STATE OF MICHIGAN

IN THE SUPREME COURT

SHELLY MENARD *EX REL*
RYAN MENARD,

Plaintiff / Petitioner

v

TERRY R. IMIG, SHARYLL ANN EVERSON,

Defendants,

and

MACOMB COUNTY DEPARTMENT OF ROADS AND MACOMB COUNTY,

Defendants / Respondent.

SCT Docket No. 158563
COA Docket No. 336220
Circuit Court No. 14-003145-NI

MACOMB COUNTY'S SUPPLEMENTAL BRIEF AND APPENDIX

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INTRODUCTION

Macomb County, through its Department of Roads, is responsible for approximately 1,888 miles of highway, approximately 317 miles of which is gravel or unpaved. Macomb receives many notices each year asserting claims under the highway exception. Given the nature of gravel (or unpaved) roads, and despite the best efforts to maintain them, they can be and often are significantly and negatively affected by constant, changing, and ever-present traffic and weather conditions throughout the year, e.g., rain, drought, wind, and rapid temperature changes. These are environmental elements which have less or no immediate effect on paved roads. Such conditions are beyond the control of all governmental entities that have a statutory duty to keep all roads in *reasonable* repair so that they are *reasonably* safe for public travel.[1]

Governmental entities with jurisdiction over highways with gravel or other unpaved surface material can never ensure that such roads will remain in a constant state of perfect repair and therefore free from debris, berms, loose gravel, sand, dust, potholes, bumps, ruts, and other commonly experienced and transient road surface conditions attendant to constant use by motor vehicles and subject to the variations of Michigan's climate.[2] To hold such entities to an absolute legal standard requiring what is essentially perfect road conditions at all times is unreasonable, unworkable, and, as demonstrated herein, inconsistent with Michigan jurisprudence on the

[1] MCL 224.21(2). See also *Wilson v Alpena County Rd Comm'n*, 474 Mich 161, 168-169; 713 NW2d 717 (2006).

[2] *Wilson*, *supra*. Accord *Scheurman v Dep't of Transportation*,434 Mich 619, 631; 456 NW2d 66 (1990) (counties are not bound with "an unrealistic duty to ensure that travel upon the highways will always be safe.").

subject.[3] Indeed, for over a century, Michigan has recognized this practical reality and has protected governmental entities accordingly.[4]

Importantly, such protections are necessary to guarantee a minimum level of overall public safety, while at the same time guard against frivolous raids on the public treasury. "The liability of the state and county road commissions is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers."[5] As it is "a central purpose of governmental immunity…to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim based on governmental immunity", it is extremely important for this Court to maintain the Legislature's strictly construed and narrowly applied exceptions to immunity.[6] Every dollar spent litigating claims and every man-hour expended in defending them is a direct and palpable drain on the provision of services to all for the public good.[7]

Granting leave to appeal in this case to examine the Court of Appeals proper application on the *question of law*, i.e., legal or proximate cause, would not only be improvident, but it would

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[3] *Id*. See also *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912); *Palletta v Oakland County Rd Comm'n*, 491 Mich 897; 810 NW2d 383 (2012); *Hagerty v Board of Manistee County Road Commissioners,* 493 Mich 933; 825 NW2d 581 (2013).

[4] *Jones*, *supra* at 611.

[5] *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 148, n 1; 615 NW2d 702 (2000).

[6] *Mack v City of Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002).

[7] *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 410; 716 NW2d 236 (2006), citing *Mack*, *supra* at 203, n 18.

require the Court to first assess whether immunity has even been waived in this case because of Plaintiff's multiple failures to satisfy even the conditions precedent necessary to invoke the judiciary's ability to exercise jurisdiction over his claim. As thoroughly explained in Macomb County's answer to Plaintiff's application, even if leave were granted the Court would be compelled to address the issues that have been raised and preserved by Macomb County in its appeal to the Court of Appeals and in its previously filed answer to Plaintiff's application.[8]

This Court has repeatedly acknowledged that the starting point for every case lodged against a governmental entity under the Governmental Tort Liability Act (GTLA)[9] is determining whether the conditions precedent to filing a suit against the government have been satisfied.[10] Therefore, before it analyzes the legal questions surrounding causation, the Court must first consider whether the Plaintiff has satisfied the conditions precedent to bringing suit against the government in the first instance.[11]

Compliance with the timing and content requirements of notice provisions in the GTLA are conditions precedent to a court's ability to exercise jurisdiction over a claim against the

[8] MCR 7.307(B) and MSC IOP 7.307(B). The Court of Appeals ordered summary disposition to be entered in Macomb County's favor on governmental immunity grounds. Macomb advanced several alternative arguments in the trial court and in the Court of Appeals, and restates those arguments here, which, if addressed correctly, would result in the same disposition – Macomb County is immune from suit by Plaintiff.

[9] MCL 691.1401, et seq. See, e.g., *Costa*, 475 Mich at 409-410, citing *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

[10] See, inter alia, *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015), citing *McCahan v Brennan*, 492 Mich 730, 735; 822 NW2d 747 (2012) and *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 212; 731 NW2d 41 (2007).

[11] *Id*.

governmental defendant.[12] As the late Justice Scalia wrote: "It assuredly is within the power of Congress to condition its waiver of sovereign immunity upon *strict compliance* with *procedural provisions attached to the waiver*, with the result that failure to comply *will deprive a court of jurisdiction*."[13] This Court has similarly recognized these jurisdictional limitations, stating that courts are "*without jurisdiction* to entertain an action" against the government "unless that jurisdiction shall have been acquired by legislative consent" and a "cause of action brought pursuant to the waiver of suit immunity must be of a nature and in a forum permitted by the waiver."[14] Thus, satisfaction of the Legislature's conditions to waiver of suit immunity is a necessary precondition for every claimant to access the courts.[15] This is but a necessary consequence of the preexisting immunity from suit preserved by the people on behalf of the government and inherent in the government's functioning.[16]

As these are *jurisdictional* requirements, they must be considered sua sponte by the reviewing court before other, ordinary substantive elements of the claimant's tort case can be

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[12] *Atkins v SMART*, 492 Mich 707, 714-15 and n 11; 822 NW2d 522 (2012) (proper notice of a claim is a condition precedent to allowing the case against the government to proceed); *McCahan*, *supra* at 735 (same), *Fairley*, *supra* at 297-299 (same).

[13] *Henderson v United States*, 517 US 654, 673; 116 S Ct 1638; 134 L Ed 2d 880 (1996) (SCALIA, J., concurring) (emphasis added).

[14] *Greenfield Constr Co v Dep't of State Hwys*, 402 Mich 172, 194, 197; 261 NW2d 718 (1978).

[15] *Michigan State Bank v Hastings*, 1 Doug 225, 236 (1844) (the state cannot be sued in its own courts; it must *consent* to submit itself to their *jurisdiction*; and the Legislature must confer that jurisdiction by positive law). See also *County Rd Ass'n v Governor of Mich*, 287 Mich App 95, 118; 782 NW2d 784 (2010), citing *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002) and *Greenfield Constr* Co, 402 Mich at 194.

[16] *Mack*, 467 Mich at 212. See also *Ballard v Ypsilanti Twp*, 457 Mich 564, 568-569; 577 NW2d 890 (1998).

analyzed.[17] To fail to recognize this judicial duty to protect the government's inherent and preexisting immunity from *suit* (not just liability),[18] would be tantamount to reducing every case against the government to nothing more than a tort case against any ordinary civilian or private defendant, a proposition soundly rejected by this Court[19] and by the Legislature in the GTLA, the latter of which recognizes that the government is immune from suit for all tort liability unless the claimant can demonstrate satisfaction of the strictly applied preconditions to suit and then establish the elements of the narrowly drawn statutory exceptions.[20]

This is why the defense of immunity on a failure of a claimant to satisfy the pre-conditions to suits against the government may be raised at any time, even on (and even after) appeal.[21] Despite the fact that the Court of Appeals correctly analyzed the legal causation issue, the multiple failures of Plaintiff to satisfy the conditions precedent to his claim are fatal to his case in any event

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[17] *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999), citing *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

[18] *Walsh v Taylor*, 263 Mich App 618, 624-25; 689 NW2d 506 (2004) (Talbot, J.) ("[T]he purpose of governmental immunity is to protect the governmental body, not only from liability, but from the trial itself."). See also *Odom v Wayne County*, 482 Mich 459, 478-479; 760 NW2d 217 (2008) (citing *Mack*, *supra*, at 203, n 18 and *Walsh*, *supra*, at 624 and stating "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial" and placing on the claimant the burden to both plead and prove his or her case "relieves the government of the expense of discovery and trial in many cases").

[19] *Costa*, 475 Mich at 409-410.

[20] MCL 691.1401. See also *Nawrocki*, 463 Mich at 158.

[21] *Fox*, 375 Mich at 242, citing *Lehman v Lehman*, 312 Mich 102, 105-106; 19 NW2d 502 (1945). See also *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992), accord *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 574; 692 NW2d 68 (2004), citing *Straus*, 459 Mich at 532.

and these issues must be addressed by this Court even before it analyzes the Court of Appeals principal rationale.

