State Bar of Michigan

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Desert Palace, Inc. v. Costa:

Upsetting the Long-Standing McDonnell Douglas Formula

By Thomas Pinch, Tomkiw Dalton, PLC

Thirty (30) years ago, the United States Supreme Court issued its decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In that case, the Court recognized the difficulty in proving that an employer had a discriminatory motive in taking some action alleged to have discriminated against an employee or applicant on the basis of a protected category, such as race or sex. Accordingly, for cases where there is insufficient "direct evidence" of discrimination, the Court ruled that a plaintiff can still prove his/her case through a special inferential, burden-shifting approach – discussed below. The question still to be answered is: what happens if the evidence supporting an inference of discriminatory motive is not "direct," as that term has been defined, but is really "circumstantial"?

On June 9, 2003, the Supreme Court issued a unanimous decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), interpreting the 1991 amendment to Title VII and, arguably, resulting in a drastic alteration of when plaintiffs must resort to the *McDonnell Douglas* formula. In short, the decision held that "direct" evidence is not required in order for a jury to be instructed the employer's mixed motive defense (opportunity to show the same adverse action would have been taken even if no discriminatory motivation existed) – sufficient proof of discriminatory motive can be made, at least in part, by "circumstantial" evidence. As discussed below, most courts during the last thirty years have funneled all cases lacking "direct" evidence into a *McDonnell Douglas* analysis that required the plaintiff to prove that the lawful motive claimed by the employer was a pretext for discrimination and not the true motivating factor. Whether routine usage of *McDonnell Douglas* will survive *Costa* is, as yet, unknown. Amazingly, *McDonnell Douglas* was never mentioned in the opinion even though much of the oral argument in front of the High Court dealt with *McDonnell Douglas*.

In *Costa*, the Supreme Court ruled, consistent with the 1991 amendment to Title VII, that if a plaintiff "demonstrates" that one of the protected categories was a "motivating factor" for the challenged employment practice, this is unlawful discrimination under Section 42 USC § 2000e-2(m) – even if some other motivation may have also been involved. The employer, at that point, is subject to declaratory and injunctive relief and liable, usually, for attorney fees incurred in bringing the action. The employer will also be liable for backpay and other damages unless it "demonstrates" by a preponderance of the evidence that the same adverse employment action would have been taken absent the discriminatory motivation. Because the 1991 amendment did not restrict the type of evidence that could be used to "demonstrate" a discriminatory motivation, the Supreme Court held that the plaintiff was correct in claiming that she could use direct *and/or* circumstantial evidence to establish such motivation.

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Chairperson's Corner

"None of us is as smart as all of us," was a favorite slogan of a former city manager with whom I worked. The more I work and speak with attorneys who represent a variety of public/governmental agencies and authorities, the more I am convinced of the statement's verity. I never fail to enjoy the conviviality and information that is shared when members of our Section gather. If you haven't been to a PCLS seminar in a few years, I strongly urge you to do so in the future. Your attendance and contributions would be welcome at either the annual Winter Seminar, usually held in mid-February in Dearborn, or at next year's Summer Seminar, which again will be co-sponsored with the Michigan Association of Municipal Attorneys on Mackinac Island. Even as I write this column plans are being laid for these two events. In addition, the Section is co-sponsoring an ICLE seminar with the Real Property Section to be held this fall.

These seminars, along with this newsletter, are the primary reason for this Section to exist—to educate and inform the municipal and governmental agency attorney. What I believe to be an intrinsic strength of our Section is its panoply of perspectives. Our membership covers the gamut of city, village and township attorneys, in-house and retained counsel, as well as lawyers whose clients are counties, public universities, intergovernmental authorities, road commissions along with assistant attorney generals. Despite this diversity, there are many topics of common interest to our members. If there is an area of the law that you would like to see addressed in detail at a future seminar, or if you have an idea for an article in the newsletter (even better, if you would like to author such an article) let any member of the PCLS Council know and submit your articles to Dan Dalton, Newsletter Chairperson, for his consideration. In any case, I would like to see the continued growth in attendance and to share experiences and ideas with many of you at the upcoming Section seminars.

Finally, I'd be remiss if I did not recognize and express my appreciation for the leadership, assistance and advice I have received from past Chairperson Dan Matson. I would also like to welcome Lori Bluhm, Troy City Attorney; Anne Seurynck of Foster, Swift, Collins and Smith in Lansing; and Jeffrey Sluggett of Law, Weathers and Richardson in Grand Rapids as the newest members of the PCLS Council. These new members replace Randy Kraker, Al Knot and Steve Schultz, who I thank for their past service to the Section. It is only the assistance of individuals like these that permits the person sitting as Chair of the Section to appear to be "as smart as all of us."

Clyde J. Robinson

Desert Palace, Inc. v Costa

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The decision by the Supreme Court was unremarkable with respect to interpreting the particular sections of Title VII as amended in 1991. It was unanimous because the statutory language demanded the interpretation they gave to it. However, the ramifications of saying that circumstantial evidence, not just direct evidence, can establish discriminatory motive without resort to *McDonnell Douglas* make the decision potentially one of the most far-reaching discrimination opinions in recent years.

Although *McDonnell Douglas* provides plaintiffs with a means of pursuing a discrimination claim in the absence of clear evidence or motive, the formula often is the basis for dismissal in favor of defendant employers. The initial *prima facie* requirement is relatively easy to establish: membership in a protected category, minimally qualified for the job, adverse employment action, someone not in that protected category was treated better (or some similar version of these elements depending on the facts). Of course, such a minimal test would be satisfied anytime a white person is hired instead of a qualified black applicant, or anytime a female is promoted instead of a male employee, or even firing a Swedish employee while retaining non-Swedish employees. All the *prima facie* test really does is shift a light burden briefly onto the employer: articulate (but no need to prove) some lawful, legitimate reason for the challenged employment action. At that point, the burden of proof is with the plaintiff to prove that the articulated reason is merely a pretext for discrimination.

The "pretext" element may be shown by evidence that the proffered reason: "(1) had no basis in fact, (2) did not actually motivate defendant's conduct, or (3) was insufficient to warrant the challenged conduct." *Zambetti v. Cuyahoga Community College,* 314 F.3d 249, 258 (6th Cir. 2002). Even if such "pretext" is demonstrated, the plaintiff must still provide proof that would allow a jury to infer a discriminatory motivation. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (2000) ("it is not enough to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination"). Often a plaintiff will have insufficient evidence to establish pretext – as discussed, an employer's actual intent is difficult to prove – and dismissal before trial has been a fairly common result. Disproving the articulated reason has become the main problem for most discrimination plaintiffs.

During the past thirty (30) years, most federal appellate and trial courts, and many state courts, have held that unless a plaintiff produces "direct" evidence of discriminatory motive, the plaintiff is forced into the burden-shifting *McDonnell Douglas* framework. "Direct evidence," according to most courts, including the Sixth Circuit, means evidence that "does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *Johnson v. The Kroger Co.,* 319 F.3d 858, 865 (6th Cir. 2003). Further, it is evidence that "if believed, requires the conclusion that unlawful discrimination was" a motivating factor. *Id.* State courts, including Michigan, have similarly interpreted *McDonnell Douglas. Hazle v. Ford Motor Co.,* 464 Mich. 456, 463 (2001) ("Because plaintiff here has offered no direct evidence of race discrimination, she is constrained to rely on the McDonnell Douglas framework").

The *Johnson* case demonstrates how *Costa* may alter how many discrimination claims are proven, and reduce the necessity of resorting to *McDonnell Douglas*. As it happens, the plaintiff in Johnson successfully established pretext and provided enough evidence to support an inference of discrimination. But should the plaintiff have had to prove such pretext?

Under *Costa,* the following evidence was presented at trial:

1) singled out for intense stalking by a supervisor;
2) more harsh discipline than given to male employees for the same misconduct;
3) treated less favorably than males in the assignment of overtime; and
4) supervisors repeatedly stacked her disciplinary record and frequently used or tolerated sex-based slurs against her.

This evidence did not provide "direct evidence" that Costa, the only female warehouse worker and heavy equipment operator for the employer, was fired, at least in part, because she was female. Although a male employee with whom she had a physical altercation was suspended rather than fired, which was Costa's fate, there was no direct evidence that the individuals involved in the termination decision had a bias or prejudice against women or were motivated by such feelings.

Nevertheless, in *Costa,* the trial judge gave a mixed motive instruction to the jury telling them that if they believe the treatment of Costa was motivated by her gender, then the plaintiff is entitled to their verdict, even if they find that the treatment was also motivated by a lawful reason. The Court further instructed that if the jury also finds there was a lawful motivation, then they must decide whether the plaintiff is entitled to damages: such damages, like backpay, are to be awarded unless the defendant proves ("demonstrates") that the same treatment would have occurred in the absence of the discriminatory motivation.

