STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM Q. TINGLEY, III, WILLIAM Q. TINGLEY, and DANIEL R. BRADLEY, Plaintiffs-Appellants, and PROTO-CAM, INC., BEND TOOLING, INC., and TENNINE CORPORATION, Plaintiffs, v 900 MONROE L.L.C., ROBERT F. WARDROP II, WILLIAM H. FISHER III, TODD R. DICKINSON, WARDROP & WARDROP, P.C., DICKINSON WRIGHT, PLLC, FISHER & DICKINSON, P.C., 940 MONROE L.L.C., PIONEER INCORPORATED, CITY OF GRAND RAPIDS, JOHN H. LOGIE, DYKEMA EXCAVATORS, INC., and FIFTH THIRD BANCORP, Defendants-Appellees.	FOR PUBLICATION February 22, 2007 9:10 a.m. No. 243171 Kent Circuit Court LC No. 02-0037230NZ ON REMAND Official Reported Version

Before: Meter, P.J., and Wilder and Borrello, JJ.

BORRELLO, J. (*dissenting*).

The majority's opinion accurately encapsulates the facts surrounding this case and the order of our Supreme Court for remand. However, because I disagree with the majority's assertion that the existence of "a particularized injury" has not been met as that term has been defined in our Supreme Court's opinion in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), I respectfully dissent.[1]

[1] The conclusions of the lead opinion are somewhat difficult to ascertain as the lead opinion stated that the "plaintiffs did not allege or make any showing that defendants' actions resulted in (continued…)

In *Nat'l Wildlife, supra*, Justice Markman, writing for the majority, espoused a concern that, irrespective of legislative intent, the judiciary, in each case presented to it, must retain judicial requirements for standing. Couched in the concept of "judicial power," Justice Markman opined that while the Legislature may grant standing to individuals to bring actions under the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*., the judiciary retains the authority to decide whether the individual or individuals who fostered the action meet the tests for judicial standing set forth in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). Justice Markman's insistence that litigants satisfy the judicial test for standing was grounded, in part, on his concerns that

> [i]f the Legislature were permitted at its discretion to confer jurisdiction upon this Court unmoored from any genuine case or controversy, this Court would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch. If there is dispute over the manner in which the Governor is enforcing or administering a law, such dispute, in the normal course, must be resolved through the executive process. If there are citizens who believe the Governor is wrongfully or inadequately enforcing or administering the state's consumer protection or occupational safety or worker's compensation or revenue laws, it is their right to petition or lobby the Governor in order to alter these policies. It is also the right of such citizens to petition or lobby the Legislature in order to cause them to alter these laws. Finally, of course, it is the right of citizens to participate in the channels of public debate, and in the political processes, in order to influence public policies, or to place in public office persons who are more accommodating to their points of view. Unless there is an individual who has personally been injured by the Governor's enforcement or administration of these laws, it is not normally the role of the judicial branch to monitor the work of the executive and determine whether it is carrying out its responsibilities in an acceptable fashion. That the Legislature—perhaps even with the acquiescence of the executive—has purported to impose this role upon the judicial branch does not alter this constitutional reality. [*Nat'l Wildlife, supra* at 622-623.]

A common theme throughout Justice Markman's opinion is the concern that courts may only decide cases where there is an actual controversy, which begins by finding that an individual or groups have suffered an "injury in fact."

In this case, plaintiffs seek relief through their first amended complaint for violations of the environmental response act (ERA), MCL 324.20101 *et seq.*, and the hazardous waste management act (HWMA), MCL 324.11101 *et seq.*[2] MCL 324.11151(1) provides:

(…continued)

actual, particularized injury to them," while in the next paragraph concluding that "[v]iewing this allegation in a light most favorable to plaintiffs, it states a particularized injury. . . ." *Ante* at ___.

[2] Plaintiffs also raise myriad other issues in their 44-page first amended complaint. However, for purposes of this appeal, we are limited to a discussion regarding plaintiffs' claims arising from MCL 324.20101 (ERA) and more specifically, MCL 324.11101 (HWMA).

> If the department finds that a person is in violation of a permit, license, rule promulgated under this part, or requirement of this part including a corrective action requirement of this part, the department may issue an order requiring the person to comply with the permit, license, rule, or requirement of this part including a corrective action requirement of this part. *The attorney general or a person may commence a civil action against a person***,** the department, or a health department certified under section 11145 for appropriate relief, including injunctive relief for a violation of this part including a corrective action requirement of this part, or a rule promulgated under this part. An action under this subsection may be brought in the circuit court for the county of Ingham or for the county in which the defendant is located, resides, or is doing business. The court has jurisdiction to restrain the violation and to require compliance. In addition to any other relief granted under this subsection, the court may impose a civil fine of not more than $25,000.00 for each instance of violation and, if the violation is continuous, for each day of continued noncompliance. A fine collected under this subsection shall be deposited in the general fund of the state. [Emphasis added.]

