new well is drilled, and/or the water is no longer potable.

Sec. 6:6 A newly drilled well shall not be used for human consumption until the construction and installation have been approved by the Health Officer, and the following are submitted: (a) a completed water well record prepared by the well driller, when applicable, and (b) a certified laboratory report indicating the water supply is free from specified bacteriological or chemical contaminants. All water samples shall be collected

by the owner, well driller, or permit holder, Health Officer, or other person specifically designated by the Health Officer.

Sec. 6:7 All potable water wells, in addition to the requirements of Act 399 of the Public Acts of 1976, shall be located not closer than fifty (50) feet from any septic tank or injection well, and not closer than one hundred (100) feet from any drainfield or other source of contamination, and shall be located wholly upon the property served. Isolation distances may be increased by the Health Officer when sufficient protection is not provided by the specified isolation distances and shall be increased by the Health Officer where greater isolation distances are required by Act 399 of the Public Acts of 1976, as amended. Under certain conditions, where suitably executed and recorded easements or right-of-way agreements exist, this provision may be waived by specific written permission of the Health Officer. Return wells used in conjunction with a groundwater heat pump shall be at least fifty (50) feet from any supply well. A groundwater heat pump shall have a disposal location approved by the Health Officer.

Sec. 6:8 The Health Officer may reduce the minimum required isolation distance of one hundred (100) feet from a well to a drainfield if compliance with said isolation requirement would create undue hardship upon the property owner(s) and if, in the opinion of the Health Officer, the well can be drilled into an aquifer that is protected from surface contamination by a minimum ten (10) foot thick continuous clay layer, as determined from area well logs.

Article VII Department Responsibility for Community Notification

Sec. 7:1 Upon the request of any city, village, township or charter township, the Health Officer shall provide notification of any well permit issued in that jurisdiction (or in that jurisdiction's designated wellhead protection area) after the effective date of this Amendment.

Sec. 7:2 The Health Officer shall maintain a database of all well drilling activities identified in this Regulation. Periodically the Department shall produce and make available a report on groundwater in Washtenaw County.

Article VIII Jurisdiction / Right to Inspect

Sec. 8:1 The Health Officer shall have jurisdiction throughout Washtenaw County, including all cities, villages, townships, and charter townships, in the administration and enforcement of these Rules and Regulations and any amendments hereafter adopted, unless otherwise specifically herein. All premises affected by these Rules and Regulations shall be subject to inspection by the Health Officer, and the Health Officer may collect such samples for laboratory examination as s/he deems necessary for the enforcement of these Rules and Regulations.

Sec. 8:2 The Health Officer, upon presentation of proper identification, may enter and inspect at reasonable hours any well installation on public or private property for the purpose of reviewing the installation or abandonment of a well.

Sec. 8:3 No person shall remove, mutilate or conceal any notice or placard posted by the Health Officer except by permission of the Health Officer.

Article IX Violation Remedies

Sec. 9:1 After learning that this Regulation has been violated, the Health Officer may:

a. Issue a Cease and Desist Order and/or suspend any permit, certificate or other approval issued pursuant to this Regulation to the owner or other party violating this Regulation, and afford the owner or other interested party Notice and Opportunity for Hearing.

b. Request that Washtenaw County Corporation Counsel file a legal action to enjoin the violation. In addition, the Health Officer may seek to recover any and all costs related to correcting, removing or abating the violation, including enforcement costs.

c. Issue a citation within ninety (90) days after the alleged violation is discovered. The citation shall state with particularity the nature of the violation, including reference to the Section of the Regulation alleged to have been violated, the civil penalty established for such violation, if any, and a right to appeal the citation pursuant to MCLA 333.2461.The citation shall be delivered or sent by U.S. mail to the alleged violator.

d. Any party issued a citation may request an informal conference within ten (10) days from the date the citation is issued, at which time the person may indicate why s/he believes that s/he has not violated this Regulation.

e. Any party issued a citation may appeal the citation to the PHAC/EAB or its designated committee within thirty (30) days after the citation is issued.

f. A person aggrieved by a final decision of the Health Officer or the PHAC/EAB or its designated committee, may petition Washtenaw County Circuit Court for review. The time period for appeal shall begin the day following the date of such final decision.

Sec. 9:2 Monetary civil penalties may be imposed according to the following schedule:

a. First violation: Up to: $ 200.00

b. Second violation: $ 500.00

c. Third and subsequent violations each: $ 1000.00

Sec. 9:3 A civil penalty levied under this Section may be assessed for each violation or day that the violation continues. The civil penalty may be for a specified violation of this Regulation or promulgated Rule that the Health Officer has the authority and duty to enforce.

Sec. 9:4 A decision by the Health Officer not to issue a citation shall not be construed as a waiver of any other rights or remedies authorized by law or this Regulation.

Sec. 9:5 Notwithstanding the existence or pursuit of any other remedy, the Health Officer may maintain an action in the name of the County in a court of competent jurisdiction for an injunction or other appropriate process against any person to restrain or prevent violations of these Rules and Regulations.

Article X Conviction of Misdemeanor

Sec. 10:1 Any person who violates or who knowingly submits false information required by this Regulation is guilty of a misdemeanor, punishable by imprisonment for not more than ninety (90) days, or a fine of not more than $200.00 or both. Conviction by jury, court or voluntary plea and acceptance by court under this provision shall not waive any other claim for fines, costs, injunction or other relief authorized by this Regulation. Each day that a violation of this Regulation exists shall constitute a separate offense.

