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

ANSWER TO APPLICATION FOR LEAVE TO APPEAL FILED BY DEFENDANTS / RESPONDENTS MACOMB COUNTY DEPARTMENT OF ROADS AND MACOMB COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Cases

Unpublished Opinions

Court Rules

Treatises

Law Reviews and Professional Publications

COUNTER-STATEMENT OF JURISDICTION

The "statement of jurisdiction" is ordinarily rote citation to this Court's authority to exercise jurisdiction over an application for leave to appeal a lower court's decision. See Mich Const 1963, art 6, § 4.[1] However, Defendant, Macomb County Department of Roads (hereafter Macomb), respectfully submits that in this case, since Plaintiff's original notice was deficient, he *failed* to satisfy the preconditions and limitations required by the Legislature to waive suit immunity found in the Governmental Tort Liability Act (GTLA), MCL 691.1401, and therefore the *prima facie* jurisdiction was lacking for the trial court to allow Plaintiff to proceed under the highway exception. As courts are always required to question the basis of their jurisdiction over a particular cause of action, Macomb submits, as explained herein, that subject matter jurisdiction to proceed with the claimant's cause of action against it is lacking and must be considered as a prima facie and, indeed, dispositive issue in this case, which precludes the Plaintiff's claims. *Reed v Yackell*, 473 Mich 520, 540; 703 NW2d 1 (2005).

The Legislature, as the representative of the People, can erect whatever barriers it chooses to jurisdictionally bar claimants from accessing the courts to satisfy claims against the government. *Atkins v SMART*, 492 Mich 707, 714-715 and n 11; 82 NW2d 522 (2012). "[I]t being optional with the legislature whether it would confer upon persons a right of action therefor or leave them remediless, it can attach to the right conferred *any limitation it chose*." *Id*., quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919 (1908) (emphasis added). 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

[1] See also MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2), (7); and MCR 7.302(C)(2)(b).

that failure to comply *will deprive a court of jurisdiction*." *Henderson v United States*, 517 US 654, 673 (1996) (SCALIA, J., concurring) (emphasis added).

This Court has long recognized that governmental entity defendants are fundamentally distinct from civilian defendants. *Costa v Community Emergency Medical Serv's*, 475 Mich 403, 410; 716 NW2d 236 (2006), citing *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) and *Mack v City of Detroit*, 467 Mich 186, 203, n 18; 649 NW2d 47 (2002). One of the many ways this is evident in application of the GTLA to claims against governmental entity defendants is the prima facie legal principle that the state created the courts and so the state, along with all of its defined subordinate entities, is not subject to the courts, or to their *jurisdiction*, absent strict satisfaction by the claimants of the conditions precedent to the Legislature's statutory waiver. *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). See also *Greenfield Constr Co v Dep't of State Hwys*, 402 Mich 172, 194, 197; 261 NW2d 718 (1978) (circuit courts are "*without jurisdiction*" to entertain actions against the government without legislative consent" and since the *waiver* of this immunity must be strictly construed, 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") (emphasis added). The GTLA does not provide immunity. Rather, it provides the waiver by way of *limited* exceptions to this immunity, the latter of which is preexisting and inherent in the exercise by the government of its functions. *Mack*, *supra*.

Without the express waiver, state courts are simply *not vested* with the authority, i.e., the jurisdiction, to consider the substantive claims lodged against the governmental entity. *Sanilac Co Bd of Supervisors v Auditor General*, 68 Mich 659, 665; 36 NW 794 (1888) ("The state is not

liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure."). See also *Ballard v Ypsilanti Twp*, 457 Mich 564, 568-569; 577 NW2d 890 (1998).

Indeed, the very ability of the government to function depends on its having the *inherent* characteristic of immunity from *all tort liability* absent legislative acquiescence, on behalf of the People, to be subjected to suit in state courts. *Ballard*, *supra* at 569. See also *Mack*, 467 Mich at 212. As such, as this court has properly recognized, governmental immunity is not an affirmative defense, but rather it is a jurisdictional defense that presents a preexisting and nonwaivable aspect of the governmental entity's discharge of its public functions. *Id*.

Because the defense of immunity is jurisdictional, a failure to satisfy the pre-conditions to suits against the government may be raised at any time, even on (and even after) appeal. *Fox v Univ of Michigan Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965); *Lehman v Lehman*, 312 Mich 102, 105-106; 19 NW2d 502 (1945).

As Macomb asserted in the Court of Appeals, and continues to assert here, the trial court lacked jurisdiction over Petitioner's claims against Macomb for several critical reasons. First, for three separate reasons, proper notice was lacking. Proper statutory notice under the GTLA is a *condition precedent* to the lifting of the government's suit immunity. *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). See also *Atkins*, 492 Mich at 710 ("Statutory notice requirements must be interpreted and enforced as plainly written."). "[W]hen the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain notice requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed." *Id*., citing *McCahan v Brennan*, 492 Mich 730, 746-747; 822 NW2d 747 (2012). See also *Atkins*, *supra* at 714-715 and n 11.

