STATE OF MICHIGAN
IN THE COURT OF APPEALS

BOBBIE JO KOOMEN, PERSONAL REPRESENTATIVE FOR THE ESTATE OF ROBERT J. ROMIG, deceased and TERRY ROMIG,

Plaintiffs-Appellants,

v

BOULDER BLUFF CONDOMINIUMS, UNITS 73-123, 125-146, INC., d/b/a BOULDER BLUFF ESTATES CONDOMINIUM ASSOCIATION, Michigan Non-Profit Corporation, "BOULDER BLUFF ESTATES CONDOMINIUM ASSOCIATION", an unregistered business entity, GEROW MANAGEMENT COMPANY, INC., a Michigan Corporation,

Defendants-Appellee.
_____/

Court of Appeals No. 347653
Court of Appeals No. 384254
Lower Court No. 18-005518-NO

BRIEF OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION AND MICHIGAN DEPARTMENT OF CIVIL RIGHTS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE MICHIGAN CIVIL RIGHTS COMMISSION AND MICHIGAN DEPARTMENT OF CIVIL RIGHTS

Amici are the Michigan Civil Rights Commission (Commission) and the Michigan Department of Civil Rights (Department). The Commission and the Department file this brief on behalf of the plaintiffs to urge this Court to make clear that Article 5 of the Michigan Persons with Disabilities Civil Rights Act (PWDCRA) applies not only at the time of initial occupancy but for as long as the dwelling is "occupied" by an individual with a disability. In other words, the law provides reasonable accommodations and modifications not only to those who are disabled, but also to those who become disabled. MCL 37.1506a.

The Commission and the Department have a strong interest in this matter based upon their constitutional and statutory authority. The Civil Rights Commission is a constitutionally established body, see Mich Const 1963, art 5, § 29, and the Commission is responsible for administering the PWDCRA, see MCL 37.1601, which includes its provisions prohibiting discrimination against a person on the basis of a disability in housing, see MCL 37.1501 through 37.1507. The Department, which was established two years later, acts as the investigative arm of the Commission and is the lead agency that investigates and resolves discrimination complaints. Together, the Commission and the Department work to investigate and enforce Michigan's civil rights laws, including the PWDCRA, which serves to protect the disabled from housing discrimination, among other things. See MCL 37.1605 (complaint procedure), 37.2601(2) (powers and duties).

The Commission and the Department are committed to protecting Michigan's residents from housing discrimination based on disability and invite those who have been subject to unfair housing practices to submit complaints to the Commission for review. See https://www.michigan.gov/mdcr/0,4613,7-138-78359-396645--,00.html (last accessed January 28, 2020). Consistent with this mission, the Department of Civil Rights is responsible to the executive director of the Department and "shall be responsible for executing the policies of the [C]ommission." MCL 37.2602.

This amicus curiae brief is being filed under Michigan Court Rule 7.212(H). The Commission and the Department respectfully request that this Court hold that the reasonable accommodation and reasonable modification provisions of the PWDCRA apply not only at the time of initial occupancy but continue to apply as long as the real property is "occupied" by an individual with a disability.

INTRODUCTION

In Michigan, there are almost 1.5 million residents, including more than 100,000 veterans, who suffer from some kind of disability. Those who are disabled comprise approximately 15% of the population. And Michigan law protects them from discrimination, including discrimination in housing. The breadth of the protections of Michigan law are critical questions for not only these residents, but for all Michigan residents as the disabled are an essential part of the community.

In order to remain integrated in the community, those who are disabled rely on the ability to live in housing with other Michigan residents without obstacles or barriers. It is a basic part of fair housing. The legal standards governing an association's failure to accommodate or modify the physical layout of a property for the disabled is an issue that arises with regularity before the Civil Rights Commission and the Department of Civil Rights. In the last five years, they have addressed close to 500 such cases, averaging 100 such complaints each year.

