STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ALICE M. BROWN,

Plaintiff-Appellee,

v

CITY OF SAULT STE. MARIE, a Michigan municipal corporation, ERIC FOUNTAIN, GREG SCHMITIGAL, MIKE BREAKIE, JEFF KILLIPS and BRUCE LIPPONEN,

Defendants-Appellants. /

S. Ct. No. _____

MCOA No. 330508

L.C. No. 14-13459-NO

NOTICE OF FILING APPLICATION

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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TO: Michigan Court of Appeals Clerk
Via TrueFiling Electronic Filing

Clerk of the Court
Chippewa County Circuit Court
319 Court St.
Sault Ste. Marie, MI 49783

NOW COME Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips and Bruce Lipponen, and state that on December 1, 2016, their application for leave to appeal was filed with the Michigan Supreme Court.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Hilary A. Ballentine

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Dated: December 1, 2016

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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants seek Supreme Court review of a Court of Appeals opinion which reversed a trial court order granting summary disposition, by which the trial court resolved all claims between all the parties. This Court has jurisdiction to consider and resolve this application pursuant to MCR 7.303(B)(1) (the Supreme Court may review by appeal a case after decision by the Court of Appeals). This Court's jurisdiction has been timely and properly invoked under MCR 7.305(C)(2)(a), as evidenced by the following:

- October 20, 2016 Court of Appeals Opinion (**Exhibit A**); and
- December 1, 2016 Application for Leave to Appeal and accompanying documents (filed within the 42-day time limit of MCR 7.305(C)(2)(a)).

STATEMENT IDENTIFYING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF

Pursuant to MCR 7.305(A)(1)(a), Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips, and Bruce Lipponen ("Defendants"), state that the within Application for Leave to Appeal seeks the Court's review of the court of appeals' October 20, 2016 unpublished opinion reversing and remanding the order of the Chippewa County Circuit Court dated November 10, 2015 granting Defendants' Motion for Summary Disposition. Defendants seek a peremptory reversal of the court of appeals' opinion, and failing that, a grant of Defendants' Application for Leave to Appeal.

STATEMENT OF THE QUESTION PRESENTED

MCL 691.1404(1) requires that a plaintiff seeking to bring a claim under the highway exception must first provide notice to the governmental agency specifying, among other things, "the injury sustained." A panel of the court of appeals determined that while plaintiff's statement in her notice of "'severe and permanent injuries' may have been insufficient by itself," that insufficiency was remedied by plaintiff's reference to FOIA documents, which allegedly provided further information about the nature of plaintiff's claimed injury.

The question presented for this Court's review is:

Upon plaintiff's failure to file a timely written notice specifying the injury allegedly sustained within that notice, has plaintiff failed to set forth a prima facie claim under MCL 691.1402(1)?

Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips, and Bruce Lipponen answer "Yes."

Plaintiff-Appellee Alice M. Brown answers "No."

The Chippewa County Circuit Court did not address this question, granting summary disposition to Defendants-Appellants on the basis of other deficiencies in Plaintiff's notice.

The Michigan Court of Appeals answered "No."

INTRODUCTION AND NEED FOR SUPREME COURT REVIEW

A governmental agency in Michigan is shielded from tort liability when it is engaged in the exercise or discharge of a governmental function and its conduct does not fall within one of the statutory exceptions to immunity, MCL 691.1407(1).[1] Pursuant to the highway exception to governmental immunity found at MCL 691.1402(1), a person who sustains bodily injury or property damage "by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency".[2] Common sense compels the conclusion that, inasmuch as the legislature is not required to provide a defective highway exception to governmental immunity, it has the authority to allow such suits only upon compliance with rational limits, *Rowland v Washtenaw County Rd Commission,* 477 Mich 197; 731 NW2d 41 (2007). One such

---

[1] MCL 691.1407(1) states that:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

[2] MCL 691.1402(1), the highway exception to governmental immunity, states in pertinent part that:

> (1) Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

prerequisite of the right to sue is timely and proper notice, *id* at p 213. MCL 691.1404(1) is just such a notice statute:

> (1) As a condition to any recovery for injury sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3), shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Notice provisions like this are enacted by the legislature in order to provide the State the opportunity to timely investigate and to evaluate claims, to reduce the uncertainty of the extent of future demands, or even to force a claimant into an early choice as to how to proceed, *McCahan v Brennan,* 492 Mich 730; 822 NW2d 730 (2012).

Notice provisions require notice to a particular entity. They are viewed as a means of ensuring that notice will be provided to the proper governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified. In short, to bring a claim under MCL 691.1402(1), such as Brown purports to do here, she must first provide notice in compliance with MCL 691.1404(1). To be deemed sufficient under MCL 691.1404(1), in addition to being timely, a notice must specify the following four elements: (1) the exact location of the defect; (2) the exact nature of the defect; (3) the injury sustained; and (4) any witness known at the time of the notice. *Plunkett v Dept of Transportation,* 286 Mich App 168, 176; 779 NW2d 263 (2009). A notice need not be provided on a particular form but must be timely and recite the information required by statute. *Id.*

Over the course of its history, the Court has on numerous occasions opined and pronounced on matters of statutory construction. As a result, the State's jurisprudence is

replete with case law authority articulating the rules to be followed in applying statutes. In fact, much of the Court's jurisprudence in the area of statutory construction has evolved as part of addressing the statutes comprising Michigan's statutory governmental immunity scheme, MCL 691.1401, *et seq*. As such, it must be said that the governing law here is well established and must be applied. This is something the court of appeals declined to do. The straightforward application of fundamental principles of statutory construction to the admittedly clear and unambiguous language of MCL 691.1404(1) leads to the proper result here: a peremptory reversal of the court of appeals' October 20, 2016 opinion and, failing that, a grant of this Application for Leave to Appeal.

