To: Justices and Clerk of the Michigan Supreme Court
Re: Proposed amendment to MCR 2.202(6)(a)(v)
From: Douglas Shapiro, Judge, Michigan Court of Appeals

I write to offer comments on the proposed amendment to MCR 2.202(6)(a)(v) involving interlocutory appeal of orders denying governmental immunity. I believe the rule set forth in that sub-part should be eliminated or, at minimum, amended to limit the right to automatic interlocutory appeal to those cases that do not require factual determinations. I hope my views are of help to the Court in considering the proposed amendment. Of course, these views are mine and I do not speak for the Court of Appeals or any other individual judges.

## I. THE 2002 and 2009 COURT RULE AMENDMENTS

Prior to an amendment to MCR 7.202 in 2002, there was no provision for an automatic right of appeal from trial court denials of governmental immunity.

Adoption of the 2002 amendment was opposed by the Appellate Practice Section of the State Bar. At the public hearing, the Section's representative stated, "[Y]ou'll be seeing interlocutory appeals where in fact there may be some genuine questions of fact and if there's going to be a proposal like this it really should be limited strictly to legal issues. So the appellate practice section does oppose this amendment."

Thomas Rasdale, the then-Assistant Clerk for the Court of Appeals, pointed out in his written comments that, "As I understand it, the rationale for the proposed court rule is that other jurisdictions have such a rule. However, if you investigate those other jurisdictions, you will find that [the] government defendants unlike Michigan "do not have the ability to file an application for leave to appeal." He raised the question, "Is there something about denial of summary disposition based on governmental immunity which an application for leave to appeal cannot adequately handle?" He further questioned whether "it would be fair to delay every plaintiff's case a year or more because of this automatic right of [appeal]?" (Mr. Rasdale's comment is the first in the Public Comments in response to Administrative Docket #2001-07 proposing amendment of Rule 7.202.)

At the public hearing, several individuals spoke in favor of the amendment. Bill Martin addressed suits brought by prisoners, discussing a single case in which resolution had been delayed by years primarily because the trial judge refused to issue a ruling for five years. A representative of the Department of Environmental Quality spoke about the need to have a way to fast track cases involving allegations of unconstitutional takings of property. A representative of the Michigan Association of Counties asserted that "if the defense [of governmental immunity] is kicked out at the trial level there exists no remedy except to go through the complete trial process." The representative was either unaware of the procedure by which interlocutory appeal may be sought by leave or chose not to address it.

The other speaker was Lorraine Dolan, who recommended adoption of a rule mirroring the Ohio statute governing interlocutory appeals in governmental immunity cases. Dolan worked for American Risk Pooling Consultants. She noted that of the five states in which she underwrote policies only Ohio had adopted the automatic right to interlocutory appeal by the government. The Ohio statute that Dolan referred to did not provide for interlocutory appeals by right where there were questions of fact. As explained by the Ohio Court of Appeals:

> In such appeal, the appellate court conducts a de novo review to determine if judgment should be entered for the political subdivision as a matter of law or if there remains a genuine issue of material fact requiring further development of the facts necessary to resolve the immunity issue. [*McCullough v Youngstown City Sch Dist*, 2019-Ohio-3965; 145 NE3d 996, 1003 (Ohio App, 2019) (quotation marks and citation omitted).]

The 2002 proposed amendment to MCR 7.202 was adopted with three Justices dissenting. 466 Mich xcii, xcii (2002). The only explanation given for the amended rule is provided in the staff comment, which states that "an order denying immunity to a governmental defendant . . . is provided in many jurisdictions." The sole case cited in support of this assertion is *Mitchell v Forsyth*, 472 US 511; 105 S Ct 2806; 86 L Ed 2d 411 (1985). Unfortunately, the staff comment does not contain a quote from *Mitchell* supporting its statement nor does it offer a jump cite. I have

reviewed *Mitchell* in full and find no discussion whatsoever regarding states' treatment of governmental immunity interlocutory appeals.