MCL 691.1404(1), the notice provision at issue in this case, provides:

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

Notice under the highway exception, just like notice under all other similar provisions interpreted and applied by this Court, must be *timely* and the content of the notice must *strictly comply* with the language of the relevant provision. See, e.g., respectively, *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 212; 731 NW2d 41 (2006) (notice *must* be served within 120 days of the incident giving rise to the claim and there are no savings provisions, equitable or otherwise) and *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011) ("[t]he statute requires notice of 'the *exact location*' of the defect") (emphasis added). If the notice *fails* in these respects, i.e., either as to *timeliness* or *content*, then, as Macomb asserted in the Court of Appeals, the failure to satisfy these conditions precedent constitute an insurmountable jurisdictional defect, one which, if present, can be raised and addressed by the reviewing court at any time. *Lehman*, *supra*. Indeed, courts are always required to question the basis of their jurisdiction over a particular cause of action. *Reed*, 473 Mich at 540.

This court is currently considering two cases, the outcome of which will bear directly on the *timeliness* of notice and the *content* of notice under the highway exception. In *Streng v Bd of Mackinac County Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), lv den 500 Mich 919 (2016), recon den 500 Mich 997 (2017), the Court of Appeals held, *inter alia*, that the 60- not 120-day statutory notice provision found in MCL 224.21 applied to highway defect claims lodged

against county road commissions.[2] See also *Brugger v Midland Cty Bd of Rd Comm'rs*, 324 Mich App 307, 316; 920 NW2d 388 (2018), abeyed 920 NW2d 131 (2018), which held that the decision in *Streng* was to be applied prospectively, only, to claims lodged under the highway exception. But see *Harston v Cty of Eaton*, 324 Mich App 549, 558-559; 922 NW2d 391 (2018), following the Court of Appeals opinion in *W A Foote Memorial Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), which held that judicial decisions interpreting statutory text apply retroactively to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule and inviting this Court to expressly state so. In this regard, whether *Streng* applies retroactively, and Macomb here contends that it should, will be addressed by this Court in the case of *W A Foote Memorial Hosp v Michigan Assigned Claims Plan* (Docket No. 156622).

Indeed, the retroactivity of *Streng* would apply to governmental immunity cases in all circumstances because proper application of the rule, an interpretation of MCL 224.21 that applies the 60-day provision to governmental entities, would simply recognize that such preconditions to suit against governmental entities are *jurisdictional* limitations placed on the claimant's ability to access the courts of Michigan via legislative waiver of the preexisting and inherent immunity in all governmental functions. *Mack*, 467 Mich at 212; *Atkins*, 429 Mich at 710; *Fairley*, 497 Mich at 298. Accord *Harston*, 321 Mich App at 558-559 (stating that because "the cause of action [under the highway exception] can defeat governmental immunity, which is *especially significant* for enforcing only those causes of action enacted by the Legislature", *Streng* applies retroactively) (emphasis added). Macomb submits that the aspect that is *especially significant* in the context of

[2] 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.

suits against the government is the necessity of the claimant to *strictly* comply with and satisfy *all conditions and limitations* placed upon him or her by the Legislature to access the courts of this state, because this is a jurisdictional requirement. *Greenfield Constr Co*, 402 Mich at 194; *Fairley*, 497 Mich at 298; *McCahan*, 492 Mich at 746-747.

Plaintiff's original notice was provided beyond the 60-day period. (**ATTACHMENT A**). The accident underlying plaintiff's suit occurred on June 7, 2013. Plaintiff provided notice on October 2, 2013 and Macomb County acknowledged receipt on October 3, 2013. Plaintiff's notice was not provided within 60 days of the June 7, 2013 accident. Defendant, Macomb County Department of Roads, is *included* within those entities governed by MCL 224.21. See footnote 2, *supra*. Thus, because the 60-day provision applies to Macomb County, Plaintiff has failed to fulfill a condition precedent to lodging a successful claim against the government. See *Moulter*, 155 Mich at 168-169; *Atkins*, 492 Mich at 714-715 and n 11; *McCahan*, 492 Mich at 746-747; and *Fairley*, 497 Mich at 298. As Macomb urged in the Court of Appeals, a claimant's failure to satisfy any conditions or limitations of a claim against the government, including a failure to satisfy the notice provision, presents a jurisdictional bar to a state court's consideration of the case. [3] In this regard,

[3] 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 plead that the Plaintiff's notice was defective. See **ATTACHMENT C**, Macomb's Brief on Appeal. 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 242-243; *Reed*, 473 Mich at 540. Fourth, the question of retroactive application would not pose a problem as 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). Moreover, this Court may decide to consider it where it is interrelated and part of the

Macomb asserts that state courts lacks jurisdiction over the underlying claims against it and this Court must consider the question and can do nothing other than dismiss the case against Macomb on these grounds alone. See *Reed*, 473 Mich at 540 and *Fox*, 375 Mich at 242, respectively.

Second, this Court is currently considering "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)." *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit*, (Docket No. 157097). In its opinion below, the panel cited the liberalized interpretation of the notice provision enunciated by the Court of Appeals in *Plunkett*. (**ATTACHMENT B**, *Menard v Imig et al*, unpublished per curiam opinion of the Court of Appeals, issued September 6, 2018 (Docket No. 336220), p 9, n 7). In doing so, the Court of Appeals disagreed with Macomb's argument that Plaintiff in this case did not strictly comply with provision's requirements.