The Supreme Court characterized its decision as merely addressing when the "mixed motive" jury instruction may appropriately be given. It did not acknowledge that such a decision would affect when the *McDonnell Douglas* burden-shifting formula is required to be used.

In *Johnson*, the following evidence was provided with respect to whether the plaintiff employee was terminated based upon his race:

(a) store manager's comment expressing concern about the potentially detrimental effect on business of having a black co-manager;
(b) store manager's remark to store department heads regarding the plaintiff's lack of ability and intellectual shortcomings;
(c) regional manager's notation and comments made in connection with a performance evaluation that plaintiff lacked initiative; and
(d) regional manager's suggestion that the plaintiff should consider other positions with Kroger because he lacked an analytical mind.

Johnson, 319 F.3d at 865. Also, the store manager had allegedly treated the plaintiff less favorably than Caucasian co-managers, refusing to mentor or train the plaintiff, criticizing him in public, and blaming him for errors that were the responsibility of other employees. The Sixth Circuit found that these facts did not "compel" the conclusion that the decision to discharge the plaintiff was motivated by racial animus. No evidence was presented to show

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Legislative Update

By Kester K. So and Matthew F. Hiser, Dickinson Wright PLLC

Over the course of the last several months, the Michigan Senate and House of Representatives have introduced numerous bills of municipal interest. The following are summaries of some of those bills that have been enacted and some of those bills that have been vetoed by the Governor.

LEGISLATION ENACTED

- Biodiesel Plants; Tax Abatement: **Public Act 5 of 2003** (formerly **House Bill 4010**) amends the Plant Rehabilitation and Industrial Development Act, 1974 PA 198, as amended, to permit local units of government to extend property tax abatements to facilities that create or synthesize biodiesel fuel, and to electric generating plants fueled by biomass. The act became effective on April 24, 2003.
- Natural Resources, Forests and Mining: **Public Act 6 of 2003** (formerly **Senate Bill 105**) amends 1990 PA 182, as amended, to permit counties to make an election to receive payments from the National Forest System in either the 25% payment amount or the full payment amount provided by the federal Secure Rural Schools and Self-Determination Act. The act became effective on May 9, 2003.
- Spouse Death Benefits: **Public Act 8 of 2003** (formerly **House Bill 4332**) amends the Fire Fighters and Police Officers Retirement Act, 1937 PA 345, as amended, to prohibit a municipality from denying duty death pension benefits to the remarried surviving spouse of a fire fighter or police officer. The act became effective on May 20, 2003.
- Expired Plate Penalties: **Public Act 9 of 2003** (formerly **House Bill 4086**) amends the Michigan Vehicle Code, 1949 PA 300, as amended, to revise the penalty that is imposed when a person drives with expired registration plate tabs, changing it from a misdemeanor to a civil infraction, unless the person was driving a commercial vehicle. The act will become effective on September 1, 2003.
- Public Information Access: **Public Act 12 of 2003** (formerly **Senate Bill 180**) amends the Management and Budget Act, 1984 PA 431, to prohibit a State agency from using a 900 telephone number or other telephone system that charges callers for access to public information held or maintained by a State agency. The act became effective on May 29, 2003.
- Presidential Primary: **Public Act 13 of 2003** (formerly **Senate Bill 397**) amends the Michigan Election Law, 1954 PA 116, as amended, to provide that no statewide presidential primary will be conducted in 2004. The act became effective on May 29, 2003.
- Natural Resources; Great Lakes: **Public Act 14 of 2003** (formerly **House Bill 4257**) amends the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, to allow "beach maintenance activities" without a permit on Great Lakes riparian lands. The Act became effective on June 5, 2003.
- Officer Impersonation; Officer Impersonation Penalties: **Public Act 16 of 2003** (formerly **Senate Bill 117**) amends The Code of Criminal Procedure, 1927 PA 175, as amended, to enact sentencing guidelines for impersonating a peace officer to commit or attempt to commit a felony. **Public Act 15 of 2003** (formerly **Senate Bill 118**) amends The Michigan Penal Code, 1931 PA 328, as amended, to create a felony penalty for impersonating a peace officer to commit or attempt to commit a crime. Both acts will become effective on September 1, 2003.
- Public School Employees Retirement; Health Insurance; Long-Term Care: **Public Act 17 of 2003** (formerly **House Bill 4285**) amends the Public School Employees Retirement Act, 1980 PA 300, as amended, to require, beginning July 1, 2004, the retirement system to withhold the entire monthly premium for voluntary group long term care insurance coverage for retirees and their beneficiaries and dependents, at the option of the retiree. The act became effective on June 10, 2003.
- Education, teachers; Education, employees: **Public Act 18 of 2003** (formerly **House Bill 4038**) amends the Revised School Code, 1976 PA 451, as amended, to prohibit the Superintendent of Public Instruction from issuing an initial teaching certificate to a person unless that person presents evidence that he or she has successfully completed a course in CPR and first aid. The act became effective on June 10, 2003.
- Harbor Funding: **Public Act 19 of 2003** (formerly **Senate Bill 150**) amends the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, to permit public colleges and universities to enter into agreements with the Department of Natural Resources to finance harbor and waterway projects and to allow public colleges and universities to receive funding for participation in federal projects, the development of harbors and public boating access sites. The act became effective on June 18, 2003.
- Urban Township: **Public Act 20 of 2003** (formerly **House Bill 4197**) amends the Local Development Financing Act, 1986 PA 281, as amended, to expand the current definition of "urban township" to make more townships eligible to establish local development financing authorities. The act became effective on June 20, 2003.
- Income Tax, Property Tax Credit; Property Tax, Special Assessments: **Public Act 28 of 2003** (formerly **House Bill 4008**) amends the Income Tax Act, 1967 PA 281, as amended, so that a special assessment levied for police, fire and advanced life support can be counted in the amount of property taxes and special assessments paid when calculating the homestead property tax credit if (i) the assessment is levied in the entire township except all or a portion of a village within the township and (ii) the assessment is levied and based on state equalized value or taxable value. The act became effective on June 26, 2003.