Amongst other things, this appeal provides the Court an opportunity to take up and to reinforce a subject of major significance of the State's jurisprudence, i.e., the manner of the enforcement of statutory notice provisions and the need for them to be interpreted and enforced as plainly written in whatever context they arise. Because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. In a trilogy of rulings starting with *Rowland v Washtenaw County Road Commission, supra,* and including*, McCahan v Brennan, supra,* and *Atkins v Suburban Mobility Authority for Regional Transportation,* 492 Mich 707; 812 NW2d 522 (2012), the Court addressed and discussed the various statutory notice provisions which are a part of Michigan's jurisprudence.

The *Rowland* court, in addition to finding that the notice provisions of MCL 691.1404(1) pass constitutional muster, also characterized the statute as "straight forward, clear, unambiguous, and not constitutionally suspect". The *Rowland* court also elaborated on the purposes of such notice provisions. Doing so, it explained that notices of intent to

sue provisions are enacted by the legislature to provide the State the opportunity to investigate and to evaluate claims, to reduce the uncertainty of the event of future demands, or even to force a claimant to an early choice as to how to proceed. So, too, the provisions requiring notice to a particular entity further ensure that notice will be provided to the proper governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified.

In particular, the court in *Rowland* took up the question of whether the provisions of MCL 691.1404(1) should be enforced as written. It held that the plain language of the statute should be so applied. In other words, a plaintiff must serve a notice detailing the injury sustained and the exact location of the highway defect on the governmental agency within 120 days of injury. The *Rowland* court's decision rested not only on the Court's engagement in the appropriate statutory analysis, but also upon the results of its search for a rational basis for the existence of MCL 691.1404(1). That rationale includes the fact that a road must be promptly repaired to prevent further injury:

> MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written… Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the name of the witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident even if there is no prejudice…

477 Mich at 219.

In sum, the *Rowland* Court instructed that statutory notice requirements, like the one at issue in this case, must be interpreted and enforced as plainly written. The legislature will waive governmental immunity in cases of personal injury or property

damage only when written notice of the claim, including a description of the injury sustained, is served on the governmental agency within 120 days. The court of appeals' Opinion here ignores and disregards that legislative directive. Such a threat to the balance of power should not be allowed and thus, the Court properly grants Defendants' requested relief.

The *McCahan* Court also reaffirmed and applied the fundamental approach articulated in *Rowland.* In particular, it spoke to the interpretation of the notice provision in the Court of Claims Act. Doing so, it made clear that the *Rowland* rationale applies to all statutory notice of filing provisions. The principle of *Rowland* is clear: when the legislature specifically qualifies the ability to bring a claim against the State or one of its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction of the notice statute, such as requiring a defendant to prove actual prejudice, is allowed.

Finally, the *Atkins* court held that, even when supplemented with presumed "institutional knowledge of the underlying facts of an injury", an improper or imprecise written notice of a claim fails to meet the statutory notice provisions of MCL 124.419. That is because statutory notice requirements must be interpreted and enforced as plainly written.

There is no excuse given by the court of appeals here, and none is available, as to why Brown was held exempt from the clear, plain, and unambiguous language of MCL 691.1404(1). In allowing Brown to proceed, the court of appeals contravened various holdings of this Court and of the court of appeals. For this additional reason, Defendants are entitled to their requested relief.

Time and time again in applying statutes, this Court has recognized and reiterated that statutory analysis must begin with the wording of the statute itself. *Robinson v City of Detroit,* 462 Mich 439; 459 NW2d 307 (2000). Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence. *Id.,* citing *University of Michigan Bd of Regents v Auditor General,* 167 Mich 444, 450; 132 NW2d 1037 (1911). In *Robinson,* the Court reiterated the principle that it could "not assume that the legislature inadvertently made use of one word or phrase instead of another", 462 Mich at 318, citing *Detroit v Redford Township,* 253 Mich 453, 456; 235 NW 217 (1931). It also emphasized that the clear language of a statute must be followed. *City of Lansing v Lansing Township,* 356 Mich 641, 649; 97 NW2d 804 (1959).