Instead, *Mitchell* addressed *only* interlocutory appeals from orders denying qualified immunity under 42 USC 1983. The United States Supreme Court reasoned that such appeals are proper because do not require a determination of the merits of the plaintiff's claim or involve a factual determination, but concern only whether the unconstitutionality of an action by a governmental official or employee was clearly established before the claim arose:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. [*Mitchell*, 472 US at 528.]

The 2002 amendment did not address appeals involving MCR 2.116(C)(10) or underlying questions of fact, and it was initially interpreted by the Court of Appeals to only permit automatic interlocutory appeals where there is no question of fact:

> The plain language of these court rules, interpreted in a common-sense fashion, lead us to conclude that this exception applies only to situations in which the denial of summary disposition is directly based on a finding that the moving party is not entitled to government immunity and not to a situation where, although a claim of governmental immunity has been asserted, the trial court denies a summary disposition motion because the party opposing summary disposition has stated a sufficient factual case to avoid summary disposition—in other words, as in this case, in which the motion is actually disposed of as a MCR 2.116(C)(10) motion rather than a (C)(7) motion. [*Newton v Michigan State Police*, 263 Mich App 251, 257; 688 NW2d 94 (2004).]

However, *Newton* and other cases so holding were overruled by order in *Watts v Nevils*, 477 Mich 856 (2006), which stated *without explanation* that the

right to an automatic interlocutory appeal on governmental immunity applied despite controlling questions of fact because "whether there were factual issues remaining was irrelevant."

MCR 7.202 was then amended in 2009 to make it consistent with the *Watts* order. It added language that the rule encompassed not only governmental immunity motions under MCR 2.116(C)(7) but also to "an order denying summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity." MCR 7.202(6)(a)(*v*). The staff comment does not refer to any source of the added language other than the *Watts* order.

## II. DO THE 2002 AND 2009 AMENDMENTS ADVANCE THE GOALS OF EFFICIENCY AND JUSTICE?

All rules have positive and negative consequences. In my view, the negative consequences of the 2002 and 2009 amendments far outweigh their positive ones.

Governmental defendants have always had the right to file an application for leave to appeal from a denial of summary disposition. I do not have access to the relevant statistics, but I think it is fair to presume that most applications involving clear error on issues of (C)(7) immunity that did not involve questions of fact as to matters of negligence and proximate cause were granted. I think it is also fair to presume that some applications that should have been granted were not. So the inequity under the old system was that some number of cases in which immunity did apply were not granted an interlocutory appeal. My experience on the Court leads me to the unscientific, but educated, guess that 80% of meritorious applications for interlocutory leave were granted.

Under MCR 7.202 after the 2002 and 2009 amendments, every governmental defendant is entitled to the automatic appeal on the basis of governmental immunity. This approach ensures that the 20% of cases (by my educated guess) in which leave was not granted, would have been heard on an interlocutory basis. That is a positive. However, it also assures that every plaintiff (and every non-governmental co-defendant) must wait the typical 15- 18 months from claim of appeal to resolution. According to statistics provided by the Court of Appeals clerk, in the last 20 years, our Court has heard 708 appeals of denials of governmental immunity. Of those 708, 294 were affirmed, 110 affirmed in part,

reversed in part and 304 reversed in full. We do not know how the 110 partial reversals broke down, but I think it is likely that in most of those cases denial of immunity was affirmed because if immunity was reversed, no other issue would likely have been addressed, i.e. there would be no need for an "affirmance in part." For clarity, however, let's consider only the straight affirmances and straight reversals which are approximately the same, i.e., about a 50/50 split. That means that in all cases in which the Court of Appeals affirms a denial of governmental immunity, the plaintiffs and some of the defendants will have had to wait 18 months to simply get their cases back to the trial court. And in cases where the motion for summary disposition is filed in lieu of answers to the complaint, plaintiffs must wait 18 months to even get an answer to the complaint let alone discovery and so on.