Macomb asserted Plaintiff's notice was insufficient to satisfy strict compliance with the notice provision because it failed to specifically identify *both* the "exact location" and "exact nature" of the defect. (**ATTACHMENT C**, Macomb's Brief on Appeal (without attachments), pp. 14-19). Regarding the naming of witnesses, Macomb asserted that Plaintiff failed to identify all witnesses known to him at the time the original notice was provided. *Id*., pp. 19-20. Plaintiff then *added* these witnesses at a later date, further prejudicing Macomb's ability to conduct an initial investigation after receipt of notice and to adequately defend itself once it was added as a defendant.

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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).

Although the Court of Appeals ultimately reversed the trial court's decision and remanded for summary disposition in Macomb's favor, in a footnote it stated if it were to address Macomb's arguments concerning the sufficiency of the notice, it would conclude that notice was adequate under *Plunkett*. (**ATTACHMENT B**, unpub op at 9, n 7). The panel stated:

> [D]espite the Macomb defendants' argument that plaintiff's statutory notice was insufficient for failing to specifically identify the location and nature of the defect and leaving off witnesses who did not see the accident, the notice provided by plaintiff satisfied the requirements of MCL 69.1404(3) because it was "understandable and sufficient to bring the important facts to the governmental entity's attention." *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009). See also *Milot v Dep't of Transportation*, 318 Mich App 272, 277; 897 NW2d 248 (2016) (defining witness as it is used in MCL 691.1403(3) as a person "who witnessed the 'occurrence of the injury and defect.'"). *Id*.

This Court has held that the purpose of the notice provision is, inter alia, to apprise the government so that it may remedy any defect and investigate the claim as soon as possible. *Rowland*, 477 Mich at 212. To do so sufficiently, the notice must be timely and it must identify the exact location, precise nature, and all witnesses known at the time notice is provided "to confine plaintiff substantially to the character of the defect alleged in the notice and claimed to have caused injury and consequent liability". *Harrington v Battle Creek*, 288 Mich 152, 156; 284 NW 680 (1939). A compliant notice is a condition precedent to the right to bring a claim. *Id*. at 155, citing *Moulthrop v City of Detroit*, 218 Mich 464; 188 NW 433 (1922).

In the event this Court holds that retroactive application would be the proper outcome in *Streng*, *supra*, and/or further that, contrary to *Plunkett*, *supra*, a strict, rather than liberal, standard of interpretation should apply to a notice's identification of the exact location and nature of a defect, and to the disclosure of *all* witnesses at the time the Plaintiff provides notice, Macomb submits that Plaintiff's notice was deficient. Such a defect *in any* of these requirements means that the *conditions precedent* to suit simply were not established. Therefore, the trial court lacked

jurisdiction to proceed to consider the merits of Plaintiff's claims. Any action other than to dismiss this suit on the basis of insufficient notice was an extra-jurisdictional act by the trial court and *ultra vires* of its constitutional and statutory authority.

Third, Macomb also challenges the underlying jurisdiction of the trial court to allow Plaintiff to amend his complaint for a *third* time and nearly *three years* after the original notice to *add* a defect that was not contained in the original notice. (**ATTACHMENT C**, pp. 6-8 and 19-22). This amendment was filed *after* Macomb had submitted its motion for summary disposition. Macomb asserted that the amendment improperly allowed Plaintiff to provide notice of a newly alleged defect, which was specifically tailored and designed to remedy the deficiencies in Plaintiff's original notice and in his case, which deficiencies were pointed out in Macomb's earlier filed motion for summary disposition. *Id*. at pp xiv, 6-8 and 19-22. The Court of Appeals ruled "because summary disposition was warranted in favor of the Macomb defendants regardless of the amendment, we need not address that now moot issue." (**ATTACHMENT A**, Slip Op. at 2, n 2).

Fourth, and no less important, a different standard of review applies when assessing a motion for summary disposition brought by a governmental entity on immunity grounds. There is confusion in the proper standard of review to apply to the government when a motion for summary disposition on grounds of immunity is asserted. One line of cases, relied on by the trial court here, employs a "hybrid" standard of review using MCR 2.116(C)(7) and MCR 2.116(C)(10). See, e.g., *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).

The proper standard of review was enunciated in this Court's decision in *Mack v City of Detroit*, 467 Mich 186, 199; 649 NW2d 47 (2002). There, the Court held that to proceed with his claim against the government, a claimant is required to plead *and* prove facts in avoidance of

immunity. Thus, the trial court must consider, at the outset and as a matter of law, whether a claimant has sufficiently pleaded and proved his or her case. At the specific urging of undersigned counsel 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). *Yono v MDOT*, 497 Mich 1040; 864 NW2d 142 (2015).

The issue went unresolved because the Court correctly found there was no defect in the highway and reversed. This issue remains extant. It was raised by Macomb below. Although the Court of Appeals found that "causation" was lacking and remanded for entry of summary disposition in Macomb's favor, it approved of the trial court's application of the standard of review consistent with the line of cases that allows a trial court to place the burden on the governmental entity. (**ATTACHMENT B**, unpub op at 3, n 3).[4] This was error. This reviewing standard directly implicates jurisdiction of the trial court to allow a case to proceed past the immunity inquiry.

