STATE OF MICHIGAN

COURT OF APPEALS

OSHTEMO CHARTER TOWNSHIP,

Plaintiff-Appellee/Cross-Appellant,

v

KALAMAZOO COUNTY ROAD COMMISSION,

Defendant-Appellant/Cross-Appellee,

and

ALAMO TOWNSHIP and KALAMAZOO CHARTER TOWNSHIP,

Defendants-Appellees.

FOR PUBLICATION
April 29, 2010

No. 292980
Kalamazoo Circuit Court
LC No. 2009-000307-CZ

Before: METER, P.J., and ZAHRA and DONOFRIO, JJ.

METER, P.J. (*concurring*)

While I concur in the majority's analysis concerning the doctrine of scrivener's error as applied to this case, I write separately to express my opinion that the same result may be obtained using the typical principles of statutory construction as set forth in Michigan case law.

At issue here was the trial court's issuance of a preliminary injunction. A trial court must consider the following four factors when deciding whether to issue a preliminary injunction:

> (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. [*Thermatool Corp v Borzym*, 227 Mich App at 366, 376; 575 NW2d 334 (1998).]

The decision of the court "must not be arbitrary and must be based on the facts of the particular case." *Id.*

This appeal centers on whether the court correctly evaluated plaintiff's likelihood of prevailing on the merits – factor 3 from *Thermatool Corp* – and the resolution of this issue depends on whether the court correctly construed MCL 257.726(3). I find that the court did not correctly construe the statute both because of the doctrine of scrivener's error (as adequately set forth in the majority opinion and not repeated here) *and*, alternatively, because of additional principles of statutory construction that are grounded in Michigan case law.

MCL 257.726(3) provides:

> If a township has established any prohibition or limitation under subsection (1) [on the operation of trucks or other commercial vehicles] on any county primary road that an adjoining township determines diverts traffic onto a border highway or street shared by the township and the adjoining township, the adjoining township may submit a written objection to the county road commission having jurisdiction over the county primary road, along with a copy to the township that established the prohibition or limitation, on or before the later of March 1, 2009, or 60 days after the township approves the prohibition or limitation. The written objection shall explain how the prohibition or limitation diverts traffic onto the border highway or street shared by the township and the adjoining township. The county road commission shall then investigate the objection. The township and adjoining township shall cooperate with that investigation and negotiate in good faith to resolve the objection. If the objection is not resolved within 60 days after the township receives a copy of the written objection, the county road commission has the authority to, and shall, either approve or void the prohibition or limitation that is the subject of the objection within 60 days thereafter, which decision shall be final. For purposes of this subsection, "county primary road" means a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.671 to 247.675.

As noted in the majority opinion:

> The trial court based its decision that plaintiff was likely to prevail on the merits on a literal application of the language of MCL 257.726(3). The court concluded that, in accordance with the last sentence of the statute, the road commission was authorized to resolve conflicts over prohibitions or limitations placed on a street or highway designated as a "county primary road" by "1951 PA 51, MCL 247.671 to 247.675." The court then noted that the statutory provisions codified at MCL 247.671 through MCL 247.675 contain no "county primary road designation[s]" and, therefore, the three streets at issue could not be "county primary road[s]" within the meaning of MCL 247.671 to MCL 247.675. If the streets at issue were not "county primary road[s]," then the road commission lacked the authority to nullify any portion of plaintiff's Truck Route Ordinance. [See Ante at ___.]

I find that the construction afforded the last sentence of MCL 257.726(3) by the trial court violated principles of statutory construction as set forth by the law of our state.

The trial court correctly noted that clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treas*, 477 Mich 170, 174; 730 NW2d 72 (2007). However, the trial court failed to acknowledge the principle that "apparently plain statutory language can be rendered ambiguous by its interaction with other statutes." *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). Here, when MCL 257.726(3) is read in conjunction with MCL 247.671 through MCL 247.675, as referenced in MCL 257.726(3), an ambiguity arises in MCL 257.726(3).

MCL 257.726(3) applies to challenges raised to prohibitions or limitations placed on a "county primary road." "County primary road" is defined as "a highway or street designated as a county primary road pursuant to 1951 PA 51, MCL 247.6**7**1 to 247.6**7**5." (Emphasis added.) A review of MCL 247.671 to 247.675 reveals the absence of any provisions designating "a highway or street as a county primary road . . . ." The provisions governing the designation of county primary roads are instead set forth in §§ 1 through 5 of 1951 PA 51: MCL 247.6**5**1 through MCL 247.6**5**5. Thus, an ambiguity exists because the provisions referenced in MCL 257.726(3) provide no means to effectuate the text of MCL 257.726(3), whereas the provisions found in MCL 247.651 through MCL 247.655 do. Therefore, a construction of MCL 257.726(3) that substitutes "MCL 247.651" for "MCL 247.671" reflects a commonsense construction that best accomplishes the purpose of MCL 257.726(3). *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994); *Adams Outdoor Advertising, Inc v Canton Twp*, 269 Mich App 365, 371; 711 NW2d 391 (2006).

The trial court's conclusion that it had to enforce MCL 257.726(3) as written renders MCL 257.726(3) nugatory and also produces absurd consequences. As noted by the majority, a court should avoid assigning any construction to a statute that renders any part of the statute nugatory. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004). I additionally note, as I wrote in *Detroit Internat'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 674; 760 NW2d 565 (2008), that a majority of Supreme Court justices have also determined that a court should avoid interpreting a statute in a way that produces absurd consequences.

The above analysis and cited case law convinces me that vacating the preliminary injunction and remanding for further proceedings would be appropriate even if we were to refrain from relying on Justice SCALIA'S recitation of the doctrine of scrivener's error.

/s/ Patrick M. Meter