IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

ALICE M. BROWN
Plaintiff-Appellee,

v.

CITY OF SAULT STE. MARIE, et al.,
Defendant-Appellants.

Supreme Court No. 154851

Court of Appeals No. 330508

Chippewa Circuit Court No. 14-13459-NO

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AMICUS CURIAE, CITY OF FLINT'S BRIEF IN SUPPORT OF DEFENDANT-APPELLANTS

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STATEMENT REGARDING JURISDICTION

Amicus curiae, City of Flint, agrees with the parties' statements on the basis for jurisdiction.

STATEMENT OF QUESTION PRESENTED

1) Does a plaintiff satisfy MCL §691.1404(1), which conditions waiver of governmental immunity on a notice specifying "the injury sustained," by referencing documents that more fully described the plaintiff's injuries?

   Defendant-Appellant and *Amici* answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: No.

   Court of Appeals answer: Yes.

   This Court should answer: No.

STATEMENT OF FACTS

Amicus curiae, City of Flint, adopts the statement of facts offered by Appellants, in the absence of any contrary statement of facts provided by Appellee.

I. INTRODUCTION

The question before this Court is whether the MCL §691.1404(1) requirement that a notice of claim "specify . . . the injury sustained" is satisfied by reference to external documents, not included with the notice, that describe plaintiffs' injuries. In this case, the notice provided by Appellee stated only that she "suffered severe and permanent injuries." Appellee argued, and the Court of Appeals agreed, that the notice's identification, as witnesses, of "a number of water department employees whose identity is revealed in the F.O.I.A. request forwarded to [Appellee's attorney] on July 9, 2014", was sufficient to remedy the notice's deficiency in specifying the injury, because that request also contained information about Appellee's injury.

In doing so, the Court of Appeals continued its practice of improperly expanding the highway exception, in contravention of this Court's instructions that such exceptions to governmental immunity be interpreted narrowly, in deference to the policy choices of the Legislature. The Court of Appeals also failed to consider multiple legislative purposes behind such notice requirements and thus failed to recognize how Appellee's notice frustrated those purposes. *Amicus curiae* files this brief in order to highlight how these errors, in an area of law that is of significant interest to the municipalities of this State, warrants either the summary reversal of the Court of Appeals, or the granting of leave to appeal.

II. ANALYSIS

This case involves a question of statutory interpretation. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202 (2007). When language is unambiguous, words are given their plain meaning and the statute is applied as written. *Id.* Statutory interpretation must give effect "to every phrase, clause, and word in the statute, and no word should be treated as surplusage or rendered nugatory." *Gardner v Dep't of Treasury*, 498 Mich 1, 6 (2015).

A. DESPITE THIS COURT'S INSTRUCTIONS TO THE CONTRARY, THE COURT OF APPEALS CONTINUES TO ANALYZE WHETHER A GOVERNMENTAL ENTITY HAS SUFFERED ACTUAL PREJUDICE WHEN DETERMINING THE SUFFICIENCY OF NOTICES REQUIRED BY STATUTE AS PRECONDITIONS TO QUALIFY FOR AN EXCEPTION TO GOVERNMENTAL IMMUNITY

The Michigan Legislature enacted MCL §691.1404(1) and conditioned the highway exception to governmental immunity on a claimant's notice specifying, among other things, "the injury sustained." MCL §691.1404(1). This Court has clearly established that the basic principle of governmental immunity is that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 158 (2000) (emphasis in original) (*citing Robinson v Detroit*, 462 Mich 439, 455 (2000); *Suttles v DOT*, 457 Mich 635, 641 (1998); *Horace v Pontiac*, 456 Mich 744, 749 (1998); *Wade v Dep't of Corrections*, 439 Mich 158, 166 (1992); *Reardon v Dep't of Mental Health*, 430 Mich 398, 411 (1988); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618 (1984)). As noted in *Naworcki*, this principle arises from the 1984 case of *Ross v Consumers Power Co (On Rehearing)*, where this Court, "held that the immunity conferred on governmental agencies is *broad*, with *narrowly* drawn exceptions." *Id.* at 149 (emphasis in original).

Putting this principle into practice, the *Nawrocki* Court required "strict compliance with the conditions of the statute." *Id.* at 158-59. It thus looked first to the language of the statute itself, relying on the longstanding principle that "[i]t is a fundamental principle of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Id.* (internal citation omitted). This faithful adherence to the statutory text led the *Nawrocki* court to conclude a pedestrian could bring a claim under the highway exception because that exception covered "public travel," but that a person could not bring one based on

inadequate signage, because the exception only permitted claims based on failure to repair or maintain the actual road itself. *Id.* at 172, 183-84.