- Income Tax, Property Tax Credit; Property Tax, Special Assessments: **Public Act 29 of 2003** (formerly **Senate Bill 23**, the companion bill to former **House Bill 4008**) amends the Income Tax Act, 1967 PA 281, as amended, so that a special assessment levied for police, fire and advanced life support can be used in calculating the homestead property tax credit if (i) the assessment is levied in the entire township except all or a portion of a village within the township and (ii) the assessment is levied and based on state equalized value or taxable value. The act became effective on June 26, 2003.
- Natural Resources; State Agencies: **Public Act 36 of 2003** (formerly **House Bill 4083**) amends the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, to require the State to subordinate its interest in a recorded farmland development rights agreement or an open space development rights easement under Part 361 of Act 451 to a subsequently recorded mortgage lien, lease or interest if the parcel of land meets certain requirements. In essence, the State will grant priority mortgage liens or interests in property that is also subject to a development rights agreement or easement. The act became effective on July 3, 2003.
- Supplemental Appropriations: **Public Act 39 of 2003** (formerly **House Bill 4032**) provides for supplemental appropriations for the State's 2002-2003 fiscal year, and provides for expenditures of such appropriations. The act became effective on July 8, 2003.
- Abandoned Building Codes: **Public Act 55 of 2003** (formerly **House Bill 4081**) amends the Housing Law of Michigan, 1917 PA 167, as amended, to expand the definition of "dangerous building" to include buildings damaged by deterioration, neglect, abandonment, or vandalism. The act generally clarifies that such types of abandoned buildings can be subject to demolition under the Housing Law of Michigan. The act also specifies that demolition costs for which local units of government are eligible for reimbursement from property owners include hearing officer fees, costs related to title searches or commitments used to determine the parties in interest, recording fees for notices and liens filed with the register of deeds, demolition and dumping charges, court reporter attendance fees, and collection costs authorized under the Housing Law of Michigan. The act became effective on July 14, 2003.
- Drunk Driving; Controlled Substances; Traffic Control: **Public Act 61 of 2003** (formerly **House Bill 4247**) amends the Michigan Vehicle Code, 1949 PA 300, as amended, to establish 0.08 percent blood alcohol content (as opposed to 0.10 percent) as the "per se" standard for driving while intoxicated and makes changes to the criminal process and licensure sanctions related thereto. The enactment of this act prevents the state from being subject to federal sanctions regarding aid to transportation systems. The act will become effective on September 30, 2003.
- Speed Limit Input: **Public Act 65 of 2003** (formerly **House Bill 4133**) amends the Michigan Vehicle Code, 1949 PA 300, as amended, to allow township boards to be involved in the process for setting speed limits on state trunkline highways and county roads. **Public Act 64 of 2003** (formerly **House Bill 4224**) is much like Public Act 65 except that it provides no provisions permitting a township board to withdraw from the process for setting speed limits. Both acts became effective on July 22, 2003.
- Abandoned Housing: **Public Act 80 of 2003** (formerly **Senate Bill 230**) amends the Housing Law of Michigan, 1917 PA 167, as amended, to make the provision in Act 167 providing that a building may not be removed unless the cost of its repair will be greater than the building's state equalized valuation inapplicable to urban core cities. The act became effective on July 23, 2003.
- Farm Renaissance Zones: **Public Act 93 of 2003** (formerly **Senate Bill 163**) amends the Michigan Renaissance Zone Act, 1996 PA 376, as amended, to increase the cap on agricultural renaissance zones from 10 to 20, and to remove the December 31, 2002, deadline for their designation. The act became effective on July 24, 2003.
- Economic Development Grants; Revolving Loan Fund: **Public Act 94 of 2003** (formerly **Senate Bill 239**) amends 1851 PA 156, as amended, which prescribes the powers and duties of county boards of commissioners, to allow a county board of commissioners to grant or loan funds that are not derived from ad valorem taxes to a nonprofit corporation organized for the purpose of providing loans for private sector economic development initiatives. The act became effective on July 24, 2003.
- Motorcycles; State Agencies, State and Education: **Public Act 103 of 2003** (formerly **Senate Bill 462**) amends the Michigan Vehicle Code, 1949 PA 300, as amended, to transfer the responsibility for the establishment and administration of the Motorcycle Safety Program from the State Board of Education to the Secretary of State. The act will become effective on October 1, 2003.
- Property Tax, Homestead Exemption; State Audits; Department of Treasury: **Public Act 105 of 2003** (formerly **Senate Bill 520**) amends the General Property Tax Act, 1893 PA 206, as amended, to make a number of changes to provisions dealing with the administration of the homestead property tax exemption, including among other things, allowing various local officials to audit homestead exemptions in local tax collecting units located in the county. The act became effective on July 24, 2003.
- Education Financing; State Bonds: The Governor's executive budget proposal for FY 2004 included a proposal to have school districts refinance their School Bond Loan Fund ("SBLF") obligations. To do so a number of school districts will borrow money from the Michigan Municipal Bond Authority to prepay their outstanding loans from the SBLF, and the proceeds from the prepayment will then be deposited into the school aid fund to help pay for the FY 2004 school aid budget. **Public Act 108 of 2003** (formerly **Senate Bill 572**), **Public Act 109 of 2003** (formerly **Senate Bill 573**) and **Public Act 110 of 2003** (formerly **House Bill 4866**) allow for the repayment of the loans. Each of these acts became effective on July 24, 2003.
- Tax Administration; Property Tax; Department of Treasury: **Public Act 114 of 2003** (formerly **Senate Bill 586**) amends the Revenue Act, 1941 PA 122, as amended, to allow a person to disclose tax information, as provided in Act 122, if the disclosure is required for the proper administration of the General Property Tax Act and to prohibit a person who receives such information from disclosing it for any purpose other than the administration of the General Property Tax Act. The act became effective on July 24, 2003.
- Elections, Candidates; Campaign Practices; Campaign Finance: **Public Act 119 of 2003** (formerly **House Bill 4522**) amends the Michigan Election Law, 1954 PA 116, to require a candidate who runs for political office to file his or her post-election sworn statement with the same official with whom the candidate's committee campaign statements were filed, as specified under the Michigan Campaign Finance Act. The act became effective on July 29, 2003.

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- Counties, Revolving Loan Fund: **Public Act 122 of 2003** (formerly **House Bill 4300**) amend 1913 PA 380, which regulates gifts of property to local units of government, to allow a county to grant or loan funds to a township, village, or city within the county for the purpose of encouraging and assisting businesses to locate and expand within the county. However, the grant or loan could not be derived from ad valorem taxes except for ad valorem taxes approved for economic development. The act became effective on July 29, 2003.
- Homestead Exemption Revision: Since the passage of Proposal A, a substantial number of taxpayers have reportedly become confused and have had difficulty distinguishing between the "homestead exemption" from school operating taxes and the "homestead credit" against income taxes. This has reportedly caused some taxpayers who have filed a homestead exemption not to claim a homestead credit, and vice versa. **Public Act 126 of 2003** (formerly **Senate Bill 129**) is one act in a series of acts that amends various statutes to delete references to "homestead" and, in some cases, replace them with references to "principal residence" in provisions that exempt homestead property from school operating taxes. Public Act 126 amends The Revised School Code, 1976 PA 451, as amended, to replace references to homestead exemption with references to principal residence exemption. Other acts in the series: **Public Act 127 of 2003** (formerly **Senate Bill 130**) amends the Neighborhood Enterprise Zone Act, 1992 PA 147, as amended, to replace references to homestead exemption with references to principal residence exemption. **Public Act 128 of 2003** (formerly **Senate Bill 131**) amends the Real Estate Transfer Act, 1993 PA 330, as amended, to replace references to homestead exemption with references to principal residence exemption. **Public Act 129 of 2003** (formerly **Senate Bill 132**) amends 2002 PA 27 regarding the development of blighted property to replace references to homestead exemption with references to principal residence exemption. **Public Act 130 of 2003** (formerly **Senate Bill 135**) amends the Seller Disclosure Act, 1993 PA 92, as amended, to replace references to homestead exemption with references to principal residence exemption. **Public Act 140 of 2003** (formerly **Senate Bill 133**) amends the General Property Tax Act, 1893 PA 206, as amended, to provide for the definition of the homestead property tax exemption to be changed to principal residence property tax exemption. **Public Act 141 of 2003** (formerly **Senate Bill 134**) amends the School Aid Act, 1979 PA 94, as amended, to replace references to homestead exemption with references to principal residence exemption. Each of these acts became effective on August 1, 2003.

B. LEGISLATION VETOED BY THE GOVERNOR:

- Counties, Parks and Recreation Commission: **House Bill 4456** would amend 1965 PA 261, which regulates county and regional parks, to require that for counties with a population greater than 750,000 but less than one million (Macomb County), at least one of the seven members of a county parks and recreation commission who are appointed by the county board of commissioners be an officer of a local homeowners' or property owners' association or a local resident. The bill was passed by the Senate and by the House, and was ordered enrolled on June 24, 2003. However, the bill was vetoed by the Governor on July 15, 2003.
- Sewer System Regionalization: **Senate Bill 195** would create a new act to establish an authority to provide additional review and oversight of the "contract process" of and the rates charged by the Detroit Water and Sewerage Department ("DWSD"). The bill would also require the DWSD's chief financial officer to prepare and submit to each member of the authority a proposed budget for the next fiscal year, require the authority to establish policies and procedures for the contracting of services for the water or sewer system, and establish remedies for customers who are overcharged by the system. The bill was passed by the Senate and by the House, and was ordered enrolled on March 18, 2003. However, the bill was vetoed by the Governor on March 26, 2003.
- Radio Tower Use: **Senate Bill 293** would amend 1929 PA 152, as amended, which authorizes a State-owned and operated radio broadcast system for police purposes, to require the director of the Department of State Police to allow any governmental public safety agency, subject to certain conditions, to utilize the Michigan Public Safety Communications System, including attaching public safety communications equipment to radio towers. The bill was passed by the Senate and by the House, and was ordered enrolled on June 25, 2003. However, the bill was vetoed by the Governor on July 15, 2003.
- School Aid, Penalties; Education, Calendar, Attendance: **Senate Bill 364** would amend the State School Aid Act, 1979 PA 94, as amended, to eliminate the minimum number of school days during a school year in order to allow for the implementation of alternative schedules, including but not limited to a four-day school week. Instead of 180 days, the bill would require at least 1,098 hours of student instruction in each school year. The bill was passed by the Senate and by the House, and was ordered enrolled on June 12, 2003. However, the bill was vetoed by the Governor on July 1, 2003.

State Court Decisions Of Interest

By Ronald D. Richards, Jr., Foster, Swift, Collins & Smith P.C.

County Compliance with Township Zoning Ordinance

Pittsfield Charter Twp v Washtenaw County, ___ Mich ___; ___ NW2d ___ (2003) (Docket No. 119590, dec'd 7/9/03).