Macomb County has raised, and has continued to preserve, significant predicate legal issues that, of necessity, would have to be first addressed by this Court if it were to grant Plaintiff's application or address the case in any manner other than to affirm the opinion below.[22] If the Court were to address these issues, it would be required to affirm the Court of Appeals decision for those additional reasons presented by Macomb County since inception of this case, and for those additional reasons raised in its appeal from the Circuit Court's erroneous opinion denying governmental immunity. If the Court were *not* to address these prima facie and predicate questions of law, granting leave to appeal to address the question of legal causation would be improvident because it would be beyond the Court's jurisdictional authority. As Macomb County has already noted in its answer, these insurmountable predicate legal issues are as follows:

(1) The 60- not 120-day time limitation for notices applies and thus Plaintiff's notice was untimely because it was served no earlier than October 3, 2013 and the accident occurred on June 7, 2013 (App. 1a – 3a).[23]

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[22] See footnote 8, *supra*.

[23] See *Streng v Bd of Mackinac County Rd Comm'n*, 315 Mich App 449, 463; 890 NW2d 680 (2016), lv den'd 500 Mich 919; 887 NW2d 802 (2016) (the 60-day notice provision applies to actions against counties under MCL 224.21). By statute, for charter counties with a population of 750,000 or more, the powers and duties of a road commission may be reorganized by amendment to the charter. MCL 224.5. The Macomb County Department of Roads is such an entity. Macomb County Charter, art XI, § 11.5.2. Any contention on the part of Menard to claim that this issue is waived would be futile. First, jurisdictional defects cannot be waived. *Travelers v Detroit Edison*, 465 Mich 185, 203-204; 631 NW2d 733 (2001). Second, governmental immunity is not a defense but an inherent characteristic of government and cannot be waived by the entity's failure to plead it. *Mack* 467 Mich at 226. In any event, Macomb did raise the issue that Plaintiff's notice was defective. (App. 46a, 50a, inter alia). Third, because the question of immunity is jurisdictional, this court must, like all courts, consider the challenge sua sponte, if necessary. *Fox*, 375 Mich at 242-

(2) The contents of the original notice were deficient, first because Plaintiff did not and cannot identify the "exact location" and "exact nature" of the defect, nor did he properly identify the witnesses as required by the plain and unambiguous language of the provision.

(3) The deficiencies in Plaintiff's original notice cannot be rehabilitated by an improperly allowed dilatory amendment to his complaint, because it is effectively a new (and therefore also untimely) notice adding a new, alleged defect (the "berms"), which incidentally is also not an "actionable" defect under the highway exception because they are not permanent, integrated aspects of the roadbed surface.[24] The defect must be "persistent" and it must exist at all times.[25] Transient, less than ideal conditions of or on the roadbed surface are not actionable defects.

It should be pointed out at this point that the whole premise of Plaintiff's case is based on this improvidently allowed amendment to add untimely notice of a non-actionable "defect", the exact location of which has never been determined! (App. 396a – 400a) Had the trial court not granted Plaintiff's motion to amend to *add* the alleged defect of "berms", which are said to have

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243. Fourth, the question of retroactive application is not an issue because the case is still open, and, in any event, the law *always was* that MCL 224.21 applied. See *Harston v Eaton County Rd Comm'n*, 324 Mich App 549, 558 and n 7; 922 NW2d 391 (2018). Finally, where the question is fairly addressed by the lower court, either directly or by implication, and it is a question of law that can be resolved by the appellate court, the issue is appropriately before the court. See *Peterman v Department of Natural Resources,* 446 Mich 177, 183; 521 NW2d 499 (1994). The Court may decide to consider it where it is interrelated and part of the major issues presented. *Id*. Finally, this Court has noted that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when 'necessary to a proper determination of a case'" *Klooster v City of Charlevoix,* 488 Mich 289, 310; 795 NW2d 578 (2011), quoting *Prudential Ins Co of America v Cusick,* 369 Mich 269, 290; 120 NW2d 1 (1963). Plaintiff's suit is simply and unequivocally barred because the notice was untimely.

[24] *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001), overruled on other grounds 471 Mich 700 (2005).

[25] *Id*., accord *inter alia*, *Palletta*, 491 Mich at 897; *Hagerty*, 493 Mich at 933.

narrowed the roadbed, then the trial court's conclusion, inter alia, that the Plaintiff's allegations were sufficient to state an actionable defect, could not serve as the basis of Plaintiff's argument that such alleged defect caused his injuries.

(4) The Court of Appeals erred in applying the erroneous "substantial compliance" interpretation to notices under the highway exception concerning whether a claimant provided the "exact location" and the "exact nature" of the defect per *Plunkett v MDOT*,[26] a published decision in the Michigan Court of Appeals that runs directly contrary to *every other case* that this Court has had occasion to address on the subject of the interpretative principles to be applied to notices of claims against the government under the GTLA.[27] *All* of this Court's cases from *Rowland* forward, addressing this issue have specifically held, confirmed, and reconfirmed, that a *strict* not *liberal* interpretation of the notice requirements of statutes waiving the government's suit immunity must apply.[28] Concepts like "substantial compliance", "prejudice", and "judicial" or "equitable estoppel" cannot be invoked to save the claimant's cause of action.[29] In fact, despite acknowledging *Rowland's* requirements of a strict interpretation of the notice provisions preceding claims against governmental entities, the panel in *Plunkett* cited pre-*Rowland* case law,[30] all of which have been overruled or significantly limited by *Rowland's* oft-repeated and sweeping

[26] 286 Mich App 168, 177; 268 Mich App 168 (2009).

[27] *Rowland*, *supra*; *McCahan*, *supra*; *Atkins*, *supra*; *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011); *Fairley*, *supra*,

[28] See *id*.

[29] *Id*.

[30] See *Plunkett*, 286 Mich App at 177, nn 10 through 16.

admonition.[31] No equitable or saving interpretations can be applied to the plain and unambiguous language of the notice provisions in the GTLA.[32] While this Court was recently poised to consider the question of *Plunkett's* ostensible continuing viability among the lower courts concerning what, if any, interpretive leeway remains when applying the statutory notice provisions in the GTLA (and particularly under the highway exception), it has yet to answer the question.[33] Importantly, as reiterated by this Court time and again, in context of governmental immunity cases, courts simply do not have the authority to apply judicial gloss to the language of notice provisions precisely because doing so is judicial usurpation of the Legislature's charge to protect the

[31] "Statutory notice requirements must be interpreted and enforced as plainly written." *Atkins*, 492 Mich at 710. One cannot "substantially" comply when they must "strictly" comply.

[32] *Rowland*, 477 Mich at 212. See also *Jakupovic*,489 Mich at 939 (strict compliance is required and a claimant must identify the "exact location" of a defect in the highway in order for the claim to survive.

[33] In its order granting oral argument in the cases of *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit* (Docket No. 157097), the Court directed the parties to address "whether strict or substantial compliance is required with the notice provision contained within MCL 691.1404(2), compare *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007), with *Plunkett v Dep't of Transportation*, 286 Mich App 168 (2009)." However, the Court did not address the question. Indeed, the Court did not even arrive at the interpretive principle stated in *Plunkett*, much less cite the case anywhere in its opinion. The issue remains extant and continues to significantly prejudice and affect the government's ability to carry out its day-to-day functions free from the burdens of constant, unnecessary litigation in courts that do not even have subject matter jurisdiction to address the claims in the first instance because the latter survive based solely on an errant and legislatively prohibited interpretive principle. Macomb squarely raised the issue in its appeal and in its answer to Plaintiff's application and the Court would be duty bound to address it were any other action taken than to affirm the Court of Appeals opinion. Indeed, it would seem as the issue remains one that the Court has most recently sought to address, it would take that opportunity here since the Court of appeals applied the *Plunkett* standard, and it is patently contrary to *this* Court's GTLA jurisprudence.

government from suit on behalf of the people by defining the terms and conditions of the waiver of *suit* immunity in the first place.[34]

If the judiciary can ignore the technical requirements of the provisions and in doing so apply liberal, flexible or forgiving interpretations, it can subvert the will of the people because the *notice* is the means through which the people have *consented* to allow a court to exercise jurisdiction over a claimant's case in the first place and to have the government waive its immunity, answer in the lawsuit, and expend the resources necessary to defend the claim. As this Court stated long ago, the Legislature can place whatever conditions it wants on the waiver, with the result being that a failure of a claimant to satisfy them deprives the court of jurisdiction over the case altogether.[35]

If the *Plunkett* standard applies, which Macomb explicitly challenges, then it eviscerates all of the other cases from this Court that have required strict compliance with the statutory notice provisions that the Legislature has put in place to allow suits against the government to proceed. Macomb County has raised this issue and it must be addressed by this Court *before* any consideration of the legal causation issue because without *jurisdiction* no court has authority to adjudicate Plaintiff's tort claim in the first instance.