It is said that the words of a statute provide "the most reliable evidence of its intent…", *United States v Turkette,* 452 US 576, 593; 101 S Ct 2524; 69 Law Ed 2d 246 (1981); *Sun Valley Foods v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999). It is only where a statute is ambiguous that a court properly looks outside of the statute to ascertain the legislature's intent. *Turner v Auto Club Insurance Association,* 448 Mich 22, 27; 528 NW2d 681 (1985). Resolution of the precise meaning of the term "the injury sustained" as used in MCL 691.1404(1) is the key to deciding this appeal. Its meaning is readily determined by resort to these fundamental rules of statutory construction. They compel a court to be guided by the clear and plain language of the words used in a statute. The text of MCL 691.1404(1) governs the outcome here and proves the propriety of Defendants' position that Brown lacks a viable highway claim in avoidance of Defendants' governmental immunity.

MCL 691.1404(1) states in part that the "notice shall specify…the injury sustained." This word choice – including use of the word "the" is made in a statute that is straightforward, clear, unambiguous, and constitutional. Accordingly, it must be enforced as written. But, the court of appeals ignored the clear language of the MCL 691.1404(1). It condoned a whole new way of giving notice of a highway defect claim. It is one which the legislature never contemplated nor embraced when drafting and enacting MCL 691.1404(1).

Adherence to the general principles of statutory construction must persuade the Court to agree with Defendants' position. That is a primary aim of the words comprising MCL 691.1404(1) is to do no more or less than to demand that the statutory notice of intent to sue specify "the injury sustained", thereby preserving for governmental agencies the full range and scope of their immunity. At issue in this case is the mandatory language of MCL 691.1404(1) requiring that the notice of intent to file suit "shall" specify the injury sustained. Courts of this State have repeatedly recognized that the word "shall" is mandatory and imperative. The word "shall" is generally used in a statute to indicate a mandatory and imperative directive, *Costa v Community Emergency Medical Services, Inc,* 475 Mich 403; 716 NW2d 236 (2006) and *Burton v Reed City Hospital Corp,* 471 Mich 745, 752; 691 NW2d 424 (2005).

Defendants' position that "injury sustained" means "injury sustained" in MCL 691.1404(1) is the only one that furthers the legislative intent underlying the enactment of the GTLA. It alone gives meaning to the clear and plain language used in §1404(1) while satisfying fundamental rules of statutory construction. Short of explicit legislative authorization to do so, courts do not properly burden governmental agencies with

additional liability through accepting a notice less than what is precisely required by MCL 691.1404(1) requires. Stated otherwise, MCL 691.1404(1) does not recognize claims unaccompanied by a notice of intent describing "the injury sustained." To do so would be contrary to sound judicial expressions recognizing the legislature's intention to confer immunity on governmental agencies for most of the activities in which they participate. As specifically observed by the Court in *Ross v Consumers Power Company (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984), the consensus which that Court's efforts produced were not viewed as the Justices' individual respective determinations as to what would be most fair or just or the best public policy. Rather, the *Ross* decision was intended to reflect the legislature's intention concerning the nature and scope of governmental immunity, *Ross, supra,* at p 596. Brown's notice, which simply states that she "suffered severe and permanent injuries" simply does not suffice under the clear and unambiguous directives of MCL 691.1404(1).

The *Nawrocki v Macomb County Road Commission*, 463 Mich 143; 615 NW2d 702 (2000) court identified the "one basic principle" that guided its decision – that the immunity conferred upon governmental agencies is broad in scope and that the statutory exceptions thereto are to be narrowly construed. That same rationale, emphasizing the broad corporate governmental immunity and the narrowness of the statutory exception is there to must prevail here. Such an approach requires a careful reading and adherence to the language of MCL 691.1404(1). The court of appeals' contrary ruling also marks a departure from the Court's decisions in *Rowland v Washtenaw County Rd Commission*; *McCahan v Brennan*, and *Atkins v Suburban Mobility Authority for Regional Transportation*, and the principles announced therein. In light of the clear and unambiguous language of

MCL 691.1404(1), the Court properly enforces the legislative determination demanding the submission of a notice of intent which, in pertinent part, specifies the precise nature of the injury sustained – or at a minimum, something much more than the overly vague "severe and permanent injuries."

As seen above, MCL 691.1404(1) clearly and plainly directs that the notice itself "shall specify…*the* injury sustained." The notice supplied by Brown here did not satisfy this statutory requirement. There is no reading of MCL 691.1404(1) which allows for relieving Brown of the obligation of giving a notice of intent previously as required by §1404(1) by a general reference to FOIA documents. The court of appeals' October 20, 2016 opinion represents an incorrect reading of the clear and unambiguous provisions of MCL 691.1404(1), by allowing Brown to predicate her lawsuit upon a notice of intent referring to a vague description of the injury purportedly sustained as a result of Defendants' conduct, with a reference to FOIA documents to "cure" this defect. It is the source of great confusion to the Bench and Bar of this State. And it contravenes long standing and well understood principles and tenets of statutory construction, thus implicating issues of major significance to the jurisprudence of the State, and diminishing Michigan's statutory immunity theme.

