

STATE OF MICHIGAN
IN THE SUPREME COURT

JOSEPH LASH,

Plaintiff-Appellee,

v

CITY OF TRAVERSE CITY,

Defendant-Appellant,
_____ /

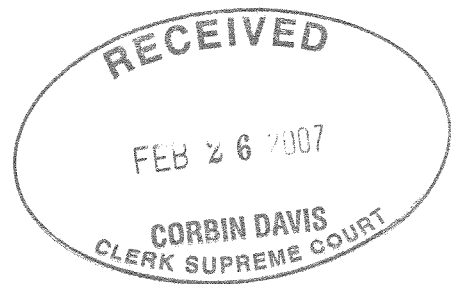
Supreme Court No. 131632

Court of Appeals No. 263873

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

CITY OF TRAVERSE CITY'S REPLY BRIEF

PROOF OF SERVICE



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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	i
ARGUMENT.....	3
A. LASH’S ARGUMENTS FAIL TO TAKE INTO ACCOUNT THE AMBIGUITY IN MCL 15.602.....	3
B. LASH’S ARGUMENTS OFFER NO BASIS FOR INFERRING A PRIVATE CAUSE OF ACTION FOR MONEY DAMAGES FROM THE LANGUAGE OR PURPOSE OF MCL 15.602.....	6
RELIEF	8

INDEX OF AUTHORITIES

Page

MICHIGAN CASES

<i>Bell v League Life Ins Co,</i> 149 Mich App 481; 387 NW2d 154 (1986).....	6, 7
<i>DiBenedetto v West Shore Hospital,</i> 461 Mich 394; 605 NW2d 300 (2000).....	6
<i>Farm Bureau Mutual Ins Co v Nikkel,</i> 460 Mich 558; 596 NW2d 915 (1999).....	3
<i>Grand Traverse County v Michigan,</i> 450 Mich 457; 538 NW2d 1 (1995).....	6
<i>Klapp v United Ins Group Agency, Inc,</i> 468 Mich 459; 663 NW2d 447 (2003).....	3
<i>Long v Chelsea Comm Hospital,</i> 219 Mich App 578; 577 NW2d 157 (1996).....	6, 7
<i>Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd,</i> 472 Mich 479; 697 NW2d 871 (2005).....	6
<i>People v Peals,</i> 476 Mich 636; 720 NW2d 196 (2006).....	4
<i>Shinholster v Annapolis Hospital,</i> 471 Mich 540; 685 NW2d 275 (2004).....	3
<i>White v Chrysler Corp,</i> 421 Mich 192; 364 NW2d 619 (1985).....	6

FEDERAL CASES

<i>Green v Victor Talking Machine Co,</i> 15 F2d 869 (DC NY, 1926)	5
<i>Jennings v Menaugh,</i> 118 F 612 (CC Ind, 1902).....	5

OUT-OF-STATE CASES

<i>Khaaliq v Pennsylvania State University,</i> 2002 WL 1042349 (DC Pa, 2002).....	5
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STATUTES

MCL 15.602 3, 5, 6, 7

MCL 15.602(1) 3, 5

MCL 15.602(2) 4, 5

ARGUMENT

A. LASH'S ARGUMENTS FAIL TO TAKE INTO ACCOUNT THE AMBIGUITY IN MCL 15.602.

Lash argues that MCL 15.602 cannot be used to deny him employment because the plain meaning of the word “miles” does not specify road or radial miles. (Brief of Plaintiff-Appellee Lash, pp 12-15). Lash insists that interpreting the statute to permit a measurement by road miles amounts to impermissibly adding language to the provision. *Id.* But Lash’s argument fails to take into account that the word “miles” tells only the length of the measurement; it does not specify what is to be measured. Thus, the statutory text is ambiguous. A provision of the law is ambiguous if it ‘irreconcilably conflicts’ with another vision....” *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999). See also *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003). A phrase is also ambiguous if, when read in context, the provision is equally susceptible to more than a single meaning. *Farm Bureau, supra, Shinholster v Annapolis Hospital*, 471 Mich 540, 549; 685 NW2d 275 (2004).