The defendant county sought to construct a new homeless shelter on property it owned in the plaintiff township. The township's zoning ordinance had already designated that property as I-1, which neither expressly nor conditionally permits such a use. The township opined that the proposed use was impermissible because it would violate the zoning ordinance, and because the Township Zoning Ordinance ("TZA"), MCL 125.271 *et seq.,* and specifically MCL 125.271(1) gave its zoning priority with which the county must comply. The county retorted the county commissioners act ("CCA"), MCL 46.1 *et seq.,* and specifically MCL 46.11, gave county boards of commissioners unfettered discretion relative to township zoning ordinances when determining the site of county buildings. The township requested a declaratory judgment in circuit court, and an injunction barring the county from ignoring its zoning ordinance. The circuit court granted summary disposition in the county's favor, ruling that the county was immune from the township's zoning. The Court of Appeals reversed, and held that since the statute granting the county authority to locate buildings does not explicitly state it supercedes township zoning, the county is not immune from such zoning. The Michigan Supreme Court reversed, and held that the county need not comply with the township's zoning upon locating its proposed homeless shelter. The Court articulated that the proper inquiry whether the county must comply with the township's zoning requires analysis of the relevant statutes, and ascertaining 'if there are any textual indications that would convey the Legislature's intent on the issue of priority." *Id.* at ___. The Court then determined that the higher priority is with the county, for three reasons. First, the CCA contains only one limitation on the county's authority to site buildings, showing that the Legislature in addressing the county's limited authority "must have considered the issue of limits and intended no other limitation." *Id.* at ___. Second, the township's position offends the doctrine of last enactment, because the CCA was substantially amended in 1998, whereas the TZA has not been substantially amended regarding the issue at hand any time since then; thus, the CCA, as the most recent statement of the Legislature, prevails over the TZA. Third, acceptance of the township's argument would improperly cause MCL 46.11(b) to be mere surplusage. For those reasons, the Court concluded that the county is not required to comply with the township's zoning provisions in siting its proposed homeless shelter. It therefore reversed the Court of Appeals, and reinstated the circuit court's order of summary disposition.

State University Residence Halls & the Public-Building Exception

Maskery v University of Michigan Bd of Regents, ___ Mich ___; ___ NW2d ___ (2003) (Docket No. 121338, dec'd 7/2/03).

The plaintiff's daughter resided at a residence hall on the campus of the University of Michigan. The residence hall was locked twenty-four hours a day, with access granted only through use of a courtesy telephone outside the building's entrance that a visitor could use to call a resident and request admittance. The telephone was located on top of a stairway leading to the building's entrance. The plaintiff used the courtesy telephone, after which she lost her balance and fell down the stairs. The plaintiff thereafter sued the university, claiming that its placement of the courtesy phone near the steps created a dangerous and defective condition. She alleged that governmental immunity did not bar her suit because the residence hall fell within the "public building exception, MCL 691.1406. The defendant university moved for summary disposition on the ground that the claim was barred due to immunity granted by law, and the trial court granted that motion. The Court of Appeals reversed the order granting summary disposition, after determining that the residence hall was open for use by members of the public.

The Michigan Supreme Court reversed, and held that the continuously locked residence hall at the public university was not "open for use by members of the public" under the public-building exception to governmental immunity. It first reaffirmed the proposition that mere public ownership of a building does not necessarily bring a building into the public building exception. This is because MCL 691.1406 states that governmental agencies owe a duty to repair and maintain "public buildings under their control *when open for use by members of the public*"(emphasis in original). *Id.* at ___. The proper inquiry whether a building is "open for use" by the public requires analysis of the nature of the building, its use, and if "the government has restricted entry to the building to persons who are qualified on the basis of some individualized, limiting criteria of the government's creation." *Id.* The test focuses on whether the government intends to limit the public's access to the building; a breach of the rules that limit entry does not render the building open to the public. Further, since the public-building exception only applies *when* the building is open for the public's use, any accidents occurring when the building is closed to the public does not come within the exception and the government is entitled to immunity in those situations. *Id.* at __ (emphasis in original). In the case before it, the Court noted that the residence hall was not open for use by the public, given that the public could only enter the building through use of a courtesy phone and a resident unlocking the door. Because the government limited the access to those qualified on the basis of individualized, specific criteria (i.e., permission from a tenant), the building was not open to the public. Therefore, the plaintiff failed to satisfy the requirements of the public-building exception, and the Court of Appeals erred in reversing the trial court's grant of summary disposition in favor of the defendant.

FOIA & the Prevailing Party

Meredith Corp v City of Flint, ___ Mich App ___; ___ NW2d ___ (2003) (COA Docket No. 232310, dec'd 6/3/03)

The plaintiff television station submitted a FOIA request to the defendant city for disclosure of an audiotape of a 911 call and police dispatch radio traffic concerning a shooting incident involving a minor. The city denied the FOIA request, asserting that the information was exempt pursuant to MCL 15.243(1)(b)(i) and (ii) as

part of an on-going investigation. The station then filed a complaint, asserting that (a) the information was subject to disclosure, (b) the attorneys in the underlying juvenile proceeding consented to the disclosure, and (c) the minor had been bound over for trial and the law enforcement investigation was not on-going.

The city later moved to intervene in the family court proceeding wherein the minor was charged criminally with the shooting. The city also filed a motion for a protective order in the juvenile proceeding concerning disclosure of the tape.

Meanwhile, the station filed a motion in circuit court to compel disclosure of the information it requested pursuant to the FOIA, and sought punitive damages for the city's arbitrary denial of its request. The city responded that release of the tape may jeopardize the minor's fair trial rights. The circuit court ruled that the city's refusal was without justification, because there was no evidence of an on-going law enforcement investigation and any concerns regarding the minor's right to a fair trial does not justify a FOIA denial. It then ordered the release of the tape to be in accordance with that which was deemed necessary in the juvenile proceeding. The family court later denied the city's protective order request, after which the city released the tape to the station.

Thereafter, the station moved in its FOIA case for costs, attorney fees, and punitive damages relating to the city's FOIA denial. The circuit court ruled that (a) that the station was the prevailing party since the suit was necessary to obtain the tape, (b) the station was entitled to attorney fees only from the date after which the minor's attorney and prosecutor indicated they did not oppose release of the tape, (c) the station could recover attorney fees incurred in the family court proceeding, and (e) the station was not entitled to punitive damages since the city's actions were not arbitrary.

The Court of Appeals affirmed in part, reversed in part, and remanded the matter. It first affirmed the circuit court's finding that the station was a prevailing party because the station's suit was reasonably necessary to compel disclosure of the requested information. It relied on evidence that the city did not release the tape until ordered to do so by the circuit court. Next, it reversed the decision on the scope of the attorney fees awarded, and held that the circuit court erred in limiting the attorney fees to those incurred after counsel in the family court proceeding noted their consent to release of the tape. A circuit court does not have discretion to limit attorney fees to those incurred when the city's refusal was unreasonable. Rather, the circuit court must award the prevailing party attorney fees. The Court then affirmed the circuit court's decision to grant the station's attorney fees incurred in the family court proceeding. As long as an action for public records disclosure is initiated pursuant to the FOIA, the prevailing party is entitled to attorney fees, costs, and disbursements of all such fees related to achieving production of the requested documents. That some attorney fees were incurred in a separate but related matter does not preclude recovery of those fees. Finally, the Court reversed the decision denying the station's request for punitive damages. Since the city knew the tape was subject to disclosure yet pursued nevertheless a strategy to delay release of the tape, the city's subsequent refusal was arbitrary such that punitive damages should have been awarded. MCL 15.240(7).

Consent Judgment Does Not Violate the Township Zoning Act

Cuson v Tallmadge Charter Twp, Case No. 234157 (unpublished COA decision, dec'd 5/15/03).

The plaintiffs sought to vacate a consent judgment entered in a previous case, *Land Acquisition, LLC v Tallmadge Charter Twp* (Ottawa Circuit Court file No. 99-32939-CZ). They claimed that the judgment that the circuit court entered in that case violated the township rural zoning act ("TZA"), MCL 125.271 *et seq.*, as well as public policy. They also asserted that the township violated the open meetings act ("OMA"), MCL 15.261, in approving the proposed consent judgment. The circuit court granted the defendant township's summary disposition motion.

The Court of Appeals affirmed the circuit court's grant of the township's summary disposition motion. It first ruled that the plaintiffs' OMA challenge lacked merit because the only relief the plaintiffs sought was barring the township's future violations of the OMA. Such relief was properly rejected because the plaintiffs' showing of a future OMA violation was merely hypothetical.