It being the role of the legislature to determine when and under what terms the State may be sued, the judiciary has no authority to restrict or amend those terms. A statutory notice requirement must be interpreted and enforced as written. No judicially created saving construction is permitted to avoid a clear statutory mandate. Brown's interpretation of MCL 691.1404(1) and its acceptance by the court of appeals essentially rewrite the statutory text of MCL 691.1404(1) to provide that a notice need be neither

exact nor precise. Based on the holding of the court of appeals, an imprecise notice of intent to sue under MCL 691.1404(1) will now be permissible. No longer will a plaintiff be required to specify "the injury sustained." Rather, a plaintiff's submission will be deemed appropriate if, when considering as a whole the so-called notice affords clues as to the location of a highway defect. The court of appeals' allowance of less than exact and precise notice of the injury purportedly sustained as a result of a highway defect contravenes the clear and explicit language of MCL 691.1404(1). The notice of intent provided by Alice Brown was insufficient to meet the clear and precise mandate of MCL 691.1404(1). Further, any supplementation of the written notice of intent to sue is insufficient to assist Brown in her attempted compliance with §1404(1).

In urging the Court to grant their requested relief, Defendants likewise reference the confusion which will permeate Michigan's governmental immunity jurisprudence following the court of appeals' October 20, 2016 Opinion. It is verily said that Michigan's jurisprudence is now cluttered with inconsistent decisions. Predictability of outcome is lost and some litigants will prevail while others will lose on the same factual scenario.

The present state of the law reflects the confusion engendered by the court of appeals' skewed construction of "the injury sustained" language of MCL 691.1404(1). This can only be remedied by a ruling from this Court that, for the clear and plain language of MCL 691.1404(1), to be met, a written notice of intent to sue provided to a governmental agency must specify "the injury sustained." For that reason, the Court properly reverses the court of appeals' October 20, 2016 opinion. In sum, the undisputed facts here should have compelled the conclusion, consistent with this Court's numerous decisions construing statutory notice provisions and, more specifically, addressing the operation of MCL

691.1404(1), that Brown lacked a cognizable highway defect claim because she did not give the proper notice required under MCL 691.1404(1).

The court of appeals' holding here is also reversible on public policy grounds. The decision presents a prime example of the court of appeals' unwillingness to defer to the wisdom of the legislature for policy decisions. For reasons never explained here, the court of appeals saw fit in its October 20, 2016 opinion to ignore the legislature's use of the words "the injury sustained" in MCL 691.1404(1) and, in that manner, disregarded the legislature's careful treatment of the highway exception to immunity. The court of appeals was bound to give due deference to the mandate of MCL 691.1404(1), to wit: that the *notice* itself specify "the injury sustained." The existence or non-existence of FOIA documents, incorporated by reference in the notice, does not alter this requirement. Stated another way, the court of appeals was not free to supplant its views for those of the legislature and thereby question the wisdom of the legislation, *Oakland County Bd of County Road Commissioners v Michigan Property and Casualty Guaranty Association,* 456 Mich 590; 575 NW2d 751 (1998) and *Council of Organizations and Others for Education About Parochiad, Inc v Governor*, 455 Mich 557; 566 NW2d 208 (1997). Stated otherwise, the wisdom of legislation is a matter for the legislature and is not within the province of the courts. In recognition of this very fact that the proper reach of a court does not extend to the consideration of the wisdom of a statute, this Court in *Glancy v City of Roseville,* 457 Mich 580; 577 NW2d 897 (1998) reiterated the point in the context of interpreting Michigan's Governmental Tort Liability Act [GTLA] that the responsibility for drawing lines in a complex society, of identifying priorities, of weighing the relevant considerations, and of choosing between competing alternatives is the legislature's job, not that of the judiciary.

The court of appeals' intrusion into the legislature's analysis and rationale for the passage MCL 691.1404(1), and the ultimate disregard of the clear and plain language of MCL 691.1404(1) is improper and must not be allowed.

MCL 691.1404(1) qualifies and allows a plaintiff to bring a claim against a governmental agency only upon meeting certain procedural requirements, i.e., serving notice on the governmental agency specifying "the injury sustained[,]" among other details. Brown's interpretation, one accepted by the court of appeals, essentially re-writes the statutory command. The court of appeals posited that, as long as accompanied by other written submissions which describe the plaintiff's claimed injuries, such submissions will suffice as proper notice under §1404(1). In short, the court of appeals replaced a clear and direct statutorily required notice with one of its own making. This approach entirely subverts the statutory notice scheme adopted by the legislature and the legislative purpose underlying the notice of intent to sue.

For these reasons, peremptory reversal, or alternatively leave to appeal, is proper.

STATEMENT OF FACTS

A. Alice Brown claimed she was injured when she approached and fell into an excavation hole used to repair a frozen water main.

On May 6, 2014, crew members of the City of Sault Ste. Marie water department[3] excavated a construction hole approximately 15-20 feet wide, 20 feet long, and approximately 6 feet deep near Alice Brown's property in order to repair a frozen water main. (Fountain dep, p 28; Moreau dep, pp 23-24). The repair took place on Sova Street, a 66 foot-wide two-lane street, with 33 feet of paved road surface. (Moreau dep, pp 27-28).

The testimony is undisputed that the excavation hole was contained entirely on Sova Street and did not involve any demolition of the sidewalk. (Alice Brown dep, pp 29-30; Richard Brown dep, p 15; Fountain dep, p 27; Killips dep, pp 12-13; Breakie dep, p 17). Fountain testified that the hole was about five feet from the sidewalk. (Fountain dep, p 27). Accordingly, one could walk up and down the sidewalk without encountering the excavation hole. (R. Brown dep, p 15).