While there is limited legal precedent addressing the proper construction of § 506a governing reasonable modifications, the decision below is an outlier that contradicts the language and structure of the Act, would frustrate its purposes, and leave the disabled without any recourse in response to association or others who might attempt to circumvent the law. The language at issue – "real estate transaction" – governs both reasonable modifications and reasonable accommodations, and the protection is clear that it prohibits the refusal to make a reasonable modification for a premises that is already "occupied" and thus is not limited to the initial sale, exchange, rental, or lease but extends to the duration of the ownership or agreement.

The trial court mistakenly ruled that such a modification is only required if the request is made at the time of the original sale, exchange, rental, or lease of the dwelling. This ruling means that if a person becomes disabled and therefore in need of an accommodation or modification at any time after taking possession of a unit, that person is not entitled to it. Nor, according to the trial court's reasoning, is a disabled person other than the individual personally making the sale, exchange, rent, or lease entitled to any disability accommodation protections under Michigan law. Most dramatically, a housing provider would become legally permitted to create barriers after the initial decision to sell, rent, or lease a property.

The trial court's error here shielded the condominium association that refused a request for a reasonable modification – the establishment of a handrail – for Robert Romig, who tragically died as a result of injuries suffered from a fall. Romig was elderly, suffering from a heart condition, and he resided in the condominium governed by the condominium association. That association repeatedly refused to allow him to install a railing on the stairs to the porch so that he could safely enter and exit his home, and Romig suffered two falls. Even after receiving medical information setting forth the need for this reasonable modification, the association nonetheless denied the request. After Romig's second severe fall, the association approved the modification – 68 days after the initial request – but it came too late. Romig never recovered from his injuries and later died.

This Court should reverse the lower court's decision and clarify Michigan law, and it should do so in a published decision.

ARGUMENT

I. Under the PWDCRA, an association has a duty to make a reasonable modification to the property for a disabled person who is occupying the premises.

This is a case of first impression in Michigan. The issue is whether a condominium association is legally required to make a reasonable modification to an existing premises for a person with a disability who is already residing in a dwelling after the dwelling has been acquired in a real estate transaction, or is only legally obligated to provide such modifications to persons with disabilities *while* they are searching for a place to reside. The law requires such a reasonable modification in connection with the sale, rental, or leasing of the property to include any reasonable changes to the property already occupied by the disabled person.

The PWDCRA, like the Michigan Civil Rights Act, is a broad, remedial statute. See *Bachman v Swan Harbour Associates,* 252 Mich App 400, 427 (2002), citing *Eide v Kelsey–Hayes,* 431 Mich 26, 36 (1988). When interpreting this statute, it is important to remember the "well-established rule that remedial statutes are to be liberally construed to suppress the evil and advance the remedy." *Id.* at 34.

The rules of statutory construction are well established. The fundamental task of statutory construction is to discover and give effect to the intent of the Legislature. The task of discerning our Legislature's intent begins by examining the language of the statute itself. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135 (1996).

Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and the court applies the statute as written. Judicial construction under such circumstances is not permitted. *Id.* Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent. *Luttrell v Dep't of Corrections,* 421 Mich 93 (1984). When construing a statute, the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp,* 439 Mich 623, 635 (1992).

In the view of the Commission and the Department, the decision below is wrong for three reasons. As an initial matter, the decision conflicts with the plain language of the Act. Moreover, the conclusion is contrary to the longstanding application of the statute by the Commission and the Department. And finally, it conflicts with federal law, which is substantially equivalent and therefore relevant.

A. The plain language of the Act makes clear that the Condominium Bluff Estates Condominium Association had an obligation to make Terry Romig a reasonable modification.

There are two statutes at issue here, one provides the definition of "real estate transaction," MCL 37.1501(d) and the other provides the protections for the disabled with respect to reasonable modifications, MCL 37.1506a(1)(a).[1] The standard at issue here governs both reasonable modifications under §(1)(a) and also reasonable accommodations under §(1)(b).