The Court then addressed the issue whether the consent judgment entered in the Land Acquisition, LLC, matter violated the TZA and public policy. It held that the consent judgment offended neither the TZA nor public policy, and relied on *Green Oak Twp v Munzel*, 255 Mich App 235; __ NW2d __ (2003) (rejecting a similar argument that a consent judgment entered in settlement of a zoning lawsuit is a de facto rezoning violative of the TZA). As in *Green Oak Twp*, the consent judgment at issue did not constitute a promulgation of a zoning ordinance or an amendment thereto under MCL 125.282; thus, the judgment did not contravene the TZA. The Court then rejected the plaintiffs' public policy argument, again relying on *Green Oak Twp*. It explained that the plaintiffs' remedies were "political in nature against their township board members or through the timely intervention in prior proceedings." *Id.* at ___. The Court therefore concluded that the plaintiffs' challenges to the TZA, like their request for an injunction barring future violations of the OMA, lacked merit and were properly rejected below.

Ordinances & Building Inspector's Warrantless Searches

Ewing v City of Detroit, Case No. 239896 (unpublished COA decision, dec'd 6/12/03).

The defendant city's ordinance 291-H, effective November 15, 1978, created an inspection program for dwelling units in the city. Ordinance 579-H, enacted February 15, 1984, required all rental units in the city to register with the city's building and safety department, and required all rental properties be inspected annually. In March 1991, the city adopted Ordinance 2-91, which attempted to adopt the BOCA building code by reference, and Ordinance 3-91, which provided for inspections of buildings to comply with the BOCA code. The 1991 ordinances had a repealing provision that attempted to repeal all existing ordinances.

The plaintiff filed suit against the city, alleging that because a prior court ruling determined that ordinances 2-91 and 3-91 were invalid, the inspection fees she paid pursuant to those ordinances should be refunded. The plaintiff also alleged that ordinances 291-H and 579-H were unconstitutional in that they permitted warrantless searches in violation of the Fourth Amendment. The

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Opinions of the Attorney General Mike Cox

Editor's note: Assistant Attorney General George M. Elworth of the Freedom of Information and Municipal Affairs Division and a member of the Publications Committee furnished the text of the headnotes of these opinions. The full text of these opinions may be accessed at www.mi.gov/ag.

CONCEALED WEAPONS:

A person convicted of a felony whose conviction has been set aside by order of a Michigan court in accordance with 1965 PA 213, as amended, if otherwise qualified, may not be denied a concealed pistol license under section 5b(7)(f) of the Concealed Pistol Licensing Act. A person convicted of one of the offenses described under section 5b(8) of the Concealed Pistol Licensing Act, whose conviction has been set aside, may nevertheless be denied a concealed pistol license on the basis of information concerning that conviction if the concealed weapon licensing board determines that denial is warranted under section 5b(7)(o) of the Act.

Opinion No. 7133
May 2, 2003

COUNTIES:

A county board of commissioners may not reduce the annual salary of a county treasurer during a four-year term of office, following the resignation of the person elected to that office, and prior to the appointment of a new county treasurer for the unexpired remainder of the term. The statutory prohibition applies regardless of whether the person was elected or appointed to that term of office.

Opinion No. 7128
April 7, 2003

County corrections officers who are also "peace officers" have been exempted from the ban on possession of stun guns and similar devices in sections 224a and 231 of the Michigan Penal Code, MCL 750.224a and MCL 750.231, but those county corrections officers who are not "peace officers" have not been so exempted.

Opinion No. 7135
July 16, 2003

COUNTY ROAD COMMISSIONS:

A county road commission has the authority to enter into an agreement with an Indian Tribe under the Urban Cooperation Act of 1967 to maintain roads.

A county road commission also has the authority to enter into an agreement with an Indian Tribe under 1951 PA 35 to maintain roads that are outside the geographical boundaries of its county.

Opinion No. 7134
May 21, 2003

INCOMPATIBILITY:

The Incompatible Public Offices Act prohibits a person from simultaneously holding the office of county commissioner and be a member of the concealed weapons licensing board for that county.

Opinion No. 7129
April 7, 2003

MENTAL HEALTH

Counties are responsible for transporting, and for the costs incurred by county peace officers associated with transporting, persons hospitalized under chapter 4 of the Mental Health Code to and from court to secure their right under section 455 of the Mental Health Code to be present at their civil commitment hearings.

A law enforcement officer who personally observes conduct that causes the officer to reasonably believe an individual requires mental health treatment and, based on those observations, takes the individual into protective custody, is the only person authorized to execute the application for hospitalization under section 427 of the Mental Health Code and may not delegate that responsibility to a mental health services worker.

Opinion No. 7127
April 7, 2003

RETIREMENT AND PENSIONS:

The Reciprocal Retirement Act permits a city employee to use his years of service with a prior public employer to meet his present employer's retirement plan's service requirements, even if the employee has withdrawn his funds from the prior employer's retirement plan.

Opinion No. 7130
April 21, 2003

TAXATION:

A rollback of multi-year, voter-approved millages that create a sinking fund for the construction and repair of school buildings approved after May 31 of the tax year is required by Const 1963, art 9, § 31, and its implementing legislation in each year after the year of approval in which the percentage increase in the taxable value of the affected property exceeds the increase in the General Price Level from the previous year. Each year's millage is to be reduced by not only the millage reduction fraction for that year but also by the millage reduction fractions for previous years as well.

Opinion No. 7131
April 24, 2003

Continued on the next page

Opinions of the Attorney General

Continued

Property owned by the State of Michigan is not subject to forfeiture, foreclosure, and sale under the General Property Tax Act if the state fails to make the payments in lieu of property taxes required under Part 21, subpart 14 of the Natural Resources and Environmental Protection Act.

Section 404 of 2002 PA 525, section 1002 of 2001 PA 44, and section 1002 of 2000 PA 267, sections of three appropriations acts for the Department of Natural Resources, violate Const 1963, art 4 § 25, in that they alter or amend section 131 of the General Property Tax Act but do not re-enact and publish that section at length.

Notwithstanding the unconstitutionality of certain provisions of the appropriations acts as determined in this opinion, the Department of Natural Resources is not required under section 131 of the General Property Tax Act to distribute to local tax collecting units the proceeds that were deposited in the land sale fund in fiscal years 2000 through 2003. Consistent with established principles advancing the interest of budgetary stability provided for under Michigan's Constitution, this opinion applies prospectively only.

Opinion No. 7132
May 1, 2003

State Court Decisions of Interest

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city retorted the predecessor ordinances (ordinances 291-H and 579-H) are still in effect because there was no proper repealer, and that therefore the fees the plaintiff paid in 1991 can be attributed to those predecessor ordinances and need not be refunded. It also argued that the ordinances satisfy constitutional requirements. The circuit court granted the city's motion for summary disposition.

The Court of Appeals affirmed. It first held that the inspection fees the plaintiff paid under ordinances 2-91 and 3-91 were proper. Since the earlier ordinances (ordinances 291-H and 579-H) were never properly repealed, and since those earlier ordinances required the plaintiff to pay what apparently are the same fees for the city's inspections as that which the plaintiff paid under ordinances 2-91 and 3-91, the Court stated that the plaintiff's payment of those fees was proper. The Court then rejected the plaintiff's argument that the earlier ordinances impermissibly authorized warrantless searches. While those earlier ordinances appear on their face to allow warrantless searches, those ordinances must be read in light of the relevant Michigan statutes. The Court interpreted the ordinances to be constitutional as requiring a building inspector to obtain a search warrant when requested in a non-emergency situation because (1) courts must construe ordinances in a constitutional manner where possible, and (2) the ordinances do not expressly allow inspection of a dwelling without a warrant. The Court therefore concluded that the trial court properly granted the city's summary disposition motion.