Using the "hybrid" standard results in the following analysis taken from the Court of Appeals opinion in *Yono v MDOT*, 306 Mich App 671, 679-680; 858 NW2d 158 (2014), rev'd on other grounds 499 Mich 636 (2016):

[4] Although the panel cited this Court's decision in *Kozak v City of Lincoln Park*, 499 Mich 465, 468; 885 NW2d 443 (2016), that case dealt with the sufficiency of the governmental entity's rebuttal (which came by way of a single affidavit it submitted with mere conclusory statements), not the question of whether a trial court may deny the government's immunity motion based only on initial factual allegations that a claimant, after litigation and discovery, *will eventually be able to satisfy* the conditions, limitations and exceptions to immunity. The primary question posed by this Court in *Yono*, 497 Mich at 1040, has not been answered.

> [A]s with a motion under MCR 2.116(C)(10), *the movant bears the initial burden to show that he or she is entitled to immunity as a matter of law*. See *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant has immunity, the burden shifts to the nonmoving party to present evidence that establishes a question of fact as to whether the movant is entitled to immunity as a matter of law. *Id.* at 537, n 6. If the trial court determines that there is immunity, the court must deny the motion. If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant has immunity, the burden shifts to the nonmoving party to present evidence that establishes a question of fact as to whether the movant is entitled to immunity as a matter of law. *Id.* at 537, n 6. If the trial court determines that there is a question of fact as to whether the movant has immunity, the court must deny the motion. *Dextrom*, 287 Mich App at 431.
>
> [*Yono*, 306 Mich App at 133-134 (emphasis added).]

Mack teaches that the burden should *never* be on the government to demonstrate it is entitled to immunity because it already is immune unless the conditions, limitations, and exceptions in the GTLA apply. *Mack*, 467 Mich at 199, n 14, 203, n 18 (stating "Plaintiff must plead and prove facts in avoidance of immunity" and "unlike other claims of immunity, sovereign and governmental immunity are not affirmative defenses, but characteristics of government which prevent imposition of tort liability.").

Allowing a case against the government to continue based only on well-pleaded factual allegations is a fundamental jurisdictional defect because the trial court's duty is to determine if the claimant has both pleaded and proved a case to proceed against the government. The inapplicability of immunity is an element of the claimant's case. *McCann v Michigan*, 398 Mich 65, 77, n 1; 247 NW2d 521 (1976). Thus, there is a presumption of immunity. *Mack*, *supra* at 202. If the trial court denies the government's defense, the government gets an automatic right of appeal with respect to the *entire case* against it because the underlying and inherent immunity *from suit* has not yet been waived. See 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) (stating if an appeal of right on the legal issue of whether an exception to immunity applies was not always available to the governmental entity "the claim of immunity could be 'effectively lost' when a plaintiff's allegations in avoidance of immunity were 'erroneously permitted to go to trial'"). This Court later affirmed this reasoning in *Watts v Nevils*, *et al*, 477 Mich 856, 856; 720 NW2d 755 (2006), putting to rest the errant notion that litigation of the underlying substantive claims can continue on in the trial court while the issue of immunity is resolved on appeal.

Unless and until the Court of Appeals, and ultimately this Court, disagrees with the government's defense, the veil of immunity that protects it from litigation and liability has not been lifted. This is merely a procedural consequence of the nature of governmental immunity.

Macomb asserts in this counter-statement of jurisdiction that the state court *never* had jurisdiction to proceed further upon the filing by Macomb of its motion for summary disposition. As such, this Court's only option is to deny the application and dismiss Plaintiff's case.

If the Court disagrees with this jurisdictional statement, then Macomb would submit the Court's jurisdiction is limited to considering whether Plaintiff has, as a matter of law, both pleaded and proved her case under MCL 691.1402, such that the additional elements of her claim against Macomb can proceed.[5] In the latter case, the Court has jurisdiction over this appeal pursuant to Mich Const 1963, art 6, § 4.[6]

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[5] Even if a 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 the factual and legal (proximate) cause of the claimant's injuries, and that no mitigating defenses exist, e.g., the open and obvious doctrine. *Suttles v State Dep't of Transportation*, 457 Mich 635, 653; 578 NW2d 295 (1998).

[6] See also MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2), (7); and MCR 7.302(C)(2)(b).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Plaintiff presents only two questions for review. The first question relates to the Court of Appeals' "causation" analysis under MCL 691.1402. The second is a more general request to this Court to reverse the Court of Appeals' opinion granting Macomb summary disposition. Because the issue of *causation* under the highway exception, one of the primary elements of a tort claim underlying that provision, must be considered *only after* the claimant has proved and pleaded that they have a *prima facie* case against the government, i.e., that he or she has satisfied the preconditions, limitations and exceptions to the inherent and preexisting immunity enjoyed by the government, see *Suttles*, 457 Mich at 653, Macomb submits that several jurisdictional and substantive questions would necessarily have to be addressed first. These predicate issues, whether the notice was sufficient, whether the amendment to the complaint was proper, whether the appropriate standard of review was used, and whether there was any actionable defect were all presented by Macomb in its appeal. (**ATTACHMENT C**). To varying degrees, the Court of Appeals addressed these questions in dicta. (**ATTACHMENT B**). However, if the Court were to grant Plaintiff's application, Macomb submits it would have to address these prima facie and, in Macomb's view, dispositive issues first. See MCR 7.307(B) and MSC IOP 7.307(B).