James Moreau, the City's Public Works Director, who was present on and off during this excavation and repair, explained that the City takes several safety measures prior to opening an excavation hole for a water line repair like the one on Sova Street. (Moreau dep, p 14). First, the street is closed, either by placing barricades on a major highway or signage on local streets. (*Id*., p 12). The City also positions its equipment around the excavation to form a barrier around the hole. (*Id*., p 13). Further, there is typically at least one crew member who watches the bank of the excavation hole to make sure there are no problems. (*Id*., p 14).

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[3] The individual defendants named in this lawsuit are crew members of the City of Sault Ste. Marie water department.

Consistent with this protocol, Sova Street was closed on May 6, 2014 while the repairs were taking place. There was a road closure sign right on the corner of Sova and Maple Streets. (Schmitigal dep, p 10; Fountain dep, p 27; Killips dep, pp 15-16; Road Closed Photo). Street traffic was completely blocked by the signage. (Breakie dep, pp 8-9). Cones were also placed around the hole commonly spaced 10 to 20 feet apart to allow room to move equipment between them. (Fountain dep, p 28; Moreau dep, p 31; Breakie dep, pp 16-17). In addition, equipment was strategically positioned around the hole to form a barrier around the hole. (Diagram of Sova Street Repair; Killips dep, p 7). As the diagram depicts, a backhoe was parked to the north of the hole, a pickup and steamer truck were east and northeast of the hole, and a vactor truck was on the south side of the hole. (*Id.*; Breakie dep, pp 16-17). Brown confirmed that with all these City Department of Public Works Vehicles in the roadway, the road would have been impassable for vehicles in any event. (A. Brown dep, p 36).

At approximately 11:30 a.m. that morning, Brown, "curious to see what was going on outside," approached the edge of the hole and fell in. (A. Brown dep, pp 22-24, 33).

Brown contended that, at the time of the incident, Defendants were responsible for maintaining Sova Street in reasonable repair so that the roadway was reasonably safe and convenient for public travel (**Exhibit C,** Complaint, ¶ 13).

B. Brown's notice to the City of the May 6, 2016 incident did not specify the injury she allegedly sustained.

On July 23, 2014, Brown, through her Attorney, sent a notice of intent to file a claim. Brown's attorney served the notice upon the City Clerk for the City of Sault Ste. Marie. The notice read as follows:

> This letter is sent pursuant to the relevant statutes requiring notice to a municipality of the intention to make a claim for injury and damage.
>
> My client, Alice Brown, suffered severe and permanent injuries due to the improper opening of a large, unguarded hole in the roadway and/or adjoining sidewalk by Ste. St. Marie city employees. These employees, upon information and belief, work for the Water Department.
>
> The conditions and events were, upon information and belief, witnessed by Mrs. Brown and her husband, Richard Brown, who reside at 210 Soba St., Ste. St. Marie, as well as a number of Water Department employees whose identity is revealed in the F.O.I.A. request forwarded to myself on July 9, 2014.
>
> Upon information and belief, certain fire and rescue personnel and/or police department personnel also nay have seen the conditions and witnessed the injuries suffered by Mrs. Brown.
>
> Unless adjusted prior to suit, I will initiate the appropriate litigation on behalf of Ms Brown to seek an adequate award for her injury and damage suffered in this event.

(**Exhibit B**, Notice).

Beyond indicating that Brown allegedly suffered "severe and permanent injuries," the notice failed to specify the precise injury sustained.

C. Brown sued the City of Sault Ste. Marie and the individual City Defendants under MCL 691.1402, the highway exception to governmental immunity.

Brown brought this action against the City of Sault Ste. Marie and several city employees (collectively "Defendants"), seeking to avoid governmental immunity under the highway exception. (**Exhibit C**, Complaint). Specifically, Brown claimed that Defendants owed and breached a legal duty pursuant to MCL 691.1402 to maintain the roadway in a reasonably safe condition for public travel including to pedestrians like her. (*Id.*, ¶¶ 23-24). Like the notice, the complaint failed to provide any insight into the nature of Brown's

claimed injuries. Instead, the complaint merely referenced "severe and traumatic injury[.]" (*Id*., ¶¶ 23, 27, 32).

D. Defendants sought and obtained summary disposition in the circuit court.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that Brown failed to comply with the applicable notice requirements of MCL 691.1404(1) because she, as the "injured person," did not provide written notice of the injury, and furthermore, did not specify the specific injuries sustained, as the statute requires. In addition, Defendants argued that the City was entitled to summary disposition in any event because it was engaging in a governmental function at the time of the incident (repairing a water line) and is thus immune from tort liability under the GTLA. Defendants maintained that no exceptions applied which would take this case out of immunity, where the street was undisputedly closed to public traffic and the excavation hole did not involve the sidewalk. Finally, the individual Defendants argued that they were entitled to summary disposition in their favor because they are immune under MCL 691.1407(2) as they were acting with the scope of their authority in repairing the water main and did not act with gross negligence that was "the" proximate cause of Brown's claimed damages.