Local Government Law and Practice
Two-Day Workshop
Kellogg Center, East Lansing, MI
November 5-6, 2003

Wednesday, November 5, 2003 Agenda

9:00 AM	Risk management and Insurance -- Stanley Prokop
10:00 AM	Eminent Domain -- Clifford T. Flood
11:00 AM	Local Units of Government -- Mike McGee
12:00	Lunch
1:00 PM	Intergovernmental Cooperation -- Mike McGee
2:00 PM	Financing Municipal Improvements -- Joel Piell
3:00 PM	Drafting the Ordinance -- George Davis
4:00 PM	Immunity and other defenses -- Rich Polling
5 - 6 PM	Networking refreshments

Thursday, November 6, 2003 Agenda

9:00 AM	Charters -- Dan Matson
10:00 AM	Open Meetings -- Don Schmidt
11:00 AM	Special Assessments and User Charges -- Amanda Van Dusen
12:00	Lunch
1:00 PM	Real Property Tax -- Robert F. Rhoades
2:00 PM	Ordinance Prosecutions -- Eric Williams
3:00 PM	Annexation -- William Beach
4:00 PM	Adjournment

For more information see *http://www.mml.org/legal/mama.htm*, *http://www.mml.org/legal/mama.htm*

Federal Court Decisions of Interest

By Daniel Dalton, Tomkiw Dalton, PLC

Supreme Court: Punitive Damages Must be Reasonable

The United States Supreme Court has now spoken clearly: The Constitutional Right of Due Process in the Fourteenth Amendment will not permit runaway punitive damages. Punitive damages, unlike actual damages, are meant to punish a defendant for particularly wrongful actions and to make an example of them. Although some Justices believe the federal court should keep its hands off of punitive damages imposed by state courts relating to claims made under state law, the majority disagrees and rules that grossly excessive awards are unconstitutional.

In the cases of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) and ________________, decided in April and May 2003, respectively, the High Court ruled that state courts are not totally unrestricted in the punitive damages they may impose. Thus, in Campbell, where the compensatory damages for economic and emotional harm totaled about $1 million, it was way out of proportion for the court to impose punitive damages of $145 million. Similarly, in the Ford case, the victims of a rollover accident and roof collapse of a Ford Bronco who were awarded $4.5 million in compensatory damages were not entitled to a punitive damages award of $290 million – regardless of how dangerous or reprehensible Ford's conduct may have been in knowingly producing the defectively designed Bronco as alleged.

While the Court would not specify a ratio between actual damages and punitive damages that would necessarily fall within acceptable constitutional bounds, it noted that a 4-to-1 ratio often seems to be the maximum that would be permitted. The Court recognized that some cases may involve small or difficult to prove actual damages but still warrant a significant financial punishment. In such a case, a larger ratio may be permissible. A ratio of more than 10-to-1 would ordinarily be grossly excessive and beyond the constitutional limits. The Court also noted that other cases may involve very high actual damages and, in such cases, the limits of Due Process may mean that the lawful ratio is significantly smaller than 4-to-1, even 1-to-1 may be the limit in some cases. Ratios of 145-to-1 and 64-to-1 applicable to the Campbell and Ford cases were clearly excessive and not permissible under the Due Process Clause, and the cases were remanded for a significant reduction.

Binding Arbitration for Statutory Claims: a New Requirement

On July 25, 2003, the Sixth Circuit Court of Appeals, covering Michigan, Ohio and other states, further refined the requirements that must be met in order to force employees to submit statutory claims, such as under Title VII, to an arbitration process rather than suing in court. *McMullen v. Meijer, Inc.*, __ F.3d __, (6th Cir. 2003). The latest restriction: the employer cannot have control over the selection of the arbitration panel pool. According to the Court, such control unacceptably undermines the neutrality of the arbitral forum.

Ryan's Family Steakhouse was the defendant in the primary state and federal cases that previously set forth requirements for arbitration of state or federal statutory claims. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000); *Rembert v. Ryan's Family Steak Houses, Inc.,* 235 Mich. App. 118 (1999). In *Rembert*, a special panel of the Michigan Court of Appeals found that statutory claims could be required to be arbitrated, but imposed several fairness safeguards and noted that charges could still be filed with state agencies responsible for enforcing statutory rights. Similarly, in *Floss*, the Sixth Circuit reviewed the fairness of the procedures and rules necessary if an arbitration forum was to be imposed on a claimant.

The *Floss* decision noted some concern that the employer, Ryan's Family Steak Houses, used a third party, EDSI, to determine the arbitration pool from which the parties would choose the arbitration panel. Even if there was no direct financial relationship between the employer and EDSI, the court was concerned whether EDSI would be biased because it had a pecuniary interest in retaining the arbitration service contract with the employer. In *McMullen*, the Court found that the bias that was a potential problem in *Floss*, was much more clear in Meijer's arbitration policy: Meijer itself had exclusive control over the pool of potential arbitrators. Therefore, even though Meijer's arbitration process had numerous safeguards to protect fairness, the process inherently lacked neutrality because Meijer controlled the individuals who were on the panel. The Court noted that this control was particularly problematic because "Meijer could easily have adopted a procedure in which an unbiased third-party, such as AAA or FMCS, selected the pool of potential arbitrators." Finding that neutrality was compromised, the Court declined to require McMullen to arbitrate her federal discrimination claim.

It did not matter to the *McMullen* Court that there was no evidence that the arbitrator chosen was biased – it was the selection process that undermined neutrality and was, therefore, fundamentally unfair. Employers that have carefully crafted arbitration procedures to meet the detailed requirements of *Rembert* may find that they have not sufficiently satisfied the most fundamental factor of all: neutrality.

Court Rules that Implied Covenant of Good Faith and Fair Dealing Not Recognized in Michigan

In a seemingly insignificant paragraph contained in a fairly lengthy opinion primarily deciding about other issues, the Michigan Court of Appeals, in a published and binding case, has ruled that "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing." *Belle Isle Grill Corp. v. City of Detroit*, __ Mich. App. __, 2003 WL 21012705 (2003). In the case, Belle Isle Grill was to operate at the Lakeside Refreshment Stand. However, Detroit Police often eliminated access to the stand by rerouting people whenever overcrowding on Belle Isle became a problem. This action, not surprisingly, hurt the new business, and the Grill operated

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Desert Palace, Inc. v Costa

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that the supervisors believed the plaintiff lacked an analytical mind, initiative or ability because of his race – such would have had to be inferred by the factfinder. The Court then said: "the need to draw such inferences prevents these remarks from constituting direct evidence of discrimination" and then went on to decide the case using *McDonnell Douglas.*

In *Johnson*, the plaintiff was successful in providing enough evidence of pretext and discrimination to avoid summary disposition and dismissal of his claim. Claims that job performance and store performance were the reasons for the actions taken against the plaintiff were largely disproved, based on Kroger's less harsh treatment of Caucasian employees.

Under the rationale in *Costa*, however, the plaintiff in *Johnson* may have rightfully had a different and lighter burden of proof. The *McDonnell Douglas* model forced Johnson to prove that the job and store performance reasons articulated by Kroger were pretextual and not the true reason for his discharge. However, if the plaintiff provided enough *circumstantial and/or direct* evidence to permit an inference of discriminatory motivation, as occurred in *Costa*, the burden of proof should have been entirely lifted from the plaintiff with respect to the lawful reasons that Kroger asserted as motivations for the discharge. Such matters would have been deferred until the damages phase – at which time Kroger would have had the opportunity to avoid having to pay damages by proving that the performance issues would have resulted in the discharge even if no race animus existed. It is a difficult standard for an employer to meet because it is ultimately a hypothetical question: "assuming no racial animus existed … what would have happened?"

Several courts have asserted that the *McDonnell Douglas* formulation is for the pre-trial motion stage and has no proper application at the trial stage. See, *Sanghvi v. City of Claremont,* 328 F.3d 532, 539-41 (9th Cir. 2003) (citing cases from other Circuits). The Supreme Court itself has provided language that has been relied upon by lower courts. See, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). According to such courts, once the employer has articulated a lawful basis for the challenged decision, any presumption of discriminatory motive is lifted and the plaintiff must actually prove discriminatory intent, just as is required in a direct evidence case. *Sanghvi, supra*. Accordingly, at a trial, the formalism of *McDonnell Douglas* may appear to fade.

The Sixth Circuit, on July 29, 2003, determined that *McDonnell Douglas* still has vitality at trial and that, while it may not necessarily be required, giving a clear instruction concerning the burdens of *McDonnell Douglas* is ordinarily permissible and often beneficial. *Brown v. Packaging Corp. of America*, __ F.3d __, 2003 WL 21738975 (6th Cir. 2003). The decision provides a detailed analysis of using *McDonnell Douglas* at trial in deciding not to reverse a judgment where the trial judge gave a *McDonnell Douglas* instruction. Judge Nelson was outvoted when it came to the section of his opinion suggesting that it is normally inappropriate for the jury to be instructed on the *McDonnell Douglas* analysis. Judge Clay, joined by Judge Haynes, wrote a concurring opinion that was the opinion of the Court as to whether the *McDonnell Douglas* instruction is appropriately given to the jury: they voted "yes" and criticized decisions from other circuits that opined that the instruction would be confusing to a jury and should ordinarily not be given.

