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STATE OF MICHIGAN

IN THE SUPREME COURT

SHELLY MENARD, Conservator of Ryan Menard, a minor,

Plaintiff-Appellant,

-vs-

MACOMB COUNTY DEPARTMENT OF ROADS, and MACOMB COUNTY,

Defendant-Appellee

and

TERRY R. IMIG and SHARRYL ANN EVERSON,

Defendants.

_____/

Supreme Court No. 158563

Court of Appeals No. 336220

Macomb County Circuit Court No. 14-3145-NI

PLAINTIFF-APPELLANT'S REPLY BRIEF

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The defendants have filed a response to the Ms. Menard's application for leave that is a study in avoidance. Defendants have written a 51 page response which dedicates only a few pages to the one and only issue that is before this Court. Defendants' considerable efforts to avoid discussion of the sole issue presented to this Court is perfectly understandable in light of the fact that there is so little to say to justify the Court of Appeals majority's mangled approach to the proximate cause issues presented in this case, the sole issue raised in plaintiff's application for leave.

After the circuit court's denial of their motion for summary disposition, defendants appealed to the Court of Appeals. In the brief they filed in that Court, defendants raised the following issues in the following order: (1) plaintiffs' presuit notice of intent to sue did not fully comply with MCL 691.1404; (2) the circuit court abused its discretion in allowing plaintiff to file an amended complaint; (3) plaintiff could not state a claim of road defect that fell within MCL 691.1402; and (4) in their final (and least meritorious) appellate argument, defendants contended that summary disposition should have been granted on the issue of proximate cause.

In its September 6, 2018 decision, the Court of Appeals majority slid over defendants' other arguments and moved directly to the issue of proximate cause. The majority, straining to construe the evidence presented in the light most favorable to defendants, found that defendants should have been awarded summary disposition because of a lack of evidence supporting causation on any of the theories offered by Ms. Menard. Opinion (Exhibit F), at 4-9.

The Court of Appeals majority announced that its determination with respect to proximate cause rendered a decision on the other issues that defendants had raised moot. *Id*., at 9. But, in a footnote to its decision, the majority resolved one of the other arguments that defendants raised, finding that Ms. Menard's pre-suit notice met the requirements of MCL 691.1404(3). *Id*., fn. 7.

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Ms. Menard has applied for leave to appeal in this Court on only one issue - the Court of Appeals ruling with respect to proximate cause. The defendants have largely ignored that issue and have inundated the Court with arguments that have no bearing on the application that Ms. Menard has filed. At the risk of giving defendants irrelevant arguments a gravitas that they do not deserve, plaintiff will briefly address the sundry issues that defendants have chosen to present to this Court before addressing the one and only issue that is presently before the Court.

I. "IMMUNITY" AND SUBJECT MATTER JURISDICTION

Defendants' response begins with twelve pages which they describe as a "Counter-Statement of Jurisdiction." The apparent point of this pointless discussion is that governmental immunity touches on a court's subject matter jurisdiction. Defendants assert that if governmental immunity exists, it deprives the Court of subject matter jurisdiction and, according to defendants, this immunity includes full compliance with the presuit notice that is required under MCL 691.1404.

The defendants seriously misapprehend the concept of subject matter jurisdiction. Subject matter jurisdiction "is not dependent on the particular facts of the case." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 734 (2001). Rather, jurisdiction over the subject matter "is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending . . ." *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992).

There is no question that a circuit court had the power to hear a case against an agency of a county for injuries caused by a defect in a roadway. Whether such a case falls within the exception to immunity provided in MCL 691.1402 involves a question of *immunity*, it does not involve the circuit court's subject matter jurisdiction. Similarly, whether such a case is subject to dismissal

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because of the failure to comply with a statutory pre-suit notice requirement does not implicate a court's subject matter jurisdiction.[1]