This Court reiterated the importance of construing governmental immunity exceptions narrowly in *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007). There, this Court overturned, with retroactive effect, two previous cases which held that "absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception." *Id.* at 200. As this Court explained in *Rowland*, MCL §691.1404(1) lacks an "actual prejudice requirement" and it would be improper for courts to judicially create one where the Legislature declined to do so. *Id.* at 219. Instead, the Court concluded that the notice provision of MCL §691.1404(1) must be enforced as written. *Id.*

Nawrocki and *Rowland* represent this Court's direction to the lower courts regarding the proper interpretation of governmental immunity statutes. Ultimately, this Court refuses to "impose upon the people of this state [its] individual determinations of proper public policy." *Nawrocki*, 463 Mich at 150-51. Instead, the lower courts should "faithfully construe and apply those stated public policy choices made by the Legislature." *Id.* at 151.

Unfortunately, this case serves as an example of how the Court of Appeals has lacked that restraint and continues to substitute its own judgment for that of the Legislature. While the Court of Appeals did not explicitly set forth that they were using the "actual prejudice" standard rejected by this Court in *Rowland*, in practice, the Court of Appeals did exactly that. Here the Court of Appeals found that the notice was adequate because "there was no evidence or a claim made that the defendant had difficulty locating and discerning the defect in question, yet that information was not clearly contained in the notice and would have required defendant to review the FOIA documents." *Brown v City of Sault Ste Marie*, No. 330508, at 6 (Mich Ct App Oct. 20, 2016).

The lower court thus explicitly analyzed whether the City of Sault Ste Marie suffered any actual prejudice based on the inadequacies of the notice, and concluded that Sault Ste Marie did not. This analysis is only relevant if the lower court is using actual prejudice as a factor in evaluating the sufficiency of notice here. Similarly, the lower court's determination that "plaintiff's notice and referenced documents clearly afford the [city] opportunity for investigation and determination of venue" is only relevant if the actual prejudice to the City of Sault Ste Marie is relevant in assessing the sufficiency of notice. *Id.* As this Court has previously directed in *Rowland*, the statute does include an actual prejudice requirement and the lack of any such requirement represents a Legislative policy decision that the courts must respect. *Rowland*, 477 Mich at 219.

This error, by the Court of Appeals, is not unique or limited to this case. As Appellee noted in her supplemental briefing, the Court of Appeals, in *Plunkett v Department of Transportation*, had previously held that the standard by which sufficiency of a notice, regarding location and defect, is to be measured is "whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the injury." *Plunkett v DOT*, 286 Mich App 168, 177 (2009). Once again, while not explicitly identifying that it was conducting an "actual prejudice" analysis, *Plunkett's* "reasonably apprises" analysis does precisely that. This "actual prejudice-lite" analysis is particularly suspect because a brief review of the cases cited in *Plunkett* reveals that the Court of Appeals relied on outdated decisions that *broadly* construed notice provisions and which excused violations of clear and unequivocal statutory requirements. *See, e.g.*, *Kustasz v Detroit*, 28 Mich App 312, 315 (1970) (allowing claim to proceed despite the lack of a verified signature as required by statute); *Meredith v City of Melvindale*, 381 Mich 572, 579 (1969) (excusing a failure to serve notice on the persons specified by law); *Smith v City of Warren*, 11 Mich App 449, 455 (1968) (noting that undefined "substantial compliance" with notice requirements may satisfy

those requirements)[1]; *Brown v City of Owosso*, 126 Mich 91, 94-95 (1901) (excusing ambiguous statements and descriptions in a notice).

These earlier cases clearly conflict with the more recent directives of this Court. The statute requires that, as a condition to the waiver of governmental immunity, the notice describe "the injury sustained." MCL §691.1404(1). *Nawrocki* requires that this requirement be narrowly construed. *Nawrocki*, 463 Mich at 158. And *Rowland* requires that this notice requirement be enforced as written. *Rowland*, 477 Mich at 202. Applying those rules to this case, the correct analysis is thus not whether the claimant "substantially complied" with the notice requirements of MCL §691.1404(1) by "reasonably apprising" the City of Sault Ste Marie of the injury she sustained, but rather whether her notice specified the injury sustained.

Here, where the notice did not include any description of the injury beyond stating that the claimant "suffered severe and permanent injuries," the plain language requirements of MCL §691.1404(1) are not satisfied. It is ultimately irrelevant whether the City of Sault Ste Marie was "reasonably apprised" of the necessary details through extrinsic records that were not attached to the notice or even referred to in connection with the notice's injury specification statement. All that should matter is whether the statutory requirement was met. This case showcases how the Court of Appeals continues to impose an actual prejudice requirement that improperly limits MCL §691.1404(1)'s statutory notice requirements. Action by this Court is needed in order to correct this ongoing and persistent error, and summary reversal of the Court of Appeals or leave to appeal is therefore warranted.

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[1] The primary citation in the Court of Appeals decision, regarding the issue here, is to a case, *Rule v Bay City*, 12 Mich App 503, 507-08 (1968), which itself cites to *Smith v City of Warren*.