Pursuant to MCR 7.305(A)(1)(b), Respondent respectfully submits that the questions for review should be as follows:

I. Was the claimant's original October 2, 2013 notice timely?

> Defendant Macomb Answers: No. Plaintiff's original notice was provided beyond the 60-day period. (**ATTACHMENT A**). The accident underlying plaintiff's suit occurred on June 7, 2013. Plaintiff provided notice on October 2, 2013 and Macomb County acknowledged receipt on October 3, 2013. Plaintiff's notice was not provided within 60 days of the June 7, 2013 accident. In *Streng v Bd of Mackinac County Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), lv den 500 Mich 919 (2016), recon den 500 Mich 997 (2017), the Court of Appeals held, *inter alia*, that the 60- not 120-day statutory notice provision found in MCL 224.21 applied to highway defect claims

lodged against county road commissions. See *Harston v Cty of Eaton*, 324 Mich App 549, 558-559; 922 NW2d 391 (2018) following the Court of Appeals opinion in *W A Foote Memorial Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), which held that judicial decisions interpreting statutory text apply retroactively to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule and inviting this Court to expressly state so. In this regard, whether *Streng* applies retroactively, and Macomb here contends that it should, will be addressed by this Court in the case of *W A Foote Memorial Hosp v Michigan Assigned Claims Plan* (Docket No. 156622). Indeed, the retroactivity of *Streng* would apply to governmental immunity cases in all circumstances because proper application of the rule, an interpretation of MCL 224.21 that applies the 60-day provision to governmental entities, would simply recognize that such preconditions to suit against governmental entities are *jurisdictional* limitations placed on the claimant's ability to access the courts of Michigan via legislative *waiver* of the preexisting and inherent immunity in all governmental functions. *Mack*, 467 Mich at 212; *Atkins*, 429 Mich at 710; *Fairley*, 497 Mich at 298. Accord *Harston*, 321 Mich App at 558-559. Defendant, Macomb County Department of Roads, is *included* within those entities governed by MCL 224.21. See footnote 1, *supra*. Thus, because the 60-day provision applies to Macomb County, Plaintiff has failed to fulfill a condition precedent to lodging a successful claim against the government. See *Moulter*, 155 Mich at 168-169; *Atkins*, 492 Mich at 714-715 and n 11; *McCahan*, 492 Mich at 746-747; and *Fairley*, 497 Mich at 298.

Plaintiff Menard Answers: Yes.

The Court of Appeals Answers: Yes. (**ATTACHMENT B**, unpub op at 9, n 7).

II. Was the claimant's original notice, confined as it must be to its contents, deficient because it failed to strictly comply with the highway exception's notice provision by failing to identify the "exact location" and "precise nature" of the defect, and *all* witnesses, thereby failing to lift the veil of the government's suit immunity and vest the trial court with jurisdiction to consider the merits of plaintiff's claims?

Defendant Macomb Answers: Yes.

Plaintiff Menard Answers: No.

The Court of Appeals Answers: No. Even though the Court of Appeals concluded there was no "causation" proved by Menard it stated in a footnote that if it were to analyze the sufficiency of the notice it would conclude the notice was adequate. (**ATTACHMENT B**, unpub op at 9, n 7).

III. Did the trial court commit reversible error in allowing claimant to amend the complaint nearly three years after the initial notice to change the nature and character of the defect alleged?

Defendant Macomb Answers: Yes.

Plaintiff Menard Answers: No.

The Court of Appeals Answers: No. Although Macomb raised this issue below, the Court of Appeals concluded the issue was moot in light of its ruling that the claimant had failed to prove causation. (**ATTACHMENT B**, unpub op at 3, n 3). Macomb asserts this as a counter-question presented because the issue would not be moot if this court were to grant Menard's application. See MCR 7.307(B) and MSC IOP 7.307(B).

IV. Did the trial court apply the appropriate standard of review to Macomb's motion for summary disposition under MCR 2.116(C)(7)?

Defendant Macomb Answers: No.

Plaintiff Menard Answers: Yes.

Court of Appeals Answers: Yes. (**ATTACHMENT B**, unpub op at 3, n 3).

V. Did the trial court err in concluding claimant had plead and proved the existence of an "actionable" highway defect in accordance with a strict interpretation of the language of the GTLA as required by this Court's jurisprudence?

Macomb Answers: Yes.

Menard Answers: No.