The Honorable James P. Lambros of the Chippewa County Circuit Court heard oral arguments on September 28, 2015, and issued its ruling from the bench. The trial court concluded that the notice provided by Brown's attorney was insufficient/defective under MCL 691.1404(1) because it was not signed and filed by "the injured person" as the statute requires. (Tr, 9/28/15, pp 11-12). Cognizant that this was a "harsh" result, the trial court aptly noted that the notice statute requires "strict compliance." (*Id.*, p 11). A

corresponding order was entered. (**Exhibit D**, Order Granting Defendants' Motion for Summary Disposition, 11/10/15).

Brown moved for reconsideration, raising the same arguments made in response to the motion for summary disposition. After hearing from both parties, the trial court issued an order denying Brown's motion for reconsideration. (Order Denying Plaintiff's Motion for Reconsideration, 11/12/15).

E. The Court of Appeals reversed the circuit court's summary disposition order.

On October 20, 2016, the court of appeals issued its opinion reversing the circuit court's order and remanding the matter for further proceedings.

In their opinion, the panel (comprised of Judges Markey, Murphy, and Ronayne Krause) agreed with Defendants that "plaintiff's statement of 'severe and permanent injuries' may have been insufficient by itself," citing the court's acknowledgement in *McLean v Dearborn*, 302 Mich App 68, 77; 836 NW2d 916 (2013) that a plaintiff's description of sustaining "significant injuries" was not sufficient under the statute. (**Exhibit A**, Opinion, p 6). However, the court of appeals excused Brown's fatal error, choosing instead to focus on the fact that a police and ambulance report sent to Brown from the City through a FOIA request contained more detailed information about the nature of her injuries. In the court's view, the "insufficiency [in the notice] was remedied by reference to the FOIA documents." (*Id.*). The court of appeals further found that Defendants were not actually prejudiced by the deficient notice because the police report and ambulance report "were mailed by the very person that plaintiff served her notice upon…" *Id.*. Nowhere in the court of appeals' opinion was the *Rowland* decision discussed.

The court of appeals also determined that Brown's notice was not insufficient even though it was signed by her attorney and served by her attorney on the City. Over Defendants' argument, the court of appeals held that "plaintiff complied with the requirement of the statute even though the notice letter was signed by her attorney." (**Exhibit A**, Opinion, p 4). In the court of appeals' view, MCL 691.1404(1) did not require the injured person "to personally sign the notice letter[,]" even though the text of the statute provides that the "*injured person…shall serve*" the notice. (*Id*.).

With the filing of this Application for leave to appeal, Defendants urge the Court to peremptorily reverse the court of appeals October 20, 2016 opinion and, failing that, grant the relief requested in this Application for Leave to Appeal.

STANDARD OF REVIEW AND SUPPORTING AUTHORITY

An appellate court reviews a circuit court's ruling on a summary disposition motion *de novo, Groncki v Detroit Edison Co,* 453 Mich 644, 649; 567 NW2d 289 (1996); *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999); *Brown v Michigan Healthcare Corp,* 463 Mich 368, 374; 617 NW2d 301 (2000) In engaging in such review, an appellate court must study the record to determine if the movant was entitled to judgment as a matter of law, *Groncki v Detroit Edison Co, supra,* and *Adkins v Thomas Solvent Co,* 440 Mich 293, 302; 487 NW2d 715 (1992). Stated otherwise, giving the benefit of the doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

Relying upon their governmental immunity, Defendants brought their motion for summary disposition pursuant to MCR 2.116(C)(7). A motion premised on immunity is properly considered under that rule as it tests whether a claim is barred because of immunity granted by law. *Fane v Detroit Library Commission,* 465 Mich 68; 631 NW2d 678 (2001). In order to survive a motion for summary disposition based upon a governmental immunity defense, a plaintiff is bound to allege facts justifying the application of an exception to governmental immunity, *id.* An appellate court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties, and where appropriate, construes the pleadings in favor of the non-moving party. *Bryant v Oakpointe Villa Nursing Center, Inc,* 471 Mich 411; 684 NW2d 864 (2004). A motion brought pursuant to MCR 2.116(C)(7) is properly granted if no factual development could provide a basis for recovery. *Haliw v Sterling Heights,* 464 Mich 297; 627 NW2d 581 (2001).

This dispute involves the question of statutory interpretation which the Court reviews *de novo*. *People v Kolanek,* 491 Mich 382, 393; 817 NW2d 528 (2012). As observed by the Court in *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999), "[O]ur primary task in construing the statute, is to discern and give effect to the intent of the legislature." The words of the statute are the most reliable evidence of the legislature's intent and a court must give each word its plain and ordinary meaning. *Krohn v Home Owners Insurance Co,* 490 Mich 145, 156; 802 NW2d 281 (2011). In interpreting a statute, a court considers both the plain meaning of a critical word or phrase as well as its place and purpose in the statutory scheme, *Sun Valley Foods, supra,* at p 237, *citing Bailey v United States,* 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

ARGUMENT

Plaintiff's Failure To File A Timely Written Notice Specifying The Injury Allegedly Sustained Within That Notice Is A Fatal Deficiency Under MCL 691.1404(1) And Bars Plaintiff From Bringing A Claim Under The Highway Exception To Governmental Immunity, MCL 691.1402(1).