Article XI Assessment against the Property

Sec. 11:1 If the owner or party violating this Regulation refuses on demand to pay such expenses incurred by the Department to abate, correct or remove a violation, unsanitary condition or nuisance, the sum shall be assessed against the property and shall be collected and treated in the same manner as taxes assessed under the general tax laws of this State.

Article XII Right to Obtain Samples

Sec. 12:1 Inspection under this Regulation shall include the right to obtain samples where the Health Officer has reason to believe that there is a likelihood of contamination of surface water, ground water, water supply or other unsanitary conditions. Upon written notice, an owner or occupant of premises where such inspection is sought shall co-operate with the Health Officer or his/her designated representative.

Article XIII Hearings and Appeals

Sec. 13:1 If an owner or interested party is adversely affected by any decision under this Regulation, s/he may request in writing a Hearing before the PHAC/EAB or its designated Committee within thirty (30) days of the date of such decision. The Health Officer shall issue a Notice of Hearing within fifteen (15) days after receiving the request. A Hearing shall then be held at the next regular meeting of the PHAC/EAB (or its designated committee), scheduled for such purposes; provided, however, that a Hearing shall be conducted no later than sixty (60) days after the Notice of Hearing is mailed to the owner or interested party. The PHAC/EAB (or its designated committee) shall affirm, reverse or modify the contested decision by a majority vote of the entire Board. The decision by the PHAC/EAB (or its designated committee) shall be in writing and state the reasons and grounds for such decision. A copy shall be furnished to the owner, any interested person, and the Health Officer within thirty (30) days of the decision.

Sec. 13:2 The PHAC/EAB shall hear appeals and may grant individual variances from these Rules and Regulations where it is determined no substantial health hazard is likely to occur therefrom, and unnecessary hardship might result from strict compliance with these Rules and Regulations. A written notice of appeal and/or request for a variance shall be filed with the Health Officer. The notice of appeal shall state the particular grounds on which it is based. Opportunity for the hearing shall be given at the next regular or scheduled PHAC/EAB meeting following the request unless receipt of the request is within less than fourteen (14) calendar days of the time for such a meeting in

which event a hearing may be provided for at a subsequent regular or special meeting of the PHAC/EAB. Due notice of such hearing shall be given to all persons listed on the last assessment roll for the township as the owner(s) of any real property contiguous to the appellant's property. In addition, notice of such hearing shall be published at least five (5) calendar days prior to the date of the hearing in the newspaper of general circulation published in Washtenaw County. The Board shall furnish the appellant with a written report of its findings and decision within sixty (60) calendar days of the date of such hearing.

Sec. 13:3 All amendments to these Regulations shall be approved by the Washtenaw County PHAC/EAB and the Washtenaw County Board of Commissioners after a public hearing required by Section 2442 of Act 368 of the Public Acts of 1978, as amended, has been held. All amendments shall become effective forty-five (45) days after approval by the Washtenaw County Board of Commissioners or at a time specified by the Washtenaw County Board of Commissioners.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP,

Intervenors,

v.

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

EXHIBIT #7 TO

INTERVENORS, WASHTENAW COUNTY HEALTH DEPARTMENT AND WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK'S BRIEF SUPPORTING A COURT ORDER IMPLEMENTING THE REVISED CLEANUP STANDARDS

EXHIBIT # 7

DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIATION AND REDEVELOPMENT DIVISION

ESTABLISHMENT OF CLEANUP CRITERIA FOR 1,4-DIOXANE

EMERGENCY RULES

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By the authority conferred on the Department of Environmental Quality by 1994 PA 451, 1969 PA 306, MCL 324.20104(1), MCL 324.20120a(17), and MCL 24.248)

FINDING OF EMERGENCY

These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment. Recent shallow groundwater investigations in the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings. The current cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.

These rules establish the 1,4-dioxane cleanup criterion for the drinking water ingestion pathway at 7.2 parts per billion and the vapor intrusion screening criterion at 29 parts per billion. These criteria are calculated using the latest United States Environmental Protection Agency toxicity data for the chemical 1,4-dioxane and the Department of Environmental Quality's residential exposure algorithms to protect both children and adults from unsafe levels of the chemical.

The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires

the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.

Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.

Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

C. Heidi Grether

C. Heidi Grether
Director

Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule.

Governor

10-27-16

Date

MI 22nd Circuit Court - Washtenaw Court Name	**PROOF OF SERVICE**	88-034734-CE Case Number

1. At the time of service, I was at least 18 years of age.
2. My email address used to e-serve: **wlistman@dbsattorneys.com**
3. I served a copy of the following document(s) indicated below:

Title(s) of documents served:

Brief: Health Department Brief

CONNECTED FILING: Exhibit # 1

CONNECTED FILING: Exhibit # 2

CONNECTED FILING: Exhibit # 3

CONNECTED FILING: Exhibit # 4

CONNECTED FILING: Exhibit # 5

CONNECTED FILING: Exhibit # 6

CONNECTED FILING: Exhibit # 7

Person Served	Service Address	Type	Service Date
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Great Lakes Environmental Law Center		e3b23647-c906-467c-b8a8-2fd32e899221	
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Bodman		7aa73b2e-21ea-466e-9b50-76c13957d2ee	
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TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.
The contents of this proof of service are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

04-30-2021
Date

/s/William Listman
Signature

DBS Attorneys
Firm Name