Using the aforementioned statistics, that means that the automatic right of appeal has created substantial *inefficiencies* in about 294 cases since governmental immunity was found not to apply but the parties had to wait 18 months for that resolution. By contrast, the 304 reversals did not create efficiencies in those cases because the great majority of those cases would have been granted relief on application for interlocutory appeal. Using my 80% guestimate, that means that the amended rule has created efficiencies in only about 60 cases.

In addition, the amendments to MCR 7.202 have many consequences on the parties and the posture of the case. Over time witnesses may become unavailable, discovery is stymied and the reality in civil litigation is that delay always benefits the party that holds the money, i.e., the defendant. At minimum, a defendant who is liable continues to hold, use and earn interest on the funds. More important, many plaintiffs are not wealthy and many are injured and unable to continue to work. As the months or years pass, those plaintiffs experience financial pressure to accept an insufficient settlement simply to stop their financial bleeding and to end a process that creates tension and hopelessness while their cases sit in a stack at the Court of Appeals.

It should also be noted that the rule does not bar successive motions for summary disposition by government defendants. I have personally seen cases on the Court of Claims in which denial of an initial motion based on a failure to file a

proper notice of intent or properly verify a complaint is affirmed by the Court of Appeals and remanded back to the trial court, at which time the defendant files a second motion for summary disposition this time based on a (C)(10) theory. Then if the trial judge finds there is a question of fact whether the government agent was negligent or was "the proximate cause" of injury, the government again filed an interlocutory appeal of right thereby causing another 18-month delay. I suspect, but have not documented, that there have been cases with three such appeals. Not many injured plaintiffs can withstand a three-year delay before the case even gets underway. And this does not include the time that is wasted when the defendant files an application for interlocutory appeal to the Supreme Court after losing its automatic appeal at the Court of Appeals. That adds months or more to the delay.

Another problem created, particularly by the 2009 amendment, is the reality that some Court of Appeals panels will themselves resolve questions of fact related to governmental immunity. They do not always say so explicitly, but I believe a review of cases would show that even when there is a question of fact, some panels simply adopt the defendant's version as controlling. Such an approach is the opposite of the proper (C)(10) standard in which facts and reasonable inferences are all to be viewed in the light most favorable to the non-movant.[1]

The last issue I would raise goes to judge shopping in the Court of Claims. Because Court of Claims judges now serve only two-year terms, a single appeal is likely to result in a new trial judge if the appeal is denied and the case is remanded. I am not suggesting that appeals are taken simply to replace a judge viewed as

[1] This is in part attributable to the interplay between MCR 2.116(C)(7) and (C)(10), as discussed in *Dextrom v Wexford Co*, 287 Mich App 406; 789 NW2d 211 (2010). Whether governmental immunity applies under MCR 2.116(C)(7) is a question of law for courts to decide, but sometimes that determination hinges on questions of fact typically considered under MCR 2.116(C)(10). *Id*. at 430-431. In *Dextrom*, the immunity question did not involve negligence or proximate causation, but instead the more straightforward question of whether the government was acting in a proprietary function. In attempting to resolve the tension between (C)(7) and (C)(10), *Dextrom* concluded that the trial court must hold an evidentiary hearing from which it could determine whether a question of fact existed. If none, it could render the immunity decision. But if questions of fact remained, the fact question would be submitted to the ultimate factfinder. See *id*. at 432-433. Unfortunately, panels of the Court of Appeals rarely remand for this critical step.

unfavorable. That would not make sense since the goal of the appeals is to obtain a reversal, not a remand. However, in those cases where denial is affirmed on interlocutory appeal, there is still a benefit to the defendant who by then is likely rid of the judge that denied them immunity in the trial court.

In sum, I recommend that MCR 7.202(6)(a)(5) be deleted in its entirety. If the Court does not wish to do so, then I suggest that the rule be amended to assure that where there is a question of material fact that must be decided to determine if there is immunity (e.g. negligence, proximate cause) that an interlocutory appeal is only available by leave.

Thank you for considering my views on this important issue.

Very truly yours,

Judge Douglas B. Shapiro