[1] The plaintiffs also advance a claim of discrimination under MCL 37.1502(1)(b), but the Commission and the Department do not address this provision as the plaintiffs should prevail in their request for reasonable modification under § 506a(1).

It is worth emphasizing that for reasonable modifications, the responsibility for the expense of the modification is borne by the person with a disability. See MCL 37.1506a(1)(a). Applying the principles of statutory construction, it is clear that the Act requires reasonable modification for a disabled person who is occupying the premises.

To begin, § 501(d) of the PWDCRA defines a "real estate transaction" to mean the "sale, exchange, rental or lease of real property or an interest therein." MCL 37.1501(d). The statute includes the clause "or an interest therein" in order to protect other family members or anyone residing in the home to receive the protections in addition to the purchaser, renter, or lessee (tenant).

Relying on this definition of "real estate transaction," the anti-discrimination provisions of § 506a are directed to the association and the landlord:

> Sec. 506a. (1) A person shall not do any of the following ***in connection with*** a real estate transaction:
>
> (a) Refuse to permit, at the expense of the person with a disability, reasonable modifications of ***existing premises occupied or to be occupied by the person with a disability*** if those modifications may be necessary to afford the person with a disability full enjoyment of the premises. In the case of a rental, the landlord may, if reasonable, make permission for a modification contingent on the renter's agreement to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. [MCL 37.1506a (emphasis added).]

By its plain reading, § 506a provides for a reasonable modification to premises already "occupied" or "to be occupied by the person with a disability." In other words, this protection contemplates that a disable person may seek a modification after taking residency to ensure that the person may fully use the premises.

And the fact that a disabled person who already lives on the premises may invoke this protection – seeking a reasonable modification – makes sense. From the experience of the Commission and the Department, it is common for a person to suffer a decline in health who may then require a modification, as Mr. Romig required here. Or after taking occupancy, the disabled resident may encounter hidden obstacles, such as barriers to essential services, like laundry facilities. Or the landlord or homeowner's association may physically alter the property after the disabled person begins to live in the residence, which create barriers. The final circumstance is the most obvious illustration of the incoherence of the lower court's analysis. In short, the trial court gives no meaning to the word "occupied," thereby negating the intent of the Legislature. Such a construction should be avoided. See *Altman,* 439 Mich at 635.

And the trial court's interpretation fails to adequately consider the context in which "real estate transaction" is introduced, with a phrase that offers the widest possible relationship to it, "in connection with." The Webster's New World Dictionary provides in one of its definitions of "connection" to include "a relationship; association; specif[ically], (a) the relation between things that depend on, involve, or follow each other; causal relationship." *Id.* (3d ed), 1987, p 295. That point captures this relationship, as the real estate transaction in which a disabled person purchases a home, as Robert Romig's former spouse did here, enables him to occupy the condominium and seek a reasonable modification when his health deteriorated and required him to have a handrailing to prevent him from falling.

The trial court's interpretation of a "real estate transaction," which restricts disability rights to the time an individual takes initial occupancy (by deed, rental, or lease agreement), fails to grapple with the context in which it appears. Thus, the court examined "transaction" without adequately addressing the obligations of the association for Romig's occupancy in "connection" with that sale.

In its January 24, 2019 order, the trial court rejected the arguments of the plaintiffs, finding that there was no connection:

> [B]ecause Terry [Romig] [Robert Romig's former wife] acquired Unit 85 on July 10, 2009, *there was no connection* between that "sale" of "real property, or an interest therein" and the circumstances in the summer of 2016 plaintiffs allege in support of their PWDCRA claims. [Opinion, dated Jan 24, 2019, p 6 (emphasis added).]

But this analysis does not employ the ordinary sense of "connection." Robert Romig would not have been living in the condominium but for the 2009 sale of the property. State differently, Mr. Romig "occupied" the premises, see § 506a(1)(a), and his occupancy "depend[ed] on," "involve[d]," and "follow[ed]", see Webster's definition of "connection," p 295, from the fact his former wife purchased the condominium years earlier.