The notion of treating the trial stage as being different from the summary judgment stage in discrimination cases may lead some to believe that *Costa*, a case about jury instructions and mixed motive analysis, has no application in the summary judgment context and does not affect *McDonnell Douglas*. The *Brown* case is particularly notable – as the portions of the opinion that constituted the decision of the Court never mention *Costa.*

The Court in *Brown* rejected the plaintiff's contention that he had produced "direct" evidence of discrimination on the basis of age. However, evidence in the case included testimony that the area manager told the plaintiff that he was not getting a promised promotion because the company vice-president "wanted younger people." The Court characterized this testimony as "circumstantial" because the area manager had no role in the decision and gave no basis for his alleged insight into the vice-president's thought processes. Nevertheless, Judge Nelson's opinion, which was the Court's decision on the issue, did not expressly conclude that the lack of "direct" evidence, as defined by the Court, meant that the plaintiff was stuck with using *McDonnell Douglas*. Rather, Judge Nelson viewed the *McDonnell Douglas* jury instruction as having been harmless, regardless of whether it should have been given, because the instructions, taken as a whole, told the jury to decide whether the evidence proved discrimination based on age.

In *Costa,* throughout the oral argument in front of the Supreme Court, it was recognized by the justices and the attorneys that almost all cases will involve "mixed motives" – with the claimant claiming a discriminatory motive and the employer claiming a lawful, non-discriminatory motive. It is the rare case where the employer falls on the sword and fails to articulate or present proofs about a lawful motivation.

Consequently, the question will almost always become whether, as in *Costa*, enough circumstantial and direct evidence has been provided to *permit* an inference of discriminatory motive. If so, then it is possible that unlike many cases in the past that were analyzed using the *McDonnell Douglas* framework, future cases, including those presently pending, will not require a plaintiff to disprove the employer's articulated lawful motivation if enough evidence, direct *and/or* circumstantial, is presented to permit (not require) an inference of discriminatory motive. Pretext and other issues relating to the employer's asserted lawful reason for an adverse action will be issues to be decided at the damages phase, with the employer having the burden of proof.

Previously, the "direct" evidence rule provided a fairly bright line indicating when *McDonnell Douglas's* framework had to be used. Now, it appears under *Costa* that a much less precise situation may now apply for discrimination cases. How much evidence is enough to *permit* inferring discrimination – triggering the mixed motive analysis and proofs? It may not be possible to rule that, as a matter of law, discriminatory motivation was "demonstrated," establishing unlawful discrimination, triggering the mixed-motive analysis and placing the burden on the defendant/employer to avoid damages from being awarded.

Consequently, because of *Costa's* rejection of the requirement for "direct evidence," it may be that defendants will have to assume that they have a burden of proving that there was a lawful motivation *and* that such motivation would have resulted in the same challenged employment decision regardless of the presence of discriminatory bias. But, in the absence of a Court ruling finding "direct" evidence was presented showing discrimination was involved, plaintiffs will also likely have to assume that they must prove the employer's asserted lawful explanation is actually a pretext for discrimination. That is, at least until future court decisions sort out the full importance and impact of the Supreme Court's *Costa* decision.

Odd Laws and Other Strange Happenings in the Legal World

Murder = Penalty for Adultery

An alleged Texas murderous may get only 2 to 10 years if found guilty. A wife who learned about her husband having an affair allegedly ran him down with her Mercedes, over and over. The defense claims that it was an accident, but also may seek to claim her actions were aroused by a sudden passion. If so, the applicable sentence is just 2 to 10 years. Until the 1970s, however, Texas law would have permitted the jury to acquit her entirely, as it excused murder when a person kills in fit of angry passion after catching his/her spouse cheating. Source: Reuters News Service (Jan '03).

Police Told to Ignore Burglar Alarms

At the request of Police Chief William Bratton, Los Angeles has settled on a new way of handling alarms from automated systems that are not verified as genuine by a homeowner or security company: *ignore them* unless someone can prove that there is a genuine emergency. Previously, police were required to respond within an hour, but Chief Bratton said that 92 percent of the alarms are false -- wasting time and money in a city struggling with gang violence, a spike in violent crime, and a shortage of officers. Source: Reuters News Service (Jan '03).

United Way – Funnel Money to Horses

In the largest theft from a United Way affiliate, a Michigan woman, VP of finance for Capital Area United Way, forged checks to herself amounting to about $1.9 million dollars – over a seven year period. Apparently, much of the money was deposited in an account to buy and care for over 60 horses the woman owned – at least one of which cost her $45,000. She pled guilty to two felony counts and faces a prison sentence of up to 10 years. Source: Lansing State Journal (Feb '03).

County Embroiled in Legal Battle Over Ability to Make Budget Cuts

When Branch County Commissioners instituted budget cuts that included laying off a worker in the Register of Deeds office and making other cuts in that office, chaos resulted. The elected Register of Deeds, who has held the position for nearly 30 years, in defiance of the County, called the laid off employee back to work, even though no such recall had been authorized by the County. The County Administrator and 3 county sheriffs forcibly entered the locked Register of Deeds office and removed the laid-off employee. The Register of Deeds then filed suit in federal court accusing several county officials of refusing to fund her office at a state-mandated level, usurping her authority as an elected official, and conducting an unreasonable search and seizure of her office. Source: Battle Creek Enquirer (Feb '03).

Flying American Flag Can Result in a Ticket for Disturbing the Peace

A Chesterfield Township resident spent $4,000 on a 12 x 18 foot American Flag and a 50 foot flagpole on his residential property. He was given a ticket for disturbing the peace. Apparently, when it is windy the flag flaps vigorously, making a popcorn-like sound. The fine, yet to be imposed by the court, will be a maximum of $500. The resident was nearly given a ticket last year, but changed the flag from nylon to polyester to help deaden the sound. It did not work well enough for neighbors, resulting in the ticket being issued. Source: The Detroit News (Feb '03).

Schools Continue to Guess (Wrong) About What Religious Speech Can/Can't Be Allowed

On St. Patrick's Day, a federal court in Massachusetts ruled that a school district violated the civil rights of students when it prohibited them handing out Christmas candy canes that had prayer messages attached. The school's position – incorrect – was that the only permissible message would have had to be somewhat secular, such as "happy holidays." The Court, however, ruled that the concern over state-sponsored religion and school-sponsored religious speech was limited to actions by the school, not independent actions taken by students. It did not matter that the message may be offensive to some other students. The students had a constitutional right to freedom of religious speech which was abridged by the school's prohibition. Source: Reuters (Mar '03).

New Defense to Murder?

In Texas, a jury acquitted a man accused of first degree murder. The defendant claimed that he was threatened by the victim because the defendant closely resembled Lance Bass of the band 'N Sync, and the victim had said he would mess up the defendant's face. The two had a fight, then the defendant obtained a gun. The two confronted each other again, and the defendant claimed he fired his gun when he believed the victim had a knife and was raising his arm to do him harm. The prosecutor failed to persuade the jury that the defendant obtained the gun following the fight in order to kill the victim in cold blood. Source: Reuters (March '03).

IRS: Getting to the Illegal Income

Remember Al Capone? He was foiled when federal authorities went after him for tax illegalities: he had not reported all his so-called "income." A Michigan Circuit Court Judge in Grand Rapids recently sentenced a man who admitted to dealing about 4 ounces of marijuana a week for a 6-month period. The man was given probation, a $20,000 fine, *and* an order that he was to declare the illegal income made in 2002 to the IRS. Such an order is unheard of in state court and normally does not occur in federal court unless a financial/tax related charge was included in the prosecution of the case. If the man does not report the approximately $9,000 in drug income from 2002, he will be subject to jail time. Source: Grand Rapids Press (March '03).

Mark Your Calendar!

Events of Interest to Local Government Attorneys

Please submit your additions and corrections to Peter A. Letzmann at *letzmann@voyager.net* or 231 526-7629

Reccurring meeting: **PCLS Council** generally meets on the First Saturday of the month in the Lansing area.

2003

Sept. 11-12 — **SBM** Annual Meeting, Lansing Center, Lansing. The State Bar of Michigan's 68th Annual Meeting will be a shorter and leaner event. The Board of Commissioners, the Representative Assembly and Section business meetings and programs will continue.

Sept. 17 — **MAMA / MML** Annual Convention, Renaissance Marriott, Detroit. This one-day program and business meeting will include electronic discovery, enforcing civil infractions (including injunctive remedies), business meeting and election of officers. [website *mml.org* for information and registration]

Oct. 12 - 15 — **IMLA** (International Municipal Attorneys) Annual Conference, Hilton Minneapolis and Towers Minneapolis, Minnesota. [website, *imla.org* conference page]

Oct. 23-26 — **ABA Section of State and Local Government** Fall Section Meeting and Seminar Albany, New York. 20-year anniversary of the *Monell* decision focused on municipal liability under 42 U.S.C. Section 1983 and First Amendment issues, land use, and public finance.