MCL 15.602 provides:

(1) Except as provided in subsection (2), a public employer shall not require, by collective bargaining agreement or otherwise, that a person reside within a specified geographic area or within a specified distance or travel time from his or her place of employment as a condition of employment or promotion by the public employer.

(2) Subsection (1) does not prohibit a public employer from requiring, by collective bargaining agreement or otherwise, that a person reside within a specified distance from the nearest boundary of the public employer. However, the specified distance shall be 20 miles or another specified distance greater than 20 miles.

The statute bars provisions in public employment agreements to limit residency requirements or travel time as a condition of employment. MCL 15.602(1). At the same time, it allows a public employer to require “that a person reside within a specified distance from the nearest boundary

of the public employer.” MCL 15.602(2). The statute specifies that the distance “shall be twenty miles or another specified distance greater than twenty miles.” *Id.*

Lash argues that this language means that the mile measurement must be applied to radial lines, rather than road lines. (Brief of Plaintiff-Appellee Lash, pp 12-15). But nothing in the text of the statute so states. The statute is silent. Lash insists that the definition of a mile indicates that it means “a measure of distance equal to 5,280 feet.” (Brief of Plaintiff-Appellee Lash, p 13). But this definitional approach misses a key point: a mile is a unit of measurement. The definition explains the length of the measurement. But it does not tell what is to be measured. The “what” must be determined by examining the word “mile” in context to see what is measured. Lash insists that what is measured is a radial line. But the City argued below, and maintains here, that what is measured is the distance by road miles from the edge of the City to the house.

This Court has taught that when a word in a statute may have more than one plausible meaning, it will look to the purpose of the statute to determine the legislative understanding of the word. See e.g., *People v Peals*, 476 Mich 636, 641-644; 720 NW2d 196 (2006) (“[b]ecause both these meanings are plausible given the use of ‘may’ in the statute, we are required to make a determination as to which meaning is most representative of the Legislature’s intent”).

Given this ambiguity, the trial court properly read the language in light of its purpose to uphold the City of Traverse City’s policy of measuring the distance by using road miles. If a citizen measures the miles from one place (the city) to another place (the potential employee’s house), using Mapquest or many other computer search machines, the miles will be calculated by taking the nearest, ordinary route from one place to another. See e.g., <http://www.mapquest.com>. This supports the City’s contention that, consistent with the common

ordinary understanding of a measurement of miles, the Court should read MCL 15.602 to apply the word “miles” to measure the distance by the ordinary, usual, and shortest route of public travel. See e.g., *Khaaliq v Pennsylvania State University*, 2002 WL 1042349 (DC Pa, 2002) (district court used Yahoo! Driving Directions, an internet-based map service, to calculate distances relevant to the 100-mile rule). See also, *Jennings v Menaugh*, 118 F 612 (CC Ind, 1902); *Green v Victor Talking Machine Co*, 15 F2d 869 (DC NY, 1926).

Lash insists that the City’s view of the statute impermissibly conflates the notion of distance with the notion of travel time. (Brief of Plaintiff-Appellee Lash, p 14). But this assertion is incorrect. The City offers no reading, which requires estimating or determining the time it would take to travel from one place to another. To the contrary, the City’s understanding of MCL 15.602 is entirely consistent with the legislative directive. Public employers are not to require their employees to live within a certain distance or travel time. MCL 15.602(1). This provision eliminates both distance and time provisions relating to residency. MCL 15.602(1).

The exception then specifies that a public employer is not prohibited from requiring an employee to live within a specified distance, if it is no more than twenty miles from the nearest boundary. MCL 15.602(2). Nothing in the City’s requirement defines a residency requirement in terms of travel time. To the contrary, the City’s ordinance offers a directive to measure the distance by using the twenty-mile limit as applied to roads. This reading effectuates the legislative purpose in a manner that is consistent with the common understanding of how to measure distance. The trial court correctly concluded that the City’s requirement was valid, and the Court of Appeals erred in reversing the trial court and holding that the City’s requirement is invalid. That ruling should be reversed by this Court.