(5) The "hybrid" MCR 2.116(C)(10) / MCR 2.116(C)(7) standard of review applied by the Circuit Court was also erroneous because it improvidently allows questions of fact to proceed on the question of a governmental entity's potential liability on less than a showing that the claimant has both plead and proved his or her case to proceed.[36] At the specific urging of undersigned counsel

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[34] "When, under the guise of statutory construction, this Court ignores the language of the statute to further its own policy views, it wrongly usurps the power of the Legislature." *Robinson*, 462 Mich at 474. Indeed, in such instances, the court exceeds its constitutional authority. *Id*.

[35] *Hastings*, 1 Doug at 236.

[36] See *Mack*, 467 Mich at 199.

by way of an *amicus curiae* brief in support of the state's application for leave to appeal in the case of *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671; 858 NW2d 158 (2014), rev'd 499 Mich 636 (2016), this Court was poised to consider this very issue and requested briefing on it:

> Whether questions of fact on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury, see *Dextrom v Wexford County*, 287 Mich App 406, 430-433; 789 NW2d 211 (2010); *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).[37]

The issue went unresolved because the Court correctly found there was no defect in the highway and reversed. This issue remains extant. The trial court followed *Dextrom* and the Court of Appeals approved.

This "standard of review" being propagated among inferior courts is erroneous when applied in the context of suits against government entities. Failing to both plead and prove the case does not give carte blanche to the claimant to explore and probe the government's defenses through onerous and burdensome discovery *until* an alternate theory can be devised. However, that is what was allowed to happen in this case when the trial court approved the amendment to add new allegations and a new defect (notwithstanding the requirement to provide notice of the defect within 60 days) over Macomb County's objection nearly 3 years into this lawsuit.

Indeed, Plaintiff's theory of the case changed in direct response to Macomb County's arguments in its immunity motion showing that there had been no proper notice, much less an allegation of an actionable defect. (App. 343a) It is not the government's burden to plead and prove the defense.[38] Indeed, failure to raise the immunity defense is never a waiver.[39] How could it be?

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[37] *Yono v MDOT*, 497 Mich 1040; 864 NW2d 142 (2015).

[38] Mack, *supra* at 199.

[39] *Id*.

As immunity is rooted in a *lack* of jurisdiction in courts of law over the claim itself, as with lack of subject matter jurisdiction, *immunity can never be waived*.[40]

(6) If Plaintiff were to successfully clear all of these insurmountable hurdles required to even *access* the jurisdiction of Michigan courts by a legitimate waiver of the government's immunity from suit, as indicated there has still not been any statement of an *actionable* defect – whether in the original notice or in the "late" notice that arose from the errantly allowed amended complaint. Highways are not expected to be in perfect condition.[41] The type of defect that is actionable under the GTLA's highway exception is one that is *persistent* and *embedded in* the roadbed surface itself. Deviations and transient conditions have never been considered the type of highway defects that trigger the government's duty. In most cases, in addition to being normal conditions encountered on Michigan roadways throughout the year, accumulations of debris, e.g., dirt, dust, gravel, trees, ice and snow; potholes; berms; and changing widths and elevations in and upon the traveled portions of the roadbed surface appear and disappear and are well-known to be present and ever changing aspects of day-to-day travel by car. Yet, none of these are actionable defects unless they are persistent aspects of the roadbed surface.[42] Beyond the allegations in his complaint (and particularly the amended complaint, which added the new defect to include berms temporarily narrowing the roadbed surface), Plaintiff never identified an actionable defect, i.e., a persistent

[40] *Id*.

[41] *Scheurman*, 434 Mich at 631.

[42] *Hagerty*, 493 Mich at 933 (dust clouds, gravel, soft shoulders and other temporary unproven and unprovable conditions of the roadbed surface including potholes or wash boarding are not actionable defects); *Palletta*, 491 Mich at 897 (loose gravel upon a roadbed surface is not an actionable defect). See also *Haliw*, 464 Mich at 308 and *Buckner Estate v City of Lansing*, 480 Mich 1243, 1244; 747 NW2d 231 (2008).

integrated aspect of the roadbed surface itself (rather than merely transient and ordinary conditions that exist at any given time upon dirt roadways in Michigan).

If the Court were to find, after properly analyzing the facts of this case in terms of these dispositive and prima facie issues raised by Macomb County, and still conclude that its immunity from suit has been waived, causation would be the very *last* question to address. In this respect, the Court of Appeals applied the proper standard. Cause in fact and legal or proximate cause, while distinct concepts, are analyzed in terms of the prevailing legislative and public policies applicable to a given case. In nearly 60 years of this Court's jurisprudence since the GTLA was passed it is established that causation in a suit against the government must be viewed under the broadly conferred and preexisting immunity inherent in government functions and the narrowly drawn statutory exceptions. So strong is this "policy" that it has become law.[43]

In this respect, the Court of Appeals respected its proper role and deferred to the Legislature in analyzing Macomb County's potential liability for what was, in terms of its duty, an accident caused by a multitude of intervening events. The injuries that befell Plaintiff did not occur "by reason of" any alleged defect in the road or by any alleged failure of Macomb County to maintain or repair same.[44] The government simply has no place as a defendant in this case. In a questionable case, where there is such a confluence of intervening events, the Court of Appeals would have contradicted the legislative mandate had it found that causation was a question for the trier of

[43] *Kyser v Kasson Twp*, 486 Mich 514, 536; 786 NW2d 543 (2010) (stating "policy-making is at the core of the legislative function.").

[44] See MCL 691.1402(1).

fact.[45] The court's only duty was to direct judgment for Macomb County because the government cannot be held legally responsible for Plaintiff's injuries in this case.[46]

Yet, Plaintiff would have the question addressed first. Moreover, as in ordinary litigation against non-governmental defendants, Plaintiff would have the questions of tort liability be addressed in every case notwithstanding the government's immunity defense, adhering to the errant notion that litigation of the underlying elements of a tort claim (including causation) can continue despite the immunity defense being raised and rejected.[47] Such a paradigm would defeat the principal that immunity is from suit not just liability. Indeed, the "inapplicability" of immunity is a fundamental element of the claimant's case.[48] This is why the plaintiff must both *plead* and *prove* his case against immunity at the outset of filing the claim and why the defense is never subject to waiver when suit is filed against the governmental entity.[49] And then, even if the claimant pleads and proves a sufficient claim *in avoidance of* immunity, he or she must still proceed to prove the tort claim by demonstrating that the state breached its duty, the breach was

[45] *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 85 (1981). See also *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

[46] *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004), citing *Skinner v Square D Co*, 445 Mich 143, 163; 516 NW2d 475 (1994).

[47] If the trial court denies the government's immunity defense, the government has an automatic right of appeal and the litigation is to be stayed, in toto, pending the outcome of the government's motion. MCR 7.203(A) and MCR 7.202(6)(a)(v). See also *Walsh v Taylor*, 263 Mich App 618, 622-24; 689 NW2d 506 (2004), accord *Watts v Nevils*, *et al*, 477 Mich 856, 856; 720 NW2d 755 (2006), in which the Court affirmed that there is no right to continue to litigate any aspect of the case pending disposition of the immunity motion.

[48] *McCann v Michigan*, 398 Mich 65, 77, n 1; 247 NW2d 521 (1976).

[49] *Mack*, 467 Mich at 199.

the factual and legal (proximate) cause of the claimant's injuries, and that no intervening causes or mitigating circumstances exist, e.g., the open and obvious doctrine, etc.[50] Plaintiff seeks to have this Court create a novel "causation" paradigm wherein cases will proceed against the government despite the preexisting immunity inherent in all governmental functions and the protections afforded by the Legislature from profoundly disruptive litigation and surrogate liability in the form of settlements forced upon the governmental entity so that it can avoid the further hemorrhage of already scarce resources.

COUNTER-STATEMENT OF THE CASE

On June 7, 2013 at approximately 10:00 p.m., 15-year old Ryan Menard (Plaintiff) and two friends, were riding bicycles along Hipp Road between 35 Mile and 36 Mile in Bruce Township, Macomb County, Michigan. Hipp Road is an unpaved gravel road, typical of the many similar roads that surround the metropolitan Detroit area in southeast Michigan. Due to its location, Hipp Road sustains fairly high-volume traffic throughout the year, but at this particular time, it was experiencing much more than ordinary traffic. A construction project had closed down M53 at Van Dyke Road and motorists were using this stretch of Hipp Road as an alternate route.

Plaintiff testified that he and his friends had been passed by several vehicles. Each time he would observe the cast of the vehicle's headlights approaching from his rear and he would move to the right side of the road. (App. 118a – 119a; 139a, 140a) He testified that he saw the cast of headlights from the pick-up truck driven by Terry Imig (Imig) approaching and was expecting to be passed. (App. 177a) He further testified that he gotten as far to the right as he could. (App. 118a – 119a) Plaintiff stated that he was dodging potholes at the time of the occurrence. (App. 118a).

[50] *Suttles v State Dep't of Transportation*, 457 Mich 635, 653; 578 NW2d 295 (1998).