In fact, the trial court's reliance on *Bachman* cuts against its conclusion. The court cited *Bachman,* 252 Mich App at 414, noting that the "purpose of the PWDCRA is to ensure that all persons be accorded equal opportunities to *obtain housing*." Op, p 5 (emphasis added by trial court). See also MCL 37.1102(1) ("The opportunity to obtain . . . housing . . . without discrimination because of a disability . . . is a civil right"). But *Bachman*'s analysis only supports the plaintiffs' position.

In *Bachman,* this Court was examining the obligations of the landlord for a resident who had begun living there in 1988 and made requests for reasonable modifications in 1997 in response to the landlord's sidewalk-replacement project that year. 252 Mich App at 404. This Court found that a landlord did not have an obligation to make a modification that would result in "undue hardship" on the landlord, but that the landlord did have the duty to make sure that a disabled person was otherwise able to have the "full enjoyment of the premises":

> We further conclude that when an accommodation request involves reasonable "modifications of ***existing premises occupied***," *a landlord cannot refuse to allow the modifications at the expense of the person with a disability if the modifications may be necessary to afford the tenant* ***full enjoyment of the premises*** *and the modifications do not result in an undue hardship on the landlord.* [*Id.* at 415 (emphasis added).]

If the trial court were right in its analysis, it seems that this Court may have merely observed that this modification did have any "connection" with the lease that was entered nine years earlier. The standard articulated here by this Court only confirms that – in the absence of an undue hardship – the condominium association had an obligation to allow Robert Romig to make this reasonable modification of installing the handrail.

In the end, a plain reading of § 501(d) of PWDCRA provides that the Act protects a disabled person who occupies the real property in "connection" with its initial sale or lease. The PWDCRA also protects anyone who has "an interest therein" to the real property, which includes family members or persons residing there, like Mr. Romig, for a reasonable modification, as he requested here.

This view of the PWDCRA is further bolstered by the anti-discrimination language of § 506(1)a(1), which confirms that the PWDCRA covers multifamily dwellings, post-initial possession, and extends to "existing premises *occupied or to be occupied by the person with a disability*" (emphasis added). Here, the trial court ruled that for an actionable violation to occur under the PWDCRA, the discriminatory act with respect to housing accommodation must take place at the time of the sale, exchange, rental, or lease of real property. This interpretation conflicts with a plain reading of the statute.[2]

B. The Department's application of the Act confirms this reading.

As the agency responsible for administering the Act, the Commission's construction of the statutory language at issue is entitled to respectful consideration and its view of the law should not be overruled "without cogent reasons." See *In re Rovas,* 482 Mich 90, 108 (2008). The Department supports the plaintiffs' position.

[2] It also conflicts with the evident legislative purpose. In 1991, House Bills 529 and 530 were introduced and later passed into law as 1992 PA 123. These bills were introduced to amend the Handicappers' Civil Rights Act and the Elliott-Larsen Civil Rights Act (MCL 37.2101 *et al.),* in order to comply with the language of the FHA. Thus, the House Legislative Analysis provided that a person who resides in a dwelling is entitled to an accommodation for a disability *after* it is sold or rented:

> House Bill 5029 would clarify the language of the act to prohibit discrimination in a real estate transaction against: a buyer or renter: *a person residing in or intending to reside in a dwelling* ***after*** *it is sold, rented, or made available; or any person associated with the buyer or renter*. [Emphasis added.]

(See House Legislative Analysis, HB 5029, August 8, 1991, attached as Attachment G.) Courts may examine the legislative history of an act as well as the history of the time during which the act was passed to ascertain the reason for the act. See *DeVormer v DeVormer*, 240 Mich App 601, 607 (2000).