Court of Appeals Answers: The Court of Appeals did not directly answer this question. It ruled that the notice was sufficient, but any claimed or alleged defect could not have been the cause of the accident in which Menard was injured. (**ATTACHMENT B**, unpub op at 9, n 7). In its appeal, Macomb argued that 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 were the defects that caused his accident, or the "berms" or "berms claims" *added* by Menard's successful effort to amend the original notice three years, 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 permanent and integrated aspects of the roadbed surface sufficient to give rise to liability. See, *inter alia*, *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912); *Palletta v Oakland County Rd Comm'n*, 491 Mich 897; 810 NW2d 383 (2012); *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161,169; 713 NW2d 717 (2006); *Hagerty v Board of Manistee County Road Commissioners,* 493 Mich 933; 825 NW2d 581 (2013). The claimant cannot rely on a combination of aspects about the roadway that when considered alone are not defects in conjunction with the actions and conduct of other parties, to establish an *exception* to immunity. 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. *Haliw v Sterling Hts*, 464 Mich 297, 308, 311; 627 NW2d 581 (2001). There must be "a persistent defect in the highway…rendering it unsafe for public travel *at all times*…." *Id.* at 312 (emphasis added). Macomb asserts that if the Court of Appeals' decision that there is no causation is somehow reversed, Macomb's argument that there was no "actionable" highway defect alleged in the claimant's original late notice, or the second untimely notice cached in the improperly allowed amended complaint, would, of necessity, have to be considered.

VI. Did the trial court err in concluding that claimant's injuries could have been caused by a highway defect when there was no *genuine* question of material fact concerning the exact defect, its exact location, and only speculation as to how these alleged but never proven defects were the cause of claimant's injuries?

Macomb Answers: Yes.

Menard Answers: No.

Court of Appeals Answers: Yes.

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, they can be and often are significantly and negatively affected by constant, changing, and ever-present traffic and weather conditions, e.g., rain, drought, wind, and rapid temperature changes, elements which have less or no immediate effect on paved roads. Such environmental conditions are beyond the control of the governmental entities.

Governmental entities having jurisdiction over highways with gravel or other unpaved surface material can never insure 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 Michigan's climate. *Haliw v Sterling Hts*, 464 Mich 297, 308, 311; 627 NW2d 581 (2001). 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 subject. *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); *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161,169; 713 NW2d 717 (2006); *Hagerty v Board of Manistee County Road Commissioners,* 493 Mich 933; 825 NW2d 581 (2013).

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." *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143, 148, n. 1; 615 NW2d 702 (2000). 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. *Mack*, 467 Mich at 195. 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. *Costa v. Community Emergency Medical Services, Inc.*, 475 Mich. 403, 410; 716 NW2d 236 (2006), citing *Mack*, *supra* at 203, n. 18.

Putting aside for the moment the prima facie jurisdictional defects noted concerning the deficiency in the notice provided and the trial court's errant hybrid analysis of Macomb's summary disposition motion allowing Plaintiff's case to proceed despite his failure to plead and prove the case in avoidance of immunity, see *Mack*, 467 Mich at 199, allowing the trial court's decision to stand would burden the public fisc by allowing nearly every accident to be a potential lawsuit for some or another alleged transient, dissipating, unavoidable and, in some instances, including the present case, unverifiable highway condition or conditions. In this same vein of avoiding unbridled

litigation against the government, when viewed under the appropriate legal standard, the unfortunate accident in this case was not *caused by* any defect in the highway, but rather, by a confluence of 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.

In its appeal, Macomb argued that 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 permanent and integrated aspects of the roadbed surface existing at all times sufficient to give rise to liability. See, *inter alia*, *Jones v Detroit*, 171 Mich 608; 137 NW 513 (1912); *Haliw v Sterling Hts*, 464 Mich 297, 308, 311; 627 NW2d 581 (2001); *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161,169; 713 NW2d 717 (2006); *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).

During litigation of the underlying case and in response to Macomb's motion for summary disposition, and Macomb's appeal, 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 *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. *Haliw v Sterling Hts*, 464 Mich 297, 308, 311; 627 NW2d 581 (2001). There must be "a *persistent defect* in the highway . . . rendering it unsafe for public travel *at all times*. . . ." *Id.* at 312 (emphasis added). 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.

If the Court of Appeals' conclusion that Plaintiff failed to prove his accident was proximately caused by a highway defect is reversed, the Court would have to address Macomb's arguments

concerning the sufficiency of the notice as timeliness and content; the propriety of allowing Plaintiff to amend his complaint; the standard of review applied to Macomb's immunity defense; and whether there was an "actionable" highway defect alleged in the claimant's original late notice, or, the second untimely notice cached in the amended complaint. This is especially so as the Court is poised to address these issues in *W A Foote*, Docket No. 156622 and *Wigfall*, Docket No. 156793.

In any event, Macomb submits that Plaintiff's application should be denied and the Court of Appeals decision left to stand.

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 Detroit 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. (**ATTACHMENT D**, Menard Dep. Tr., pp. 39-41, 87, 88). 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. *Id*., p. 38. He further testified that he gotten as far to the right as he could. *Id*., pp. 40-41. Plaintiff stated that he was dodging potholes at the time of the occurrence. *Id*., p. 40. Importantly, he testified that he expected he would be passed as he had been

previously. *Id*., p. 39-41. Instead of passing him, Imig's truck ran into the rear wheel of Plaintiff's bicycle. Plaintiff suffered serious injuries.