Importantly, he testified that he expected he would be passed as he had been previously. (App. 118a – 119a). Instead of passing him, Imig's truck ran into the rear wheel of Plaintiff's bicycle. Plaintiff suffered serious injuries as a result of the collision.

Imig, the driver of the vehicle who struck Plaintiff, testified he would always drive as close to the right side of the road as possible. When driving on gravel roads he would keep his eyes on what he called the "grass line" and that he was doing so at the time he came upon Plaintiff. (App. 176a). He also testified he was focusing his vision on the "grass line" because of the bright lights of oncoming vehicles. *Id*.

When he first saw Plaintiff on his bike, Imig testified he was so close that he had no time to do anything except try to stop. He estimated he was 20 feet from Plaintiff when he first saw him and was traveling at 25 mph. (App. 175a, 185a) He testified that he had no time or room to steer to the left (to avoid Sharryl Everson's oncoming vehicle which was about even with his truck at the time he struck Plaintiff) and that he was only able to brake which occurred at the same time he struck the Plaintiff. (App. 185a) Imig testified he did not encounter significant potholes and he did not affirm that road conditions affected his driving. (App. 173a – 174a; 186a – 187a) Imig stated he was blinded by approaching headlights from the vehicle operated by Everson. (App. 177a – 178a) He "could not see because of the bright lights." (App. 187a)

Everson testified it was completely dark out. Everson denied that her bright lights were on long enough to interfere with Imig's operation of his vehicle. (App. 199a – 200a; 228a – 229a)

Neither Everson or Imig testified that they had any loss of control of or extraordinary interference with the operation of their vehicles because of any aspect of Hipp Road. (App. 174a ("nothing significant"); 199a – 200a ("no potholes"); 228a).

Plaintiff's two friends, Logan Ganfield and Jeffrey Fietsam both testified they had no difficulty navigating the road on their bicycles. (App. 253a; 271a – 272a ("some small potholes"; "nothing more than a usual dirt road"; "maybe some loose gravel and smaller potholes, but nothing too ridiculous").

The point of impact between Imig's truck and Plaintiff's bicycle was on the right front bumper, closer to the passenger edge of the vehicle. No photographs or measurements exist from the date of the occurrence or from the following days prior to any regrading of the road to establish conditions of the road on the date of the occurrence. In fact, no photographs or measurements were ever taken of Hipp Road or the accident scene that evening, or within the days following. The first photographs were not taken until after the road had been regraded. The "exact location" of the accident, as acknowledged by Plaintiff's two experts, cannot be determined.

On October 3, 2013, Macomb received a "notice of intent". (App. 1a – 20a). The notice purported to identify the location of the accident, the nature of the defect, the witnesses, and the nature of the injuries. Regarding the location, the notice stated:

> This notice of occurrence of injury, defect, witnesses and description of injury pursuant to statute is being provided to you regarding a truck/bicyclist collision that occurred on Friday, June 7, 2013 at approximately 10 p.m. on Hipp Road, Bruce Township, Macomb County, Michigan, when a northbound pick-up truck struck a northbound bicyclist, Ryan Menard, *on the eastern edge of the traveled portion* of Hipp Road *approximately* 265-345 feet south of the driveway at 76350 Hipp Road *in the vicinity of* Apel drain (*approximately* 4 mile[sic] south of 36 Mile Road causing serious injuries to Ryan Menard.
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> [(App. 3a – 5a) (emphasis added).]

Concerning the "nature of the defect", the notice stated:

> For a period of at least 30 days or longer before the injury of June 7, 2013 took place, the improved portion of the highway/roadway designed for public/vehicular travel *was not in a condition reasonably safe and fit* beginning in the area of 76000 Hipp Road extending north to the vicinity of Apel drain [where the collision occurred] and extending further north on Hipp Road to its intersection with 36 Mile

> Road; said highway/roadway being *substantially defective and hazardous such that a permanent defect existed at all relevant times* which the Macomb County Road Commission and/or Macomb Department of Roads had or should have had notice. *There was neither a shoulder nor adequate roadway/highway width to allow safe two-way public/vehicular travel*.
>
> Further, for a period of at least 30 days or longer before the injury of June 7, 2013 took place, subject highway/roadway, in the area described above, had *advanced deterioration (i.e., extensive pot holes and washboard surfaces) caused by poor and/or inadequate maintenance/poor drainage and/or use of inferior roadway materials such that the roadway was not in reasonable repair and/or not in a condition reasonably safe for public and/or vehicular travel*. Subject highway/roadway deterioration was accelerated by very heavy traffic volumes on Hipp Road as Hipp Road was being used by motorists as an alternate/detour/bypass to avoid adjacent M-53 road closure [M-53 – 34 Mile Road to Bordman Road reconstruction] which began in March/April 2013.
>
> [(App. 4a) (brackets in original) (emphasis added).]

A UD-10 police report attached to the notice identified the location of the accident as 1320 feet south of 36 Mile Road. (App. 7a)

On August 11, 2014, Plaintiff filed a complaint against Imig, the driver of the pickup truck that struck Plaintiff. A subsequent complaint, filed on March 18, 2015, added Everson and Macomb, and alleged that on the date of the accident, Hipp Road was not in reasonable repair, which caused the accident. (App. 306a – 316a) The complaint further alleged that Imig failed to properly control his vehicle, striking Plaintiff, and causing the accident. Finally, the complaint alleged that Defendant, Everson, approaching in the opposite direction from Imig through improper use of her bright lights also caused the accident.

On July 14, 2016, Macomb filed a motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10) arguing they were entitled to summary disposition because Plaintiff had failed to plead and prove his case against the government. Macomb challenged the sufficiency of Plaintiff's notice as to the specified location of the defect, the nature of the defect, and the listed witnesses. Macomb explained that instead of identifying the precise and specific location required,

Plaintiff only provided approximation of the location of the accident. With respect to the nature of the defect, Macomb pointed out that none of the claimed "defects" satisfied the statutory definition and/or the jurisprudence interpreting it. Macomb also argued that a strict construction of the notice provision was required under prevailing law, and therefore, Plaintiff was required to name and list *all* witnesses, not just eyewitnesses. Macomb pointed out that all witnesses eventually named by Plaintiff were not listed on the original notice of intent as required by law. Macomb also challenged the substance of Plaintiff's claims, arguing that there was no actionable defect on Hipp Road, and Plaintiff had failed to prove that any such defect was the proximate cause of his injuries.

On August 12, 2016, more than 3 years after the accident and nearly three years since the submission of the original notice, Plaintiff filed a motion to file a third amended complaint to "add the claim regarding berms and the berms claim". (App. 317a – 338a). Plaintiff filed this motion as a direct response to Macomb County's motion for summary disposition on immunity grounds. (App 343a) The Circuit Court conducted the hearing on Macomb's motion for summary disposition and the Plaintiff's motion to amend at the same time. (App. 339a – 379a)

Plaintiff's motion to amend attached the original notice as an exhibit. In paragraph 3 of the motion to amend, counsel for Plaintiff stated as follows:

> Plaintiff explained in the [original] notice that "there was neither a shoulder nor adequate roadway/highway width to allow safe two-way public/vehicular travel" along with "advanced deterioration (i.e., extensive pot holes and washboard surfaces) caused by poor and/or inadequate maintenance/poor drainage and/or use of inferior roadway materials such that the roadway was not in reasonable repair and/or not in a condition reasonably safe for public and/or vehicular travel" which existed for a period of at least 30 days or longer before the injury of June 7, 2013 took place." *Further, evidence disclosed through discovery revealed that due to lack of maintenance and repair, berms were allowed to exist or caused to exist on the traveled portion of the roadway at the edges of the gravel roadway, such that it narrowed the roadway down from twenty feet to approximately 15 feet on June 7, 2013*.
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> [(App. 320a – 321a (emphasis added)).]

Plaintiff further stated that "[w]hen a motion is brought pursuant to MCR 2.116(C)(8), (9), or (10), "the court ***shall*** give the parties an opportunity to amend the pleadings as provided in MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." (App. 321a – 322a) (emphasis in original), citing MCR 2.116(I)(5).

At the hearing on the motion to file the amended complaint, which was held on the same day as Macomb's motion for summary disposition, counsel for Plaintiff explained:

> [T]he purpose of amending the Complaint, *in response to the defendant's motion for summary there was an argument made in one of the arguments about what was or was not included in the Complaint in the original notice*. What we are asking the Court to do is let us incorporate the original notice that was sent into the Complaint and *add the claim regarding berms and the berms claim*, as you are well aware of what happened and it came out through multiple depositions. It does not change in any way any need for any additional discovery or anything else.
>
> [(App. 343a) (emphasis added)]

Macomb challenged the amendment on the basis, *inter alia*, that amendment would be futile and that Plaintiff was seeking to amend the complaint to set forth "a defect that was not in their original notice". (App. 343a – 344a) Macomb's counsel continued: "[T]hey are obligated under the notice statute, MCLA 691.1404(1) to set forth the names of known witnesses, the exact location and nature of the defect." *Id.* Macomb's counsel then explained that Plaintiff had not complied with the notice statute by identifying the precise defect and it was not proper to amend and restate the claim. *Id*.