The Department has a long experience in applying the PWDCRA in addressing complaints about the failure to make a reasonable accommodation or failing to allow a reasonable modification. The number of published decisions addressing the proper application of § 506a(1) is relatively few, as the resolutions that the Department has entered have not generally been subject to further litigation.

For reasonable accommodations, the Department has been investigating these cases and entering into settlements irrespective of whether the need for the accommodation was present at the time of the initial occupancy:

- The *Bechtel* case (MDCR Complaint No. 488353). The housing provider maintained and employed a discriminatory housing policy that imposed overly burdensome and intrusive policy governing waivers to its "no pets" rule, which had the effect of preventing individuals with disabilities from obtaining reasonable accommodations. The Department concluded that the use of this policy unlawfully denied accommodation requests of persons with disabilities, creating a pattern or practice of hostile activity toward persons with disabilities. (See Attachment A, Settlement Agreement, Sept 19, 2019.)

- *Legal Services of Eastern Michigan v Grand Oaks Apartments* (MDCR Complaint No. 457795). The apartments failed to provide designated accessible parking spaces and failed to comply with established standards for accessible parking. The MDCR issued a Charge of Discrimination, and this case settled. (See Attachment B, Settlement Agreement, April 24, 2017.)

- *Linda Weiss v Kramer Triad/Country French Estates Association* (MDCR Complaint No. 435933). Linda Weiss suffered from a disability, specifically a medical diagnosis of Multiple Chemical Sensitivities. She sought an accommodation prohibiting her homeowners' association from spraying the dry application of pesticides, herbicides, and other related chemical substances within one hundred feet of her property. This case settled after MDCR issued a Charge of Discrimination. (See Attachment C, Charge of Discrimination, Nov 26, 2014.)

- *MDCR ex rel Christine Emmick v Royalwood Cooperative Apartments,* (MDCR Complaint No. 268485). The claimant challenged the cooperative apartments' no pet policy, asking to rely on an assistance animal, i.e., a service-therapy dog, to help with her mental disability. After the apartment denied the request, the claimant filed a complaint with the Department, and the Commission found that the refusal to allow the dog to assist her violated the PWDCRA, causing the claimant to suffer severe emotional distress. The Department issued a cease and desist order. (See Attachment D, MDCR Order, Feb 2, 2004.)

In brief, the issue whether the need for accommodation was present at the time of the initial occupancy, or later, played no role in the disposition of these cases.

The Department has had the same experience with cases involving requests for reasonable modifications:

- *Ravi Kapur v Eastways Farm Homeowners Association* (MDCR Complaint No. 465735). The claimant's son became disabled after contracting muscular dystrophy, which required him to use a wheelchair for mobility. The claimant sought approval for a modification to the residence to install an elevator at the claimant's own expense. The homeowners' association refused to permit the reasonable modification. The *Kapur* case was later settled in federal court. (See Attachment E, Proposed Charge of Discrimination.)

- *Brenda McKee v SHAWL II Apartments* (MDCR Complaint No. 37700, HUD No. 051214528.) The claimant alleged that apartment complex denied a reasonable accommodation for her disability by refusing to install ADA-compliant entryways. The claimant had contended that the existing doors were dangerous because of their excessive weight, which had caused injuries to her and other residents, many of whom were elderly and required scooters, wheelchairs, walkers, and canes. The slope of the pavement leading to the main entryway was also too steep, which caused several additional injuries. The claimant requested that the apartment comply with her accommodation request and replace the front entry doors with ADA-compliant doors, and also comply with the Americans with Disabilities Act. (See Attachment F, Voluntary Compliance Agreement, Jan 21, 2015.)

For these cases as well, the issue about whether the need for the reasonable modification was present at the time of sale or lease was not controlling.

C. The analog under federal law – the Fair Housing Amendments Act – also supports the plaintiffs' conclusion.

An integral part of this case is the interrelationship of state and federal disability laws. In 1988, Congress amended the Fair Housing Amendments Act (FHAA) to prohibit discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap . . . ." 42 USC 3604(f)(2). Such discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Id*. §3604(f)(3)(B).