II. THE TIMELINESS OF MS. MENARD'S PRESUIT NOTICE

After wasting the first twelve pages of their response on a misguided discussion of subject matter jurisdiction, the first legal issue the defendants argue in an apparent effort to get this Court to deny leave to appeal is an issue that has *never* before been raised in this case - whether Ms. Menard's pre-suit notice was timely. This issue was not raised in defendants' motion for summary disposition and (despite the proven proclivities of defendants' appellate counsel to raise all sorts of issues that were never presented to the circuit court) this timeliness issue was not raised in the Court of Appeals either.[1]

Until defendants filed their response to Ms. Menard's application for leave, they had always contended that the controlling presuit notice provision was MCL 691.1404. Defendants now shift gears and assert for the first time that another statutory notice provision with a shorter notice period, MCL 224.21, controls.

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[1]Indeed, contrary to defendants' contention, MCL 691.1404's pre-suit notice requirement does not even touch on the issue of immunity. This Court so held in *Fairley v Dep't of Corrections*, 497 Mich 290; 871 NW2d 129 (2015), when it noted that another statutory pre-suit notice applicable to a potential suit against a governmental agency, MCL 600.6431, "does not 'confer governmental immunity,' [but] it establishes conditions precedent to avoiding the governmental immunity conferred by the GTLA." 497 Mich at 297. A close reading of MCL 691.1404 reveals that it is not an immunity provision, nor is it a necessary precondition to the *filing* of a claim against a governmental agency with jurisdiction over a road. Rather, read correctly, the first clause of MCL 691.1404 demonstrates that the presuit notice is simply a necessary precondition to the recovery of damages in such a case.

[1]Defendants' argument that Ms. Menard's presuit notice was untimely was also not raised in the defendants' affirmative defenses. For that reason alone, this argument has long ago been waived. *See* MCR .2111(F)(3).

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The Supreme Court is not the appropriate place to be raising an argument for the first time. Moreover, defendants are categorically wrong in suggesting that MCL 224.21 represents the notice provision applicable in this case.

Confusingly, there are two different pre-suit notice statutes that can come into play when a claim is based on a defect in a public road, MCL 691.1404 and MCL 224.21. MCL 691.1404, the notice provision that has heretofore been applied by the parties, is part of the Governmental Tort Liability Act (GTLA) and its coverage includes "[e]ach governmental agency having jurisdiction over a highway . . ." MCL 224.21 is more limited in scope; it pertains only to county roads.

In *Streng v Board of Mackinac Road Commissioners*, 315 Mich App 449; 890 NW2d 680 (2016), the Court of Appeals resolved the potential conflict between these two notice statutes in a case brought against a county road commission. The Court in *Streng* held that it was MCL 224.21 that would control in such an action. What was particularly important to the *Streng* Court in resolving this conflict was language contained in a provision of the GTLA, MCL 691.1402(1). That provision specifies that, "[t]he liability, procedure, and remedy as to county roads *under the jurisdiction of a county road commission* shall be as provided in section 21 of Chapter IV of 1909 PA 283, MCL 224.21." MCL 691.1402(1) (emphasis added). *See Streng,* 315 Mich App at 463. Thus, the *Streng* Court found MCL 224.21 to be the controlling statute because "[w]hile the GTLA is a statute of general governmental immunity, MCL 224.21 is the specific statute that applies to claims of liability against county road commissioners for accidents that occur on community roads." 315 Mich App at 463.

The holding in *Streng* and the language in MCL 691.1402(1) that led the *Streng* panel to that holding are important here. Unlike *Streng*, Ms. Menard's cause of action is not one that is against

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a county road commission.

In 2012, the Michigan Legislature passed a statute that allowed counties to eliminate their county road commissions, transferring their powers to the county board of commissioners. MCL 334.6(5), (7). One of the counties that elected to eliminate its county road commission was Macomb County. It was because of Macomb County's decision to eliminate its county road commission that the defendants named in this case are Macomb County and a department of the county government, the Macomb County Department of Roads.