The trial court issued its opinion on October 12, 2016. (App. 381a – 395a) In addressing Macomb's motion for summary disposition, the trial court applied both MCR 2.116(C)(7) and MCR 2.116(C)(10), citing *Dextrom v Wexford Cty*, 287 Mich App 406, 428; 789 NW2d 211 (2010) (App. 382a) Thus, the trial court accepted "all well-pleaded allegations as true and construe[d]

them in favor of the plaintiff, unless other evidence contradict[ed] them." *Id*. The trial court then went on to apply the standard for summary disposition motions under MCR 2.116(C)(10).

In addressing Macomb's argument that Plaintiff's notice was deficient in specifying the exact location of the defect, the court concluded:

> [P]laintiff provided a general location of the alleged defective road condition and a more specific location where Menard's injuries occurred. Here, rather than describing a quarter-mile (or 1,320-foot) stretch of highway without reference to any landmarks, plaintiff described an 80-foot stretch of roadway, in relation to a precise address, and referenced the Apel drain as a landmark. Thus, the Court finds that plaintiff's notice satisfied the exact location requirement of MCL 691.1404(1), which is sufficient to justify applying the highway exception.
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> [(App. 385a – 387a)]

With respect to the naming of witnesses in the notice, the trial court concluded that Plaintiff had satisfied the "known witness" requirement of MCL 691.1404(1). The trial court reasoned that Plaintiff was not required to list *all known* witnesses, but rather those witnesses that saw the accident and what caused the accident. (App. 387a), citing *Rule v Bay City*, 12 Mich App 503; 163 NW2d 254 (1968).

Concerning Macomb's argument that Plaintiff had not pleaded an actionable defect, the trial court ruled Plaintiff's allegations that there was not an adequate shoulder and not adequate "roadway/highway width" to allow safe two-way public/vehicular travel", were sufficient to allege a "defect" in the highway to invoke the exception. (App. 389a – 392a)

The trial court also addressed Plaintiff's motion to amend its complaint to add the new defect, i.e., the alleged "berms" on Hipp Road.

> In the case at bar, plaintiff alleges that "[t]here was neither a shoulder nor adequate roadway/highway width to allow safe two-way public/vehicular travel."…Further, plaintiff alleges that the road "had advanced deterioration (i.e. extensive pot holes and washboard surfaces) caused by poor and/or inadequate maintenance/poor drainage and/or use of inferior roadway materials…."

> Accepting plaintiff's allegations as true, the berms rested on top of the roadbed surface and had the effect of artificially narrowing the improved portion of the roadway intended for vehicular travel. This is distinguishable from *Hagerty[v Bd of Manistee County Comm'rs*, 493 Mich 933, 934; 825 NW2d 581 (2013)], where gravel dust from the road accumulated on top of the roadbed surface and then rose into the air, which caused the hazardous dust cloud. In the instant case, however, road debris accumulated on top of the roadbed surface, which had the arguably hazardous effect of artificially narrowing the road itself. Further, viewing the evidence in the light most favorable to plaintiff, a reasonable factfinder could infer that Hipp Road was not reasonably safe for public travel. There are material factual questions about the existence of potholes and other defects where plaintiff was injured. Thus, plaintiff has alleged facts about the defective condition of the road sufficient to justify applying the highway exception, and summary disposition is not proper.
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> [(App. 391a – 392a)]

The trial court then addressed Macomb's argument that Plaintiff could not prove the requisite causation required by the highway exception. (App. 394a) The trial court concluded that "a reasonable factfinder could infer that [Macomb's] failure to maintain the roadway was a proximate cause of Menard's injuries." *Id*. The trial court reasoned that there was "conflicting evidence" about whether Plaintiff was avoiding potholes at the time of the accident, and whether Imig could have avoided the collision "but for the condition of the road where the accident occurred." *Id*.

Finally, while the trial court had already incorporated the "berms" as a potentially actionable defect, even though they were not mentioned by Plaintiff until the filing of his motion to file a third amended complaint to rehabilitate the deficiency in the original notice, the trial court granted Plaintiff's motion to amend. In regard to Macomb's argument that this changed the "notice" to allege a new "defect", the trial court superficially concluded, without critical analysis, that there was "very little difference" between Plaintiff's "pre-suit notice" and the requested amendments. (App. 394a – 395a)

Macomb filed a motion for reconsideration arguing that the trial court did not consider three enumerated arguments posed in its motion for summary disposition. First, Macomb stated the trial

court did not address the argument that road glare conditions associated with road width and lighting was not a defect within the meaning of the highway exception. Second, the trial court did not address Macomb's argument that no duty existed to use any specific materials for the roadbed surface. Third, Macomb asserted the trial court did not address that part of Macomb's "causation" argument asserting that under the facts, Plaintiff could not prove his injuries occurred by "reason of a failure" of Macomb to maintain and repair Hipp Road.

The trial court denied Macomb's motion for reconsideration. (App. 396a – 400a). Concerning Macomb's argument that "road width and glare conditions associated with road width" were not defects, the trial court reasoned that Plaintiff claimed that "glare conditions" arose from the alleged defect of the "artificially narrowed roadbed and the associated accumulation of berms". The court reasoned that the "glare" or "illumination" issues with the road simply arose from a defect which was an alleged "actionable defect". (App. 398a)

The trial court also concluded that although Macomb had asserted it had no duty to use materials in repairing or maintaining the road different than those already existing on the road, it had not cited any evidence as to what type of materials were used in the road's original design and construction. The trial court stated that it "could not conclude that it would be impossible for plaintiff's claim to be supported at trial because of some deficiency that cannot be overcome." (App. 398a – 399a).

Lastly, the trial court found no difference between "proximate causation", which it concluded was applied to the "highway exception" claims, and the term "by reason of" in MCL 691.1402(1). The trial court thereby rejected Macomb's argument that the term required a more stringent showing of causation, that the injuries complained of occurred "by reason" of the failure to repair and of the alleged defect. (App. 399a – 400a).

Macomb appealed and the Court of Appeals reversed. In a 2-1 opinion the majority ruled that the "alleged defects in the road were not a proximate cause of [Plaintiff's] injury." (App. 29a). The Court concluded:

> From the record, clearly Ryan's injuries were not "a foreseeable, natural, and probable" result of the Macomb defendants' failure to properly maintain the width of Hipp Road. See *id*. It was not foreseeable that the Macomb defendants' failure to remove berms from the side of the road would result in a bicyclist being struck from behind by a driver of a truck blinded by oncoming headlights. Not only was the situation not a foreseeable outcome of the Macomb defendants' negligence, but given the broad immunity provided by the GTLA, it would be not be "socially and economically desirable to hold the" Macomb defendants liable under the circumstances shown in the record. *Wiley*[*v Henry Ford Cottage Hosp*], 257 Mich App [488, 496-497; 668 NW2d 402 (2003)].
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> ***
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> The narrow nature of the road "merely provided the condition or occasion affording opportunity for the other event to produce the injury . . . ." [*Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 145; 565 NW2d 383 (1997)] (internal quotation marks omitted). In other words, viewing the facts in the light most favorable to plaintiff, plaintiff has proved only that the limited width of Hipp Road created the condition that would allow Everson's high-beam headlights to so blind Imig, who did not press his brakes despite that blindness. See *id*. As such, the narrow nature of Hipp Road "merely ma[de] possible the infliction of injuries by another, but d[id] not put in motion the agency by which the injuries [were] inflicted . . . ." *Id*. (quotation marks omitted). The width of the road would not have been an issue if Everson had decided not to use her high-beam headlights or Imig decided to stop his truck when he could not see. Consequently, Hipp Road only was a conduit for the allegedly negligent actions of others. It did not put the agency in motion. *Id*. Therefore, according to the reasoning in *Singerman*, the Macomb defendants' alleged failure to maintain the width of Hipp Road was not the legal cause of Ryan's injuries. See *id*. The injuries suffered by Ryan were so far attenuated from the alleged negligence of the Macomb defendants that it would not be "socially and economically desirable to hold" them liable. *Wiley*, 257 Mich App at 496-497.
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> [(App. 28a – 29a)]

The majority remanded to the trial court for entry of summary disposition in Macomb's favor. (App. 29a) Judge Meter dissented. He concluded that the alleged defects in the road's physical structure, particularly the "berms" foreseeably led to Plaintiff's injuries. (App. 32a).

ANALYSIS

In its order granting oral argument on the plaintiff's application, the Court has requested the parties to address "whether the Court of Appeals erred in its determination of cause in fact"; and "whether the narrowing of the roadway combined with the oncoming driver's use of high-beam headlights, or any other cause-in-fact, was a proximate cause of the accident".[51]

> In practice…most courts have long implicitly understood, and most tort practitioners have long suspected, that the concept of proximate cause is very different from the concept of cause-in-fact and has very little to do with causation principles per se. Rather, according to prevailing contemporary American tort law theory and practice, proximate cause can best be understood as a limitation to tort liability primarily based on public policy grounds, rather than based upon underlying causation principles.[52]

The Court of Appeals properly analyzed causation under this modern duty-breach-foreseeability paradigm applicable to tort cases. Additionally, the Court of Appeals properly recognized its limited role when addressing the unique situation of cases against the government.