Imig 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. (**ATTACHMENT E,** Imig Dep. Tr. 1, pp. 43-44 and 60). He also testified he was focusing his vision on the "grass line" because of the bright lights of oncoming vehicles. *Id*. at 44.

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. *Id*., pp. 41, 63. 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. *Id*., p. 64. Imig testified he did not encounter significant potholes and he did not affirm that road conditions affected his driving, *Id*., pp. 38, 66-67. Imig claimed he was blinded by approaching headlights from the vehicle operated by Everson. *Id*. pp., 22-23. He "could not see because of the bright lights." *Id*., p. 32.

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. (**ATTACHMENT F,** Everson Dep. Tr., pp. 30-31; 81, 83).

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. **ATTACHMENT E**, Imig Dep. Tr., pp. 18-19; 31-32 ("nothing significant"); **ATTACHMENT F**, Everson Dep. Tr., pp. 17-19, 81 ("no potholes").

Plaintiff's two friends, Logan Ganfield and Jeffrey Fietsam both testified they had no difficulty navigating the road on their bicycles. (**ATTACHMENT G**, Ganfield Dep. Tr., pp. 46-47; **ATTACHMENT H**, Fietsam Dep. Tr., pp. 27-29).

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. (**ATTACHMENT A**). 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.
>
> [(**ATTACHMENT A**, pp. 4-5 (pages 1-2 of the October 2, 2013 letter) (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.
>
> [(*Id*. at p. 5 (page 2 of the notice letter) (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. *Id*. at p. 8.

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. (**ATTACHMENT I**, Plaintiff's First Amended Complaint, filed March 18, 2015). 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 eye witnesses. 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". (**ATTACHMENT J**, Plaintiff's Motion for Leave to File Third Amended Complaint, filed on August 12, 2016; **ATTACHMENT K**, MSD and MTA Hearing Transcript, August 29, 2016, pp. 5-7). This was in direct response to Macomb's motion for summary disposition. (**ATTACHMENT K**, p. 5).

Plaintiff's motion 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 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*.
>
> [(**ATTACHMENT J**, ¶ 3 (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." *Id*. ¶ 10 (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.
>
> [(**ATTACHMENT K**, p. 5, ll. 1-12 (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". *Id*., ll. 20-25. 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*., p. 6, ll. 14-19.

The trial court issued its opinion on October 12, 2016. (**ATTACHMENT L**). In addressing Macomb's motion for summary disposition, the trial court employed a hybrid standard of review under MCR 2.116(C)(7) and MCR 2.116(C)(10) articulated in *Dextrom v Wexford Cty*, 287 Mich App 406, 428; 789 NW2d 211 (2010). *Id*., p. 2. 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 explain 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.
>
> [*Id*., pp. 6-7.]

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. *Id*. at 7, 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. *Id*., pp. 9-12.

The trial court also addressed the propriety of allowing Plaintiff to amend its complaint to add the additional information concerning 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 pot holes 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.
>
> [*Id*. pp. 11-12.]

The trial court then addressed Macomb's argument that Plaintiff could not prove the requisite causation required by the highway exception. *Id*. at 14. 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 pot holes 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 the complaint. In regard to Macomb's argument that this changed the "notice" to allege a new "defect", the trial court found "very little difference" between Plaintiff's "pre-suit notice" and the requested amendments. *Id*. at 15.

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. (**ATTACHMENT M**). 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". *Id*., p. 3.

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." *Id*., p. 4.

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 alleged defect. *Id*., pp. 4-5.

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." (**ATTACHMENT B**, unpub op at 9). The majority remanded to the trial court for entry of summary disposition in Macomb's favor. *Id*. at 10. Jude Meter dissented. He concluded that the alleged defects in the road's physical structure, particularly the "berms" foreseeably led to Plaintiff's injuries. *Id*., dissenting op at 2.

COUNTER-ARGUMENTS AND ANALYSIS

I. PLAINTIFF'S ORIGINAL NOTICE WAS UNTIMELY.

A. Standard of Review

The Court reviews de novo a trial court's ruling on a summary disposition motion filed by a governmental entity under MCR 2.116(C)(7). *Plunkett v Dep't of Transp* 286 Mich App 168, 174; 779 NW2d 263 (2009). Further, the proper interpretation of a statute is a question of law subject to our de novo review. *Id*.

B. Analysis

The highway exception to governmental immunity only applies when the governmental agency with jurisdiction over the highway receives timely notice of a plaintiff's claim. *Thurman v City of Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). "Statutory notice requirements must be interpreted and enforced as plainly written." *Atkins*, 492 Mich at 710.