The rule of law commands that the courts of this State respect the legislative policy choices as expressed in the language of the statutes that come before them, *McCahan, supra*. However, here, it is fairly said that the court of appeals failed to carry out its duty and obligation to apply the actual words of MCL 691.1404(1). Brown should not have been permitted to proceed with her highway claim against Defendants.

The issue before the *Rowland* Court was whether the provisions of MCL 691.1404(1) should be enforced as written, and the Court concluded that they should be. Upon engaging in an analysis of the provisions of MCL 691.1404(1), to reach that result the *Rowland* Court found the existence of clear rational bases for the existence of §1404(1). One such purpose is that a highway should be promptly repaired to prevent further injury. The *Rowland* court opined that such a rational basis sufficed to sustain the constitutionality of the statute. In other words, the Court found that the notice provisions of MCL 691.1404(1) passed constitutional muster:

> MCL 691.1404(1) is straight forward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written… Thus, the statute requires notice to be given as directed, and notice is adequate if served within a 120 days and otherwise complies with the requirements of the statute, i.e., specifies the exact location and nature of the defect, the injury sustained, the name of the witnesses known at the time by the claimant, no matter how much prejudice was actually suffered…

477 Mich at 219. It being the role of the legislature to determine whether and on what terms the State may be sued, the *Rowland* court further noted that the judiciary has no

authority to restrict or to amend those terms. The *Rowland* court also instructed that such statutory notice requirements must be interpreted and enforced as written and that no judicially created exception will avoid a clear statutory mandate.

The *McCahan* court further instructed that the *Rowland* holding applies generally to all statutory notice filing provisions. The *McCahan* court also confirmed the fact that, when the legislature conditions the ability to pursue a claim against the State on a plaintiff's having provided specific statutory notice, courts may not engraft an "actual prejudice" component onto a statute before enforcing a legislative prohibition. So too, the *McCahan* court reiterated that notice provisions are enacted by the legislature in order to provide the State with an opportunity to investigate and to evaluate claims, to reduce the uncertainty of future demands, or to force a claimant into an early choice as to how to proceed. Such provisions requiring notice to a governmental entity of a claim under also MCL 691.1402 further ensure that notice will be provided to the proper governmental entity thereby protecting plaintiffs and defendants alike from having the wrong component of government notified.

As part of its discussion, the *McCahan* court found that there was nothing unique about the notice language of §1404(1) that would confine and/or limit the principles embraced in *Rowland* to the specific facts of that case or to the interpretation of that statute, alone. When the legislature specifically qualifies the ability to bring a claim against the State or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction, such as requiring a defendant to prove actual prejudice, is allowed. Controlling Michigan law prohibits the addition of an actual

prejudice requirement otherwise reducing the obligation to comply fully with statutory notice requirements.

The *Atkins* Court concluded that the statutory notice of a plaintiff's application for certain benefits, even when supplemented with a governmental agency's presumed "institutional knowledge" of the underlying facts of an injury, did not constitute written notice of a third party claim sufficient to comply with the notice provision at issue there. In reaching that result, the Court stated the obvious: statutory notice requirements must be interpreted and enforced as plainly written. Governmental agencies in Michigan are statutorily immune from tort liability but, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. The *Atkins* court also criticized the plaintiff's interpretation of MCL 124.419 as essentially amounting to a rewriting of the statutory text so as to provide that notice of any one claim, however distinct, suffices as notice of any other claim that a plaintiff may pursue even when the statute requires explicit written notice of such a claim. The *Atkins* Court went on to conclude that knowledge of the operative facts is not the equivalent to a written notice. Similarly, aggregate knowledge of operative facts is not equivalent to the written notice of a claim. Aggregate knowledge of an event, such as an accident, cannot be served on a defendant.

The *Atkins* court also accused the court of appeals there of replacing a simple and fair statutory test with one based on apparent or imputed knowledge. It said that such an approach entirely subverts the notice process instituted by the legislature when the legislative purpose behind the process is clear. The statute at issue required specific statutory notice of any claim so that a common carrier defendant does not have to

anticipate or to guess whether a claim will be filed at some point in the future. Instead it must be told of the claim within 60 days. That Court concluded its opinion by pointing out those statutory notice requirements, like the one at issue before it, must be interpreted and enforced as plainly written. The legislature has determined that it will waive governmental immunity in cases of personal injury or property damage that occur in connection with common carrier passengers for hire only when written notice of the claim is served on the transportation authority within 60 days. The *Atkins* opinion enforced that legislative determination.

The result which Defendants urge here is one giving plain meaning to the words used by the legislature in MCL 691.1404(1). As observed by the *McCahan* court, this is not strict enforcement of the notice provision but is the course any court must follow. The court must give a reasonable interpretation to the language that the legislature passed and that the governor signed into law. There is nothing "strict", as opposed to reasonable, for a court to require that the notice "shall specify…the injury sustained." The rule of law demands that the courts of this State must respect the legislative policy as expressed in the statutes that come before them. Here, because Brown did not comply with the plain language of MCL 691.1404(1), she should be precluded from maintaining her highway claim against Defendants.