This is, therefore, not a case that is exempted from the coverage of the GTLA on the ground that it is based on an accident occurring on a county road "under the jurisdiction of a county road commission," as provided in MCL 691.1402(1). As a result, this case is not governed by MCL 224.21's notice provision. Thus, even if the question of whether the 60-day notice provision of MCL 224.21(3) had been preserved for this Court's review, the fact is that defendants are wrong in their belated assertion that MCL 691.1404 does not apply here.

III. THE SUFFICIENCY OF PLAINTIFF'S PRE-SUIT NOTICE

In their response to Ms. Menard's application, defendants next raise an issue that they argued in both courts below - that plaintiff's pre-suit notice failed to strictly comply with the requirements of MCL 691.1404(1). But, as defendants acknowledge in their response, the Court of Appeals in its September 6, 2018 opinion decided this issue against defendants. Defs' Brf., at 14-15. And, defendants have not sought to challenge the Court of Appeals ruling against them by filing in this Court a cross-application for leave to appeal within the 28 days allowed in MCR 7.307(A). It is, therefore, difficult to see what the purpose of this argument is in the response that defendants have filed.

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IV. PLAINTIFF'S AMENDMENT OF HER COMPLAINT

The circuit court granted Ms. Menard's request to amend her complaint in what was merely a housekeeping matter. The defendants challenged this ruling in their appeal to the Court of Appeals. The panel in its September 6, 2018 decision never reached this question. For reasons that are not readily apparent, defendants in responding to Ms. Menard's application have brought this amendment issue to this Court's attention.

Because this issue was never addressed by the Court of Appeals, there is no reason for this Court to consider this issue other than recognizing that, should the Court of Appeals decision with respect to proximate cause be reversed, this matter must be remanded to the Court of Appeals for consideration of this amendment issue that the panel did not consider previously.

V. STANDARD OF REVIEW FOR IMMUNITY CASES

The defendants also expend considerable effort in an attempt to convince the Court that there is a special standard that governs consideration of summary disposition motions filed in cases involving governmental immunity. Precisely what this argument is meant to accomplish in this particular case is difficult to determine. Even if defendants were correct and questions of governmental immunity are to be subject to different standards when it comes to summary disposition, the fact is that the sole issue that is before this Court is *not* an issue of governmental immunity. Rather, the only issue that the Court must address concerns the question of proximate cause, not immunity. And there is nothing to support the view that there is a different summary disposition standard applicable to proximate cause issues presented in a negligence action even if that negligence claim is filed against a governmental entity.

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VI. PLAINTIFF'S CLAIM OF A HIGHWAY DEFECT

In the Court of Appeals, defendants argued that Ms. Menard did not state a claim that fell within the defective road exception to governmental immunity, MCL 691.1402. The Court of Appeals majority did not reach this issue. Despite that fact, defendants have included arguments on this point in their response to Ms. Menard's application for leave. Once again, there is no reason for this Court to consider this legal issue in the first instance. If the panel'ss determination with respect to causation is reversed, this matter should be remanded to the Court of Appeals to address the question of whether Ms. Menard stated a claim that is encompassed by the exception to immunity provided in MCL 691.1402, the road defect exception.

VII. CAUSATION

On page 46 of their response, defendants finally get around to addressing the reason this case is presently before this Court - Ms. Menard's challenge to the Court of Appeals majority's decision with respect to proximate cause. What is perhaps more remarkable than the fact that it takes defendants 46 pages to reach the only issue that is before this Court is what the defendants choose to discuss - and not discuss - in the limited amount of space that they have allotted to what is the only relevant issue.

The defendants use the 4-1/2 pages that they dedicate to the causation issue to discuss (yet again) the "public policy" that they see as backstopping the concept of governmental immunity. This "public policy," which in defendants' view mindlessly reduces to vigilant protection of the "public fisc," has nothing to do with the causation issues presented in this case.[2]

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[2]This unnecessary discussion of "public policy" leads defendants to meander into a further discussion of another negligence concept, duty. Def's Brf., at 47-48. Plaintiffs are willing to concede that "public policy" has some role to play in determining legal duty in a

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When the defendants finally turn to something of any relevance to the issue of proximate cause, they confine themselves to an abstract discussion of the concept of reasonable foreseeability and they tout the Court of Appeals majority's approach to this question of reasonable foreseeability as entirely consistent with this Court's jurisprudence.