B. LASH’S ARGUMENTS OFFER NO BASIS FOR INFERRING A PRIVATE CAUSE OF ACTION FOR MONEY DAMAGES FROM THE LANGUAGE OR PURPOSE OF MCL 15.602

This Court has consistently sought to apply the language of statutes, as written.

DiBenedetto v West Shore Hospital, 461 Mich 394, 402; 605 NW2d 300 (2000). Michigan courts have been increasingly reluctant to create a private right of action for money damages absent clear indicia of a legislative intent to do so. See e.g., *White v Chrysler Corp*, 421 Mich 192, 199-206; 364 NW2d 619 (1985) (Michigan Occupational Safety and Health Act does not create tort liability); *Grand Traverse County v Michigan*, 450 Mich 457; 538 NW2d 1 (1995) (no private cause of action for money damages exists against the state for failure to comply with statute requiring appropriation for court operational expenses). This reluctance reflects the Court’s respect for the Legislature, its effort to maintain the separation of powers, and its desire to avoid making policy decisions.

Lash argues that MCL 15.602 provides “no provision to enforce the duties it imposed”. (Brief of Plaintiff-Appellee Lash, p 16). Lash then insists that the Court of Appeals correctly concluded that a private cause of action could be inferred because of the absence of a legislatively-prescribed remedy. *Id.* In support of the Court of Appeals decision, Lash points to two intermediate appellate court decisions, *Long v Chelsea Comm Hospital*, 219 Mich App 578, 583; 577 NW2d 157 (1996) and *Bell v League Life Ins Co*, 149 Mich App 481, 482-483; 387 NW2d 154 (1986), neither of which held that a private cause of action should be inferred. In *Long*, the Court of Appeals articulated the traditional test for evaluating the existence of a private right of action in the absence of statutory language creating one. 219 Mich App at 583. But *Long* was decided before this Court discussed the analytical framework as refined under federal law in *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd*, 472 Mich 479; 697 NW2d 871 (2005). And, in applying the test, the *Long* court refused to infer a

private right of action because it would frustrate the legislative purpose, which was not to create a money damages remedy but to protect peer review processes by granting immunity to protect participants. *Id.* at 582-584. Similarly, the *Bell* court did not conclude that the Legislature had intended to imply the creation of a private cause of action. There, the legislature had created a comprehensive scheme, which did not provide for a money damages private right of action. Thus, neither *Long* nor *Bell* provides support for the Court of Appeals decision in this case.

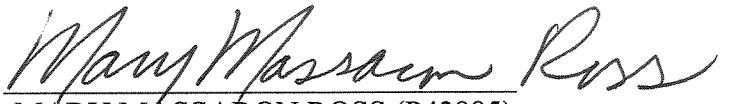
Lash recognizes the force of the City's contention that equitable and declaratory relief is available. (Brief of Plaintiff-Appellee Lash, pp 17-18). But Lash contends that if this approach were to be adopted, "no one would have the wherewithal to pursue the 'remedies'". *Id.* This assertion is not based on any record evidence and is inconsistent with the fact that many public employees are part of collective bargaining units, which can be expected to litigate and negotiate regarding employment questions of this nature on their behalf. The Legislature recognized this union context in specifically referencing collective bargaining agreements in the provision. MCL 15.602. Lash is also wrong to suggest that the remedies to be obtained "would often be meaningless." (Brief of Plaintiff-Appellee Lash, p 18). The remedies available from equitable or declaratory relief would ensure that public employees could not be terminated for failing to live within an appropriate distance. And they would also allow for a determination that an individual cannot be excluded from consideration for a position based on an invalid distance requirement. The focus is on ensuring that public employees can retain or obtain jobs without being required to reside within a municipality. It was not, and should not be, on providing a new cause of action for money damages, a remedy that has a deleterious effect on the public fisc and fails to further the legislative purpose.

RELIEF

WHEREFORE, Defendant-Appellant, the City of Traverse City, by and through its attorneys, Plunkett & Cooney, P.C., respectfully requests that this Court reverse the Court of Appeals and grant summary disposition in its favor, or grant the City such other relief as is proper in law and equity.

Respectfully submitted,

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