Likewise, Brown does not advance her position by relying upon a reference to FOIA documents purportedly in the City's possession. There is no language in MCL 691.1404(1) which allows for or contemplates the submission of materials other than a "notice," or reference to other outside materials (whether in Defendant's possession or not) as sufficient to comply with the notice's requirements. The contents of that notice are set

forth in the statute, to wit: 1) a specification of the exact location, 2) a specification of the nature of the defect, 3) a specification of the injury sustained, and 4) the names of witnesses known at the time by the claimant. There is nothing that allows other documents to satisfy the requisite notice contents.

The court of appeals read Brown's notice as a "whole" in order to reach its result. Yet, a proper reading of the clear and unambiguous provisions of MCL 691.1404(1) does not allow for that conclusion. Brown argued that her Notice of Intent substantially complied with MCL 691.1404(1), especially when taking into account the whole situation, including the police and ambulance reports in Defendant's possession. She criticized the circuit court for compelling literal compliance with all of the stated criteria. She proposed that substantial compliance sufficed. She urged the court of appeals to take the circumstances as a whole to find that her notice reasonably apprised the City of the nature of the injury sustained (as well as the location of the defect).

In her notice, Brown did not specify the precise injury sustained. Therefore, she did not reasonably apprise the City of her claim. Brown's description of her injuries as "severe and permanent" was vague and imprecise. Even the Court of Appeals agreed with this point, acknowledging:

> Here, plaintiff's statement of "severe and permanent damages" may have been insufficient by itself…

(**Exhibit A**, Opinion, p 6). Brown did not provide any detail as to the type of the injury sustained. The description of the injury sustained cannot be satisfied by looking to other evidence submitted with a notice of intent or in the possession of Defendant. Nothing in MCL 691.1401(1) permits that. But by unjustifiably expanding the "notice" to include a reference to FOIA documents, the court of appeals read the statutory notice requirement in

such a fashion as to bring Brown's case within its operation. While acknowledging its obligation to enforce MCL 691.1404(1) as written and while conceding that the statute is clear, unambiguous and not constitutionally suspect, the court of appeals reached a result that cannot be sustained under a proper reading of § 1404(1). Specifically, the court of appeals erred by construing the "notice" under § 1303(1) to include submissions other than the written notice, to wit: FOIA documents. By so proceeding, the court of appeals thwarted the purposes and aims to be served by this notice statute, ignored the legislative intent leading to the passage of the statute, and impermissibly broadened the scope of the highway exception to immunity by allowing Brown's case to proceed when Brown's notice was clearly violative of the provisions of MCL 691.1404(1). Stated otherwise, despite the fact that all of this took place in the area of governmental immunity jurisprudence, the court of appeals ignored and overlooked the obvious and patent error in Brown's notice and improperly absolved her of the obligation to comply with the notice requirements of §1404(1). Brown's pre-suit notice did not specify "the injury sustained," thus, preventing Brown from pursuing a defective highway claim under MCL 691.1402.

This Court, having concluded that MCL 691.1404(1) is "straightforward, clear, unambiguous and not constitutionally suspect", and in mandating that a plaintiff give notice specifying "the injury sustained," the court of appeals should not have excused, but should have instead enforced as written, Brown's compliance with the provisions of MCL 691.1404(1). Peremptory reversal or leave to appeal is necessary to remedy this error.

RELIEF

WHEREFORE, Defendants-Appellants City of Sault Ste. Marie, Eric Fountain, Greg Schmitigal, Mike Breakie, Jeff Killips and Bruce Lipponen, respectfully request that Court peremptorily reverse the court of appeals' October 20, 2016 opinion reversing the circuit court's grant of summary disposition to Defendants and, failing that, grant Defendants leave to appeal, and enter any other relief which is proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Hilary A. Ballentine

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Dated: December 1, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

ALICE M. BROWN,

Plaintiff-Appellee,

v

CITY OF SAULT STE. MARIE, a Michigan municipal corporation, ERIC FOUNTAIN, GREG SCHMITIGAL, MIKE BREAKIE, JEFF KILLIPS and BRUCE LIPPONEN,

Defendants-Appellants. /

S. Ct. No. _____

MCOA No. 330508

L.C. No. 14-13459-NO

PROOF OF SERVICE

Marjorie E. Renaud, being duly sworn, deposes and says that she is an employee of the law firm of Plunkett Cooney, and that on December 1, 2016, she caused to be served a copy of an Notice of Filing Application for Leave to Appeal, Application for Leave to Appeal, and Proof of Service as follows

KIRK M. LIEBENGOOD (P28074) Attorney for Plaintiff-Appellee 717 Grand Traverse St. P O Box 1405 Flint, MI 48501	**Counsel was served via U.S. mail, with postage prepaid**

The undersigned further states that the *Notice of Filing Application* was served upon the following courts:

Clerk of the Court Chippewa County Circuit Court 319 Court St. Sault Ste. Marie, MI 49783	**The trial court was served via U.S. Mail, all postage prepaid**

Michigan Court of Appeals	**Served via Court of Appeals' TrueFiling System**

/s/Marjorie E. Renaud

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