B. ALTERNATIVELY, EVEN IF THE "SUBSTANTIAL COMPLIANCE" STANDARD IS VALID, A NOTICE CANNOT SUBSTANTIALLY COMPLY WITH MCL §691.1404(1) WHERE THE NOTICE CONTRAVENES ONE OR MORE OF THE PURPOSES BEHIND THE STATUTE

In the alternative, even if the "substantial compliance" standard is valid, the Court of Appeals failed to properly apply it here because it failed to consider whether *all* of the purposes of the statute's notice requirement were furthered. When interpreting a statute, the primary goal remains giving effect to the intent of the Legislature. *Rowland*, 477 Mich at 202. This Court has identified five legislative purposes behind the MCL §691.1404(1) notice requirement:

(1) "requiring a claimant to give definite information . . . at a time when the matter is fresh";

(2) providing the governmental agency an opportunity to investigate the claim;

(3) allowing the governmental agency time to create reserves;

(4) reducing uncertainty of the extent of future demands;

(5) forcing the claimant to make an early choice regarding how to proceed.

See Rowland, 477 Mich at 211-12. Assuming *arguendo* that the "substantial compliance" standard remains valid, a notice must further the purposes of the statute, or else it cannot be said to substantially comply with the statute.

Here, the Court of Appeals considered only the "opportunity to investigate" and "venue selection" purposes. It failed to consider whether the notice had the claimant provide definite information at a time when the matter was fresh, whether the notice worked to reduce uncertainty as to the extent of future demands on the City of Sault Ste Marie, or whether the notice allowed the governmental agency time to create reserves needed to pay a potential claim. While this Court has recognized those as valid purposes behind statutory notice requirements, the lower court failed entirely to consider them.

Furthermore, by sanctioning this deficient notice, the Court of Appeals not only ignored purposes underlying statutory notice requirements, but also *frustrated* those purposes. Appellee

affirmatively denied the City of Sault Ste Marie its opportunity to receive definite information from her at the time when her recollections and information was freshest. Instead, the Court of Appeals allowed her to refuse to provide any meaningful information at all. Appellee and the Court of Appeals thus effectively shifted the burden of acquiring that information onto the City of Sault Ste Marie, and away from the Appellee.

Similarly, the notice, as provided here by the Appellee, did little to reduce any uncertainty as to the extent of future demands on the City of Sault Ste Marie. Appellee's statement that she had suffered "suffered severe and permanent injuries," provides no grounds on which the City of Sault Ste Marie could have accurately estimated any future demands or generated needed reserves. To satisfy those purposes, a claimant must provide relevant data that a governmental entity can use in order to fiscally plan for its future. To do that, the notice must include meaningful information about the nature of a claimant's injuries in order to satisfy the MCL §691.1404(1) requirement that a claimant identify the "injury sustained."

This legislatively-imposed requirement is not unwarranted or especially burdensome on a claimant, who is presumably in the best position to know what injury he or she suffered. A plain language description of the injury, describing it in common everyday language, such as, "I sprained my right ankle and was on crutches," "I broke my left arm and was in a cast," or, "I fell on my head, suffered a concussion, and had to undergo brain surgery," allows for a meaningful assessment of future claims or what reserves are warranted, in a way that stating "severe and permanent injury" does not. Furthermore, if necessary, a claimant can access and review his or her medical records, which the claimant has a well-known right to review under the Federal Health Insurance Portability and Accountability Act (HIPAA). *See* 45 CFR §164.524 (providing for the right of an individual to access his or her own medical records). A claimant can thus easily supplement his or her knowledge, as needed, in a way that a governmental entity cannot.

The Legislature has determined that, as a matter of public policy, governmental immunity is waived only on the condition that a claimant provide information that "specifies . . . the injury sustained." MCL §691.1404(1). This burden is placed, by statute, on the *claimant*, and not on the governmental entity. Any standard for "substantial compliance" with MCL §691.1404(1) must, at a minimum, include an assessment of whether the notice advances the public policy purposes of the statute, or whether those purposes are frustrated. Anything else would involve the substitution of judicial determinations for legislative enactments of public policy.

Such is the case here. Plaintiff's notice not only failed to advance the purposes behind the MCL §691.1404(1) notice requirement, but actually frustrated those purposes. The Court of Appeals, by sanctioning that notice, effectively negated the public policy determinations of the legislature and replaced those determinations with its own. As a result, summary reversal of the Court of Appeals or leave to appeal is warranted.

III. CONCLUSION

The Court of Appeals erred by ignoring this Court's instructions that exceptions to governmental immunity are to be construed narrowly and that notice requirements are to be enforced as written. Instead, it relied on a dubious "substantial compliance" standard that has no bases in the statutory text. However, even if this substantial compliance standard remains valid, the Court of Appeals failed to properly apply this standard because the notice provided here did not further, and in fact contravened, the purposes behind MCL §691.1404(1)'s notice requirement. For these reasons, this Court should grant leave to appeal or, alternatively, should summarily reverse the Court of Appeals.

Respectfully submitted,

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Dated: November 14, 2017

/s/ William Y. Kim

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