Thus, the Legislature conferred on individuals the right to commence an action pursuant to the HWMA. However, Justice Markman's opinion makes clear that our inquiry into whether a party has standing does not end with a legislative grant of standing. According to Justice Markman, to allow the Legislature to dictate standing to the courts would be tantamount to a relinquishment of this Court's constitutional authority to exercise its "judicial powers." As his majority opinion noted,

> we agree with the United States Supreme Court in *Lujan v Defenders of Wildlife*, 504 US 555, 578; 111 S Ct 2130; 119 L Ed 2d 351 (1992), which, although holding, as *Lee* does, that standing is of constitutional dimension, proceeds to observe that "[n]othing in this contradicts the principle that 'the . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" This is affirmed in the concurring opinion of Justice Kennedy, joined by Justice Souter, in which they similarly observe, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and we do not read the Court's opinion to suggest a contrary view." [*Nat'l Wildlife*, *supra* at 612 n 4 (citations omitted).]

In this case, it is my opinion that the Legislature has created a cause of action premised on a violation of the HWMA. In order to discern whether a particularized injury has occurred, another issue alluded to, but not directly addressed in *Nat'l Wildlife*, needs to be addressed. That is: Can the Legislature create a particularized injury without interfering with the constitutional mandate of the court to exercise its judicial authority to make a determination of standing? Because I would hold that when the Legislature exercises its traditional role of creating causes of action, it can at the same time announce a particularized injury without interfering with the court's traditional role of ascertaining standing, I would affirm the decision of the trial court.

Initial inquiry into whether plaintiffs have suffered an actual injury is when the concepts of judicial activism and judicial restraint, discussed in the majority and dissenting opinions in

Nat'l Wildlife, come to the forefront. Where the Legislature has opened the courthouse doors, the courts should be constrained in their use of the standing doctrine to swing that door shut. We need to emphasize that a court's inquiry into standing occurs before any discovery and perhaps even before the filing of any statements or affidavits. Accordingly, deference to the plaintiff must be given when courts initiate inquiry into whether a particularized injury has occurred, lest they overstep their judicial power and begin to legislate what types of actions will or will not curry favor from our Court. Hence, applying these principles to the action before us, I would find that plaintiffs have standing to bring this action.

For Justice Markman, it is readily apparent that the commencement of an "environmental" action does not divest the court of its constitutional obligation to engage in an initial inquiry to discern whether a party has standing. I concur. However, I also glean from the dissents of Justices Weaver and Kelly in *Nat'l Wildlife* that all citizens are *potentially* injured by violations of our state's laws enacted to protect our shared environment. I share the dissenting justices' assertion of the heightened potential for injury in actions commenced pursuant to the environmental protection laws of this state, while at the same time recognizing Justice Markman's requirement that the injury must be particularized and concrete.

With these concepts in mind, I would hold that adoption of MCL 324.11101 creates a particularized injury when the HWMA is violated. Contrary to our traditional concepts of "injury," which are embedded in an economic, social, or physical loss, a particularized injury can arise, as it does in this case, from a violation of a statute. The fact that the injury is specially laid out by the Legislature does not eliminate, nor does it interfere with, this Court's judicial authority to determine standing. The statute confers on any person the status of an enforcer of the act. Thus, the injury being the violation of the act, any person, such as plaintiffs, may bring a civil action for enforcement of the act.

Next, the lead opinion contends that even assuming plaintiffs have made a showing of a particularized injury, they have failed to demonstrate that those injuries would be redressed by a favorable decision. Absent an ability to foretell the future, it is difficult, if not impossible, for courts to engage in any analysis regarding the likely outcome of a case premised solely on the pleadings. Accordingly, I would hold that the requirement that plaintiffs must demonstrate that their allegations will be "redressed by a favorable decision" requires this Court to find merely that plaintiffs have set forth in their pleadings sufficient facts to support the elements of their specific cause of action. In this case, plaintiffs set forth numerous facts that give rise to an inference of fact that defendants violated the HWMA. Accordingly, I would remand the matter to the trial court and allow plaintiffs to proceed with their claims that were the subject of this appeal.

/s/ Stephen L. Borrello