This less-than-insightful discussion of foreseeability completely overlooks the fact that a substantial portion of the majority's opinion finding summary disposition appropriate in defendants' favor was *not* addressed to the causation element variously described as legal causation or proximate cause, a causation issue on which reasonable foreseeability might be relevant. Rather, the majority determined that several of Ms. Menard's theories of liability failed because she could not establish the other component of causation, cause-in-fact. The concept of reasonable foreseeability has nothing to do with the cause-in-fact component of proximate cause.

What is ultimately most striking about the response that defendants have filed is what it does *not* discuss. The defendants omit from that response *any* discussion of the relevant facts or the precise determinations that led the Court of Appeals majority to its erroneous conclusions. Thus, what this Court is now presented with is a Court of Appeals ruling on what is normally a question of fact - proximate cause - that plaintiff has challenged in her application for leave to appeal as contrary to the evidence *and the defendants have chosen to file a 51 page brief that is completely devoid of any discussion of those relevant facts*.

The approach that defendants have chosen in responding to Ms. Menard's application cannot be considered accidental. Defendants have consciously avoided any discussion of the facts relevant

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negligence case. But, the inclusion of this duty argument is absolutely mystifying here since duty is not and has never been an issue in this case.

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to the causation issues erroneously decided by the Court of Appeals majority precisely because they have no response. They do not address the majority's errors that were described in some detail in Ms. Menard's application for leave because they have nothing to rebut those arguments.

For example, one of the plaintiff's theories in this case is that the deterioration of Hipp Road contributed to this accident. The majority rejected this claim, finding no cause-in-fact relationship between the condition of the road and the accident. But, as plaintiff pointed out in her application for leave, that ruling ignores testimony and interrogatory responses provided by Terry Imig, the driver of the vehicle that struck Ryan Menard, indicating that the bad condition of the road contributed to the accidental Plaintiff's Application, at 26-28. The majority's sifting of the evidence in such a way as to ignore Imig's testimony favorable to Ms. Menard's claim was error. And, despite a 51 page brief in response to the application for leave, defendants offer nothing to contest plaintiff's argument.

The Court of Appeals also rejected another of Ms. Menard's theories of liability - that the artificial narrowing of Hipp Road contributed to this accident - on the ground that Imig had no time to react before striking Ryan Menard's bicycle. But, as plaintiff pointed out in her application, Imig testified that he had two to four seconds to react before making contact with the bicycle. Imig Dep, 2/11/15, at 61-62. In reaching the conclusion that it did, the Court of Appeals majority also completely ignored the testimony of two qualified experts who testified that the artificial narrowing of the road represented a cause in fact of the accident.

Once again, defendants elect to stand mute in response to these errors in the majority opinion addressed in Ms. Menard's application. Defendants offer nothing in response to the errors that Ms. Menard catalogued. They offer no response because there is no doubt that Imig testified the way that plaintiff explained in her application. Nor do defendants offer anything to contest that the testimony

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Imig and plaintiff's experts provided was directly at odds with the factual findings that led the majority to its erroneous opinion.

Finally, on the one theory of liability in which it found cause-in-fact, the majority discussed that claim on the basis of legal or proximate cause. According to defendants, the majority applied the "modern" foreseeability test. Def's Brf, at 46. It is questionable whether the majority's approach to the proximate cause issue represents a "test" of any sort. What the majority determined (based on considerations that it did not reveal) was that it would not be "socially or economically desirable," Opinion (Exhibit F), at 8, to impose liability based on the defendants' neglect that led Hipp Road to be in the poor condition that it was on June 7, 2013. This is not a modern or an ancient test of foreseeability. This is simply two judges on the Michigan Court of Appeals offering their own, rather lawless view of why, in their minds, plaintiff should not be allowed to pursue this case.

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