Plaintiff's critique of the Court of Appeals' analysis is lacking in several critical respects. Plaintiff cites *Moning v Alfono*,[53] in support of his "foreseeability" analysis. He inquires how the Court of Appeals can consider whether it was "socially and economically desirable" to hold Macomb County liable for Plaintiff's injuries. He also challenges the Court of Appeals' treatment of the issue of "proximate cause" as one of law.

"Cause in fact" or "but for causation", while distinct from proximate cause, is a mere starting point in the process of a court's consideration of the case against a governmental entity – there is

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[51] 503 Mich 1031; 926 NW2d 801 (2019).

[52] Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation "Riddles"*, 43 Tort Trial & Ins Practice L J 1, 8 (Fall 2007).

[53] 400 Mich 425, 438; 254 NW2d 759 (1977).

always, in every tort case, and especially in those against public entities, a necessary legal question of "proximate" or "legal" causation. That query, in turn, depends on the examining court's consideration of the duty-breach-foreseeability paradigm. These are fundamental, well-established concepts in the law.

Of course, anyone can point to a causa sui, a first cause, or a "but for" cause as being the inceptor of an accident or occurrence. The fact that Hipp Road in the instant case was a dirt road, rather than a paved road was a cause in fact of the accident. There is little dispute that the condition of the roadway on the night of the accident was less than ideal – but perfection is not the government's duty when it comes to maintaining the state's roadways.[54] This is a proposition recognized by this Court for well over a century.[55] Certainly the roadbed surface on Hipp Road was less than ideal because of the increase in traffic forced down that road due to the construction detour on a major stretch of state highway in a metropolitan area. This was also a "cause in fact" of the accident.

The fact that the roadbed may have been more narrow or that there may have been berms (which are not in and of themselves actionable defects), none of which is proved by Plaintiff to the extent required to even access the jurisdiction of the courts in a case against the government) was a cause in fact of the accident.

The driver of the oncoming vehicle, Ms. Everson, who had her high-beam headlights on blinding Mr. Imig as he drove his pickup truck towards Plaintiff traveling in the same direction on his bicycle was a cause in fact of the accident.

[54] *Scheurman*, 434 Mich at 631.

[55] See *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912).

Imig's tendency to drive as close to the right side of the roadway as possible along the "grass line" and his admitted failure to see Plaintiff in time to stop before the collision was a cause in fact of the accident.

Last, but certainly not least, Plaintiff's own imprudence in riding a bike in the dark on a Friday night on a busy metropolitan dirt road with no shoulders was a cause in fact of the accident.

When viewed under the appropriate legal standard, the unfortunate accident in this case was not *caused by* any defect in the highway nor did it arise from Macomb County's failures or negligence, rather than by an additional confluence of intervening events precipitated by the unfortunate coming together of the conduct and actions of Plaintiff, the driver of the pickup truck that hit him, Terry Imig, and the driver of the oncoming vehicle, Sharryl Everson. As the Court of Appeals realized in its opinion, any potential highway condition or conditions, even if they did exist as alleged, had little or nothing to do with, much less proximately *caused*, the actual accident.

Whether the defect was the "advanced deterioration" alleged potholes and washboard surface, "no shoulder" and "inadequate highway width", which Menard claimed in his original notice, the "berms" or "berms claims", which were *added* by Menard's successful effort to amend the original notice three years on, or some other condition or combination of conditions of the road, these defects were simply not "actionable" defects under the highway exception because they were not persistent and integrated aspects of the roadbed surface existing at all times sufficient to give rise to liability.[56]

[56] See, *inter alia*, *Jones*, *supra*); *Haliw*, 464 Mich at 308; *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161,169; 713 NW2d 717 (2006); *Palletta*, 491 Mich at 897; *Hagerty,* 493 Mich at 933.

And, in any event, this Court had not imposed liability upon a defendant, any defendant, much less one that is a governmental entity, based on a pure "cause in fact" analysis as to do so would be nothing more than imposing strict liability.[57] This the Court has adamantly rejected.[58] Even more where the Legislature has enacted statutes further confining traditional common-law tort liability when it is sought to be imposed against the government.[59] The tendency in the historical jurisprudence of this Court was to move away from broad readings of statutory provisions excepting the government from its ordinary position of immunity to expand traditional tort-law principles, especially causation.[60] Plaintiff would seek to revert to pre-*Robinson* concepts of causation that would impose upon the government liability for the mere fact that there was some involvement of a government function.[61]

Despite Plaintiff's protestations, it was absolutely proper for the Court of Appeals to have considered in its analysis of legal causation the legislative policy granting narrow exceptions to the broad immunity from suit and liability otherwise enjoyed by the government in its day to day functioning. See Plaintiff's Brief, p 38.

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[57] *Anderson v Pine Knob Ski Resort*, 469 Mich 20, 27-28; 664 NW2d 756 (2003).

[58] *Id*.

[59] *Id*. See also *Robinson*, 462 Mich at 459 ("immunity legislation evidences a clear legislative judgment that public and private tortfeasors should be treated differently.") (internal quotation marks admitted), citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984).

[60] *Robinson*, *supra* at 455-456.

[61] *Id*.

Public policy considerations are especially significant because the Legislature has exercised its lawmaking powers to *codify* policy to control the outcome of cases against the government in a manner significantly different than ordinary tort cases.[62] Despite Plaintiff's constant attempts to make this case against Macomb County like any other ordinary tort case against any other ordinary civilian defendant, such lawsuits are, and must be, treated differently because of the principles of immunity underlying the function of government and the purposes behind protecting it from both suit and liability in all but the few situations in which the Legislature has consented, on behalf of the people, to *allow* a claimant to proceed.

As this Court stated in *Moning*, "[t]he law of negligence was created by common law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law *absent legislative directive*."[63] As already established, the GTLA represents a legislative directive that governmental entity defendants are to be treated differently than civilian defendants. [64]. It is the Legislature, not the judiciary, that is to make the determination of when, if ever, liability is to be broadened for a governmental entity.[65] Indeed, going in reverse would be a direct affront to this Court's constitutional duty.[66] "[T]his Court exceeds the limit of its constitutional authority when it substitutes its policy choice for that of the Legislature."[67]

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[62] *Ross*, supra; *Robinson*, *supra*. Accord, *Costa*, 475 Mich at 409-410.

[63] 400 Mich at 436 (emphasis added).

[64] *Costa*, 475 Mich at 409-410.

[65] *Rowland*, 477 Mich at 207.

[66] *Robinson*, 462 Mich at 474.

[67] *Id*. at 439.

Thus, while a jury might decide whether there was "cause in fact" and what a specific standard of care might have been in a given case, the court decides questions of duty, standard of care and proximate cause"[68] Plaintiff misstates *Moning* to make it appear that the question is always one for the jury – but this ignores (and indeed obscures the function of the court and the jury in a given case).

> [W]hether defendants' conduct in the particular case is below the general standard of care, including ***unless the court is of the opinion*** that all reasonable persons would agree ***or there is an overriding legislatively or judicially declared public policy whether in the particular case*** the risk of harm created by the defendants' conduct is or is not reasonable.[69]

The emphasized language cannot be understated. Here, the Court of Appeals understood the limits of the inquiry into the question of duty and causation. And, indeed, in this particular case the importance of protecting the government's suit immunity, and all of the judicial and legislatively declared policies surrounding it mandate a finding that the government was not responsible (it had no duty to the plaintiff), and its conduct to the extent that it was even actionable, i.e., that there was even an actionable defect and that such was identifiable and articulated. Plaintiff misquotes *Moning* in an attempt to push this Court's jurisprudence well beyond its limits in addressing cases against the government. But, the government is entitled to protection from *suit* and *liability* in most cases.

In *Rowland*, the Court reminded us that the "public fisc is at risk in these cases" and "[t]he decision to expand the class of those entitled to seek recovery against the government should be

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[68] *Id*. at 438.

[69] *Id*.

in the hands of the Legislature."[70] Further, "[t]his Court does not have the authority to waive the government's immunity from suit, and tax dollars should only be at risk when a plaintiff satisfies all the prerequisites, including a notice provision, set by the Legislature for one of the exceptions to governmental immunity."[71] The public policy factors sewn into the fabric of Michigan governmental immunity law by this Court's decades of jurisprudence interpreting the GTLA cannot be ignored when delving into the often academic treatment of "foreseeability" analysis. The Court of Appeals' majority simply applied these concepts in its analysis.