In order to further its objective, the FHAA provides federal funds through the Department of Housing and Urban Development to state and local governments who investigate HUD discrimination complaints. The State of Michigan (through the Commission and the Department) is a recipient of HUD funds under the Fair Housing Assistance Program. In order to qualify for these funds, the State certifies that it administers a law that provides substantive rights, procedures, remedies, and judicial review that are "substantially equivalent" to the Fair Housing Act.

Following the passage of FHAA in 1988, the PWDCRA was amended by 1992 PA 123 to add § 506a in order to comply with the language of the Federal Housing Act (FHA). In so doing, the PWDCRA continues to be "substantially equivalent" to the FHAA. See *Bachman,* 252 Mich App at 416 ("The statutory language contained in MCL 37.1506a(1)(a) and (b) of the PWDCRA parallels the language found in the FHAA, 42 USC 3604(f)(3)").

The goal of the PWDCRA and the FHAA are identical: to ameliorate the effects of a disability such that the disabled individual can use and enjoy that individual's residence as a non-disabled person could. The U.S. Department of Housing and Urban Development contracts with the Michigan Department of Civil Rights to conduct investigations on complaints filed under the FHAA. Such contracts are contingent on HUD's determination that Michigan fair housing protections are substantially equivalent to those federally. In 2019, the State collected $1,268,373 by investigating cases filed under both state and federal law.

The fact that the PWDCRA and the FHAA are "substantially equivalent" provides further support for the position of the Commission and the Department. As noted in *Bachman,* this Court may look to the federal precedent "for guidance" when examining Michigan's statutory provisions for which there is little precedence. 252 Mich App at 416–417 ("[W]e find no published Michigan cases directly on point concerning the claims raised in the present case, an abundance of federal precedent exists with respect to the Fair Housing Amendments Act (FHAA), 42 USC 3601 *et seq*., and housing discrimination. Although this Court is not compelled to follow federal precedent in interpreting Michigan law, *this Court may turn to federal precedent for guidance*.") (Emphasis added). The federal courts have also recognized that the PWDCRA and the FHAA, while not identical, contain "similar elements." *Powers v Kalamazoo Breakthrough Consumer Housing Co-op,* 2009 WL 2922309, *11 (WD Mich, Sept 9, 2009).

The FHAA was signed into law in 1988 and became effective on March 12, 1989. The Act amends Title VII of the Civil Rights Act of 1968, which prohibits discrimination on the basis of race, color, religion, sex or national origin in housing sales, rentals or financing. The FHAA extended this protection to persons with disability and families with children. This law is intended to increase housing opportunities for people with disabilities.

In examining 42 USC 3604(f)(3) of the FHAA, it is clear that the disability protections apply as long as the dwelling is occupied by an individual with a disability. See *Hollis v Chestnut Bend Homeowners Ass'n,* 760 F3d 531, 540 (CA 6, 2014) ("In addition to proving reasonableness and necessity, an FHA reasonable-accommodation or reasonable-modification plaintiff also must prove that she suffers from a disability, that she requested an accommodation or modification, *that the defendant housing provider refused to make the accommodation or to permit the modification*, and that the defendant knew or should have known of the disability at the time of the refusal.") (Emphasis added). The test defines "unlawful discrimination" to include "the refusal to approve reasonable requests that may be necessary to permit equal and full employment of the property." *Id.* It does not limit this point to the initial decision to occupy the property or the initial point in time of occupancy. The protection extends during the period of occupancy. The same standard governs here.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the Michigan Civil Rights Commission and the Michigan Department of Civil Rights request this Court to make clear that Article 5 of the PWDCRA applies as long as the dwelling is "occupied" by an individual with a disability in connection with a real estate transaction.

Respectfully submitted,

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