Nov. 5 & 6 — **MAMA** Local Government Law and Practice in Michigan, version 2003, Kellogg Center, East Lansing. This will be a two-day review of many of the basic topics confronted the Michigan legal practitioner from assessments to zoning. New topics for this year include prosecuting the local ordinance, charter revision and amendments, risk management and insurance, with update of municipal financing, public employee relations and others. [website *mml.org* for more information and registration]

2004

Winter 2004 — **MAMA** Electronic Research for Local Government Attorneys, Wayne State Law School

Jan. 27-30 — **MTA Attorneys**, Lansing Center Lansing

Winter 2004 — **PCLS** Winter Meeting TBA

Feb. 4-10 — **ABA** Midyear Meeting, San Antonio, TX

March 23 — **MAMA** Winter Educational Conference, Lansing Center, Lansing. Day prior to MML Legislative Conference

April 25-27 — **IMLA** Mid-Year Seminar, Omni Shoreham Hotel, Washington, D.C.

June 25-26 — **PCLS / MAMA** 6th Annual Joint Summer Educational Conference, Grand Hotel, Mackinac Island

August 5-10 — **ABA** Annual Meeting, Atlanta, GA

Fall 2004 — **SBM** Annual Meeting, Lansing Center, Lansing, Date TBD

Sept. 29 - Oct. 2 — **MAMA / MML** Annual Convention, Grand Hotel, Mackinac Island

Oct. 3 - 6 — **IMLA** Annual Conference, San Antonio, Texas

2005

Jan. 25-28 — **MTA Attorneys**, Detroit Marriott Renaissance Center

Feb. 9 - 15 — **ABA** Midyear Meeting, Salt Lake City, UT

March 22 — **MAMA** Winter Educational Conference, Lansing Center, Lansing. Day prior to MML Legislative Conference

June 25-26 — **PCLS / MAMA** 7th Annual Joint Summer Educational Conference, Grand Hotel, Mackinac Island

August 4 - 9 — **ABA** Annual Meeting, Chicago, IL

Sept. 27 - 30 — **MAMA / MML** Annual Meeting, Amway Grand Hotel, Grand Rapids

Sept. 26 - 29 — **IMLA** Savannah GA, - Hyatt & Marriott

2006

Feb. 1 - 7 — **ABA** Midyear Meeting, New Orleans, LA

Aug. 3-8 — **ABA** Annual Meeting, Honolulu, HI

Sept.17-20 — **IMLA** Portland OR

2007

Feb. 7 - 13 — **ABA** Midyear Meeting, Miami, FL

Aug. 9 - 14 — **ABA** Annual Meeting, San Francisco, CA

2008

Feb. 6 - 12 — **ABA** Midyear Meeting, Los Angeles, CA

Fall 2008 — **MAMA / MML** Annual Convention, Grand Hotel, Mackinac Island

Aug. 7 - 12 — **ABA** Annual Meeting, New York, NY

Important Dates for Municipal Attorneys and MAMA Annual Meeting Agenda

September 8, 2003 PAAM 0.08 Drunk Driving Workshop, Augusta [near Battle Creek].
See information at *http://www.paamtrafficsafety.com/Seminars/upcoming.htm*

September 12, 2003 PAAM 0.08 Drunk Driving Workshop, Novi.
See information at *http://www.paamtrafficsafety.com/Seminars/upcoming.htm*

September, 17, 2003 [one day only] MAMA Annual Meeting Detroit
See agenda below and registration information at *http://www.mml.org/legal/mama.htm*

October 12 - 15, 2003 [four days] IMLA Annual Conference, Minneapolis, MN.
See registration information at *http://www.imla.org/conference/index.html*

November 5 & 6, 2003 [two days] MAMA Local Government Law and Practice in Michigan, Kellogg Center, East Lansing.
See registration information at *http://www.mml.org/legal/mama.htm*

January 9, 2004 [one day only] MAMA Hands-on Electronic Legal Research, Wayne State University Law School.
See registration information at *http://www.mml.org/legal/mama.htm*

March 23, 2004 [one day] MAMA Winter Educational Conference, Lansing, Center, Lansing.
http://www.mml.org/legal/mama.htm

MAMA ANNUAL MEETING AGENDA

8:30 AM Coffee, tea and light breakfast
9:00 AM Opening - John (Jack) Beras, City Attorney Southfield;
Welcome to Detroit, City of Detroit Corporation Counsel's office.
9:15 AM Legislative update / News from Lansing - Michael L. Brady, MML Director, State and Federal Affairs
9:45 AM Electronic Discover, Patrick L. Rose, Attorney Lansing.
10:30 AM Networking Break
10:45 AM Fighting blight, the ordinance, the enforcement, and the trials -
Terry Tobias, Scott Smith and Suanne Watt of Law, Weathers, Grand Rapids
11:30 AM Business Meeting and Election - MAMA President John Beras
12:00 Lunch and luncheon speech: "Land Use: It's Really About Water:"
The Impact of the Michigan Land Use Leadership Council, its Work and its Report,
Barb Arrigo, Editorial Writer, Detroit Free Press
1:30 PM Prosecuting the Civil Infraction and using injunctions
Clyde J. Robinson, City Attorney, Battle Creek.
2:15 PM Networking Break
2:30 PM Electronic Research for Malpractice: New Legal Technology; Web Sites and Links, Compare the Legal Research Services
[Westlaw, Nexus, Lois, Etc] Carol A. Parker, Neff Law Library, Wayne State University
3:00 PM Cracker barrel, bring your opinions of interest, successes, failures and questions, including the new 0.08 Drunk Driving law.
3:30 PM Adjournment

Following adjournment, Mike Josephson will present his Government Ethics Program. Michael S Josephson is a graduate of UCLA and UCLA law school, Mr. Josephson was a law professor, including Wayne State University School of Law, with an academic career spanning almost 20 years. During that period he was founder and chief executive of a publishing company and a national chain of bar exam preparation courses. (Josephson's Bar Review Course here in Michigan._ In 1985 he sold these businesses, left academia, and devoted himself to the Institute, which is governed by a distinguished, independent Board of Governors. Mr. Josephson receives no salary or other financial remuneration for his Institute-related work.

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for only about 3 months before closing in September 1997. One of the twenty counts in the subsequent lawsuit alleged that the City's allegedly unfair treatment of the Grill constituted a breach of an "implied covenant of good faith and fair dealing."

Previously, Michigan courts, and federal courts interpreting Michigan law, have recognized a potential action based upon an implied covenant of good faith. Michigan courts will recognize an action for breach of an implied covenant of good faith and fair dealing where "a party to a contract makes the manner of its performance a matter of its own discretion." *ParaData Computer Networks, Inc. v. Telebit Corp.,* 830 F. Supp. 1001, 1005 (E.D. Mich. 1993), citing, *Burkhardt v. City National Bank of Detroit,* 57 Mich. App. 649, 652 (1975); *Stephenson v. Allstate Ins. Co.*, 141 F.Supp.2d 784, 790 (E.D. Mich. 2001). Whether the blanket ruling in *Belle Isle Grill* eliminates the cause of action entirely is not yet clear.

In prior decisions, Michigan courts have carved out exceptions to the implied covenant of good faith. For example, Michigan courts have previously recognized that because employment is presumed to be "at will" and, therefore, terminable for any reason or no reason, there could be no implied covenant of good faith and fair dealing in that context. *Barber v. SMH, Inc.*, 202 Mich. App 366, 372 (1993). Further, Michigan courts have said that "the implied covenant of good faith cannot override an express provision in a contract." *Eastway & Blevins Agency v Citizens Ins. Co of America*, 206 Mich. App 299, 303 (1994).

In making the blanket ruling in *Belle Isle Grill* that Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing, the Court cited cases stating that there was no independent *tort* action. *Ulrich v. Federal Land Bank of St. Paul*, 192 Mich. App. 194, 197 (1991). However, Belle Isle Grill had merely asserted that a covenant of good faith and fair dealing is implied into every contract and claimed that such covenant was breached. They never contended that there was an independent *tort* claim – and the decision in the case does not characterize it as a tort claim.

Because the decision was primarily about other issues, the *Belle Isle* case may not have the potentially far-reaching effect of eliminating the cause of action for a breach of an implied covenant of good faith and fair dealing. However, businesses and municipalities should take notice of the decision and recognize that it may affect their legal rights and exposure to liability.

State Bar of Michigan

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