In re Certified Question from Fourteenth Dist Ct of Appeals of Texas,[72] sheds light on the modern approach, and the necessity for courts to always consider the undercurrents of public policy that must drive their decision-making in particular cases. In explaining the circumstances in which, even if a duty exists between a defendant and claimant in a given case, another element that must be considered is "foreseeability" of the harm, the Court explained, "in determining whether a defendant owes a duty to a plaintiff, *competing policy factors* must be considered." [73]The Court concluded, like most modern courts, that "the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing that duty outweigh the social costs of imposing a duty."[74] This Court has also said that "[s]ound public policy is a factor

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[70] *Rowland*, *supra* at 222-223.

[71] *Id*. at 223.

[72] 479 Mich 498, 501-502; 740 NW2d 206 (2007).

[73] *Id*. at 508 (emphasis added).

[74] *Id*. at 515. See also Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B U L Rev 1873, 1875 (2011); Zipursky, *Foreseeability in Negligence Law*, 44 Wake Forest L J 1247, 1273 (2009); White, *Tort Law in America: An Intellectual History* (Expanded Edition, 2003), p. 99.

in deciding duty."[75] The provision of public and quasi-public services are fraught with danger due to its hazardous qualities and the sheer volumes needed for its provision.[76] "Social policy must intervene at some point to limit the extent of liability."[77]

Importantly, the issue of foreseeability also determines whether *legal causation* exists, not just cause in fact.[78]. "[W]hether the cause is so significant and important to be regarded a proximate cause…depends in part on foreseeability when it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct *and intervening causes* were foreseeable…."[79] Given the confluence of events that occurred in this case, including, but not limited to, the increased traffic on Hipp Road due to the construction detour, the fact that it was 10:00 p.m. on a Friday night and dark or nearly dark, the fact that Imig admitted being blinded by the oncoming headlights of Everson and that he was driving as close as possible to the right side of the road and also admitted he did not see Plaintiff until it was too late to stop and that Plaintiff himself was perhaps imprudent in riding a bike on a heavily traveled dirt road with no shoulders at this time of night, there were multiple intervening causes of the accident that had only a factual connection to the condition of the roadway at that time.

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[75] *Groncki v Detroit Edison Co*, 453 Mich 644, 661; 557 NW2d 289 (1996), citing *Sizemore v Smock*, 430 Mich. 283, 293; 422 NW2d 666 (1988); *Antcliff v State Employees Credit Union*, 414 Mich 624, 630-631; 327 NW2d 814 (1982); and Prosser Keeton, Torts (5th ed), § 53, p 358.

[76] *Coleman*, *supra* at 450-451.

[77] *Groncki*, *supra*, quoting *Sizemore*, *supra* at 293.

[78] *Moning*, 400 Mich at 441.

[79] *Id*. (emphasis added).

Ultimately, the factors of any tort analysis must include foreseeability, proximate cause *and* public policy.[80] Thus, the "foreseeability" analysis becomes one inevitably that considers "proximate cause" in light of the public policy considerations. Indeed, the question at the very heart of this dispute is not duty, breach, and injury, but, "causation", and particularly, proximate causation. But that analysis requires a consideration of foreseeability. "'Proximate cause' normally involves examining the *foreseeability* of consequences, and whether a defendant should be held *legally responsible* for such consequences."[81] This in turn must be answered with reference to the public policies at issue.

Moreover, the Court of Appeals properly considered foreseeability in the context of all the other factors that were intervening in this case. This Court has consistently defined proximate cause as "a *foreseeable*, *natural*, and *probable* cause" of the defendant's negligence.[82] Such causation is distinct from factual or "but for" causation.[83]. Issues of proximate causation thus call for an independent, searching inquiry, the focus of which is whether the result of conduct that created a risk of harm and *any intervening causes* were foreseeable.[84]

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[80] See *Hidden Legacy*, *supra* at 1878-1879 and n 22 (citing *Valcaniant v Detroit Edison*, 470 Mich 82; 679 NW2d 689 (2004), for the proposition that Michigan applies a comprehensive approach, considering 6 out of 7 factors in the "duty-breach-foreseeability" nexus analysis, including foreseeability, proximate cause, and public policy).

[81] *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis added), citing *Skinner v Square D Co*, 445 Mich 143, 163; 516 NW2d 475 (1994).

[82] *Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004) (emphasis added); accord *Nielsen v Stevens,* 368 Mich 216, 220; 118 NW2d 397 (1962).

[83] *Moning,* 400 Mich at 439.

[84] *Jones v Detroit Med Ctr*, 490 Mich 960, 960; 806 NW2d 304 (2011) (emphasis added).

Plaintiff also makes the blanket statement that the question of reasonable foreseeability must be presented to the trier of fact. Plaintiff's ALTA, p. 43. However, as foreseeability is part and parcel of the duty-breach-foreseeability-proximate cause analysis applied in all tort actions, the courts may retain the issue as a matter of law.[85] Thus, in certain circumstances, the issue of causation can be considered as one of law, and therefore subject to resolution by this Court if public policy and the efficient administration of justice so warrants. In Michigan, "the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after *assessing the competing policy considerations for and against recognizing the asserted duty*."[86] To close the point, this Court stated in *Moning*, that "the court decides questions of duty, general standard of care and proximate cause".[87]

In this case, the proper policy construct when considering the causation element and potential liability of the government is the principle of statutory construction requiring strict or narrow interpretation of exceptions to governmental immunity. This principle has a distinguished pedigree.[88] "[T]he rule has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit" and "the standard of liability is *strictly construed* even under statutes which expressly impose liability".[89]

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[85] *In re Certified Question*, 479 Mich at 501-502; *Valcaniant v Detroit Edison*, 470 Mich 82; 679 NW2d 689 (2004).

[86] *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 85 (1981) (emphasis added).

[87] 400 Mich at 438.

[88] 3 Sands, Sutherland Statutory Construction (4th ed), § 62.01, p 113

[89] *Id*.

The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign.[90] As the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted.[91] The Legislature has "absolute discretion to specify the cases and contingencies in which the liability of the government is submitted" and "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government". This "a policy imposed by necessity".[92]

The majority's treatment of the proximate cause question as one of law was entirely consistent this Court's jurisprudence. A mere possibility of causation as a result of the defendant's negligence is not sufficient; and when the matter remains one of speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.[93] Under this analysis, it must be shown that reasonable minds cannot differ that injury was a foreseeable, natural, and probable consequence of the defendant's negligence.[94]

By advocating that proximate cause is a question for the jury, without qualification, Plaintiff seeks to open the floodgates in every case against the government seeking personal injury damages. But even the initial premise in ordinary cases, much less those involving a governmental

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[90] *Manion v State Hwy Comm'r*, 303 Mich 1 (1942), cert den'd *Manion v State of Michigan*, 317 US 677 (1942).

[91] *United States v Sherwood*, 312 US 584, 590 (1941).

[92] *Shillinger v United States*, 155 US 163, 166, 167-68 (1894).

[93] *Skinner*, 445 Mich at 165.

[94] *Jones*, 490 Mich at 961

defendant, is qualified. First where all reasonable people would decide the issue the same way, the question can be resolved by the court. Injury is said to be proximately caused by a particular defendant's negligence when it can be said to be a natural, probably, and direct or reasonably anticipated result *of that negligence* – not someone else's actions or negligence and not the result of intervening causes. In order to conclude that there is a factual question on the issue of causation, the Court would have to ignore, inter alia, defendant Everson's admission that she had her hi-beam headlights on when approaching Imig's vehicle and the bikers from the opposite direction; defendant Imig's admission that he was blinded by those bright lights and that he did not see Plaintiff in time to avoid hitting him; Plaintiff's own questionable decision to ride a bike on an unilluminated, shoulder-less dirt road at 10 p.m. on a Friday night in heavy traffic that was being rerouted from a major state highway through Hipp Road due to seasonal construction.

The Court should clearly understand what Plaintiff advocates. "[A]ll that needs to be foreseen is that the defendant's tortious conduct *may* have the effect of *creating a risk of harm* to the plaintiff." See Plaintiff's Br, p 42. Consider that using Plaintiff's theory of causation, and his insistence that Macomb County be treated as any other civilian defendant subjecting itself to defend suit under the MCR 2.116(C)(10) standard, which effectively places upon it a burden to *prove* it is entitled to immunity (where this Court has placed the burden to both plead and prove the case against the government on the Plaintiff),[95] would place upon the government the perpetual duty to guard against all accidents even when there has been *no proof* of the exact location and exact nature of the defect. Plaintiff's theory has been evolving as discovery has progressed and by virtue of the trial court's allowing amendment to the complaint, he was able to effectively submit a *new notice of claim* three years after the original defective (and also untimely) notice was lodged.

[95] *Mack*, 467 Mich at 199.

This is tantamount to placing strict liability on the government to *prevent* accidents even while having to defend lawsuits from which it should be immune. This places an unenviable (even impossible) burden on the government of risking untold liability for what are essentially *predictable* occurrences such as traffic accidents caused by a combination of events that are encountered by motorists, cyclists and pedestrians on a regular basis. Placed in this position, the government will have to assume enormous costs in trying to prevent accidents, while nonetheless defending lawsuits for failing to do so. Such an open-ended obligation on the part of the government is clearly unsustainable. Moreover, this extraordinary burden would have to be imposed all the while the government must continue to provide basic, and reasonably safe services to the public.

Plaintiff is effectively saying that any alleged *defect* that creates a *potential risk of harm* is therefore sufficient to allow suit against the government to proceed beyond the immunity consideration. If this is so, then there is no reason to even apply broad immunity from suit and narrowly construe the exceptions. All governmental functions have the effect of creating a risk of harm. It can be easily shown, without much scientific or analytical examination, that a certain amount of roadway maintenance as opposed to no maintenance at all creates a potential risk of harm. But the government is not supposed to be burdened with having to choose whether its attempts to maintain the roadways in Michigan will themselves be a cause for concern of liability. It is not supposed to have to guess how much or how little it must do. Everything involving roadway maintenance, from the type of materials used, to the labor and equipment involved has a limit based on available funding. Increasing the possibility of lawsuits and the costs of defending them only decreases the government's ability to provide necessary services to the public at large. If Plaintiff has his way, then *any risk of harm* created by *any maintenance deemed to be insufficient*

will survive the summary disposition stage and force the government to reassess the costs of performing its necessary functions. Ultimately, "[t]he liability of the state and county road commissions is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers."[96] As it is "a central purpose of governmental immunity…to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim based on governmental immunity", it is extremely important for this Court to maintain the Legislature's strictly construed and narrowly applied exceptions to immunity.[97]. Every dollar spent litigating claims and every man-hour expended in defending them is a direct and palpable drain on the provision of services to all for the public good. [98]

Plaintiff's envisioned "judicial causation paradigm" would be placing an intolerable burden on the government. The government would be expected to defend suits on the question fact in every case, even for those arising from accidents only factually related to the use of roadways when the existence of a defect is alleged. In addition to having to defend these lawsuits, face potential liabilities or enter into forced settlements, the governmental entity would also have to attempt to perform greater maintenance than is required in attempting to prevent even the most ordinary and everyday traffic accident. Such a paradigm would be contrary to the principle behind the government's inherent, preexisting and retained immunity from both suit and liability, which is strictly controlled by the Legislature's power to dictate the terms and conditions of the

[96] *Nawrocki*, 463 Mich at 148, n 1.

[97] *Mack*, 467 Mich at 195.

[98] *Costa*, 475 Mich at 410, citing *Mack*, *supra* at 203, n 18.

government's waiver. It is also directly contrary to this Court's jurisprudence on the subject of analyzing causation in actions against governmental entities.

In the instant case, the Court of Appeals ruled that Plaintiff's injuries were not a "foreseeable, natural, and probable result" of the alleged defects, and, as a consequence, its alleged failure to address them. That is, it was not foreseeable that the alleged "failure" on the part of Macomb would "result in a bicyclist being struck from behind by a driver of a truck blinded by oncoming headlights." (App. 8a) Applying the necessary public policy considerations at play in actions against the government the panel continued: "Not only was the situation not a foreseeable outcome of the Macomb defendants' negligence, but given the broad immunity provided by the GTLA, it would be not be "socially and economically desirable to hold the" Macomb defendants liable under the circumstances shown in the record." *Id*., citing *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496-497; 688 NW2d 402 (2003). This was a correct application of the law and a proper restraint on the Court's judicial authority, which in this particular subject matter is quite limited.

Plaintiff's injuries in this case were simply not within the scope of liability assumed by public entities. If it were otherwise, any incident arising where there is also a defect present, no matter how remote the injury and how attenuated its connection to that defect, would give rise to a trial on the merits. This is true even when considering causes resulting from environmental conditions combined with the actions and conduct of others at the time of the accident. Such broadening of the liability sphere far exceeds the bounds of sensible projection in nearly any case, not to mention those involving governmental entity defendants. It is especially important to consider the "duty-breach-foreseeability" paradigm in the context of governmental liability where, by sheer volume of the services provided, accidents (whether resulting from negligence or not) are bound to happen.

This Court's ultimate responsibility to identify, refine and limit the interrelated questions of causation and duty in negligence law is generally accepted, but that responsibility is significantly curtailed when there is legislative directive. In cases such as the present, involving ostensible waiver of the government's immunity from suit, the Legislature's parameters are primary. If the government's preexisting immunity from suit is broad and the exceptions thereto are to be narrowly construed, then there must always be a judicial examination of the prima facie legal questions before the claimant may access the courts to litigate his or her claim. Here, the legal question of proximate cause was properly examined by the Court of Appeals.

CONCLUSION

Every inquiry into the government's alleged waiver of suit immunity must start with whether the claimant has satisfied the jurisdictional preconditions to succeed in accessing the courts. More than three decades of this Court's jurisprudence on the subject of governmental immunity under the GTLA confirm the long-standing jurisdictional principle that properly orients the initial inquiry: a claimant's strict adherence to *all* requirements of the statutory exceptions are required to even access the courts of this state. There is no general right to sue the government and its subordinate entities in order to probe whether and to what extent there *might be* liability. To allow this would completely eviscerate the protective purpose of the GTLA – immunity is from suit as much as it is from liability. Indeed, this case is a perfect example that the costs of defending a suit that should *never have been allowed to proceed* past the summary disposition stage had the trial court property recognized the limits of its role in the question and applied the proper legal principles thereto.

This Court has thoroughly vetted this principle and has clearly staked out the boundaries of the government's preexisting and inherent suit immunity and the rare circumstances in which that

immunity can be lifted and consent given to explore its *potential* liabilities in a given case. The tapestry woven into the fabric of this state's jurisprudence when viewed from the proper perspective demonstrates that there is no reason to allow a suit to proceed where the preliminary checks required to pass through the door to access a court of law have not been satisfied. These are not optional requirements. They are fundamental elements the claimant bears the burden of proving *before* suit can proceed. If one is allowed to bypass these requirements then the rule of law is circumvented and the costs of the functioning of government expands exponentially. Every trial court in the state will be able to consider the question of legal causation *before* the claimant has established the *prima facie* elements showing that the immunity from suit has been waived.

In terms of highway defect cases, the government must have notice of the exact nature, exact location, and all known witnesses at the time of the incident allegedly giving rise to the injury complained of. The "time" requirement is equally jurisdictional, such that if a claimant fails to provide notice within the time required there can be no consideration of the claim in a court of law. Finally, any subsequent attempt on the part of the claimant to remediate or otherwise rehabilitate his or her original notice would be futile. Amendment cannot be allowed as a mechanism to circumvent the strictly applied requirements of the notice provisions.

Endless litigation surrounding these questions is allowed to proceed, as in this case, because the trial courts do not understand or do not care to apply the law. Clarification may be needed to reinforce these fundamental principles. However, any disposition other than to affirm the Court of Appeals decision would only give rise to the opposite – ambiguity, speculation, and confusion in the litigation of claims against the government.

Plaintiff produced *no evidence* of an actual, static actionable defect on Hipp Road on the night of and at the time of the accident. This is because (1) Plaintiff failed to specify the "exact" location

and precise "nature" of the defect on June 7, 2013 which allegedly *caused* the accident; and (2) even if the road had potholes, wash-boarding, berms, and narrowing none of the testimony of the primary actors or the experts points to any one of these, or a combination, as having actually caused the accident. Imig, the driver of the pickup truck that hit Plaintiff testified that he was driving as close to the right of the roadway as possible; he did not see Plaintiff in time to stop; and he was at least partially blinded by the hi-beam headlights of Ms. Everson's oncoming vehicle. Plaintiff testified that he was staying as far to the right as possible and that he was dodging potholes. Concerning the remaining testimony of "witnesses" and "experts" none can point to or identify an exact location of the accident or a precise defect on the date of the accident because none of these other individuals could have possibly known the existence of any of the alleged defects that they conclude were present. No photographs or measurements exist from the date of the occurrence or from the following days prior to any re-grading of the road to establish by physical evidence, conditions of the road on the date of the occurrence. In fact, no photographs or measurements were ever taken of Hipp Road or the accident scene that evening, or within the days following. The first photographs were not taken until after the road had been re-graded. The exact location of the accident, as acknowledged by Plaintiff's experts, cannot be determined.

A plaintiff who cannot establish that an actionable defect existed in the surface of the highway cannot establish that a defective highway proximately caused his or her injury.[99] There must be "a *persistent defect* in the highway . . . rendering it unsafe for public travel *at all times*. . . ."[100] The claimant cannot rely on mere allegations about the general condition of the roadway in conjunction with the actions and conduct of other parties to establish an *exception* to immunity.

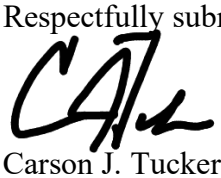
[99] *Haliw*, 464 Mich at 308, 311.

[100] *Id.* at 312 (emphasis added).

RELIEF REQUESTED

Macomb County respectfully requests the Court deny Plaintiff's application for leave to appeal. If the Court chooses to grant the application, then Macomb County would exercise its right to have this Court address those issues which it raised in its appeal, but which were not addressed by the trial court.

Respectfully submitted by:



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