Plaintiff's original notice was provided beyond the 60-day period. (**ATTACHMENT A**). The accident underlying plaintiff's suit occurred on June 7, 2013. Plaintiff provided notice on October 2, 2013 and Macomb County acknowledged receipt on October 3, 2013. Plaintiff's notice was not provided within 60 days of the June 7, 2013 accident. In *Streng v Bd of Mackinac County Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), lv den 500 Mich 919 (2016), recon den 500

Mich 997 (2017), the Court of Appeals held, *inter alia*, that the 60- not 120-day statutory notice provision found in MCL 224.21 applied to highway defect claims lodged against county road commissions. See *Harston v Cty of Eaton*, 324 Mich App 549, 558-559; 922 NW2d 31 (2018) following the Court of Appeals opinion in *W A Foote Memorial Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), which held that judicial decisions interpreting statutory text apply retroactively to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule and inviting this Court to expressly state so. In this regard, whether *Streng* applies retroactively, and Macomb here contends that it should, will be addressed by this Court in the case of *W A Foote Memorial Hosp v Michigan Assigned Claims Plan* (Docket No. 156622).

Indeed, the retroactivity of *Streng* would apply to governmental immunity cases in all circumstances because proper application of the rule, an interpretation of MCL 224.21 that applies the 60-day provision to governmental entities, would simply recognize that such preconditions to suit against governmental entities are *jurisdictional* limitations placed on the claimant's ability to access the courts of Michigan via legislative *waiver* of the preexisting and inherent immunity in all governmental functions. *Mack*, 467 Mich at 212; *Atkins*, 429 Mich at 710; *Fairley*, 497 Mich at 298. Accord *Harston*, 321 Mich App at 558-559. Defendant, Macomb County Department of Roads, is *included* within those entities governed by MCL 224.21. See footnote 1, *supra*. Thus, because the 60-day provision applies to Macomb County, Plaintiff has failed to fulfill a condition precedent to lodging a successful claim against the government. See *Moulter*, 155 Mich at 168-169; *Atkins*, 492 Mich at 714-715 and n 11; *McCahan*, 492 Mich at 746-747; and *Fairley*, 497 Mich at 298.

II. PLAINTIFF'S ORIGINAL NOTICE, CONFINED AS IT MUST BE TO ITS CONTENTS, WAS DEFICIENT BECAUSE IT FAILED TO STRICLY

COMPLY WITH THE HIGHWAY EXCEPTION'S NOTICE PROVISION, MCL 691.1404(1) IN THAT IT FAILED TO IDENTIFY THE "EXACT LOCATION", "PRECISE NATURE", AND "ALL WITNESSES", THEREBY DEPRIVING THE TRIAL COURT OF JURISDICTION TO PROCEED WITH DETERMINING THE MERITS OF PLAINTIFF'S SUIT.

The trial court and the Court of Appeals concluded that Plaintiff's notice was sufficient. (**ATTACHMENT L**, Trial Court Opinion, pp. 6-7; **ATTACHMENT B**, unpub op at 9, n 7, citing *Plunkett v Dep't of Transportation*, 286 Mich App 168 (2009)).

A. Standard of Review

This Court reviews de novo a trial court's ruling on a summary disposition motion filed by a governmental entity under MCR 2.116(C)(7). *Plunkett v Dep't of Transp*, 286 Mich App 168, 174; 779 NW2d 263 (2009). Further, the proper interpretation of a statute is a question of law subject to de novo review. *Id*.

B. Analysis

MCL 691.1404(1) provides:

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

As this Court explained in *McCahan v Brennan*, 492 Mich 730, 735; 822 NW2d 747 (2012), "when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain notice requirements that the plaintiff fails to meet, *no saving construction*…is allowed." (emphasis added). See also *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). Strict compliance with *all aspects* of the notice provisions in the GTLA is required to access the courts with a claim against governmental entity. *Rowland*, *supra*; *Atkins*, *supra*; *McCahan*, *supra*; *Fairley*, *supra*; *Jakupovic*, *supra*. Thus, a trial court must

carefully analyse the contents of the notice and the challenges raised by the governmental entity claiming immunity.

In order for notice to be sufficient to lift the jurisdictional veil of immunity and expose the government to suit, the notice must be timely, and it shall specify (1) the "exact location" of the defect; (2) the "exact nature" of the defect; (3) the injury sustained; and (4) the names of the witnesses known "at the time" by the claimant. MCL 691.1404. The purpose of identifying these with precision is to provide the governmental entity time to apprise the government of the defect so that it may remedy it, to investigate the claim while fresh. *Rowland*, 477 Mich at 212. "[T]he legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach." *Ridgeway v Escanaba*, 154 Mich 68, 72-73; 117NW 550 (1908), quoted in *Rowland*, *supra* at 210. Additional reasons given in *Rowland* include allowing time for creating reserves, reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed. *Rowland*, *supra* at 212. An equally important purpose of the notice is to qualify the defect "to confine plaintiff substantially to the character of the defect alleged in the notice and claimed to have caused injury and consequent liability". *Harrington v Battle Creek*, 288 Mich 152, 156; 284 NW 680 (1939). A compliant notice is a condition precedent to the right of recovery. *Id*. at 155, citing *Moulthrop v City of Detroit*, 218 Mich 464; 188 NW 433 (1922).

This is a critical point. A claimant cannot provide simply a "general" notice of a defect, and then, subsequently *change* the nature or character of the defect to suit his case. This is another

affirmation of the jurisdictional principle of immunity and why an initial notice – the only notice that counts for purposes of determining whether the claimant's case may continue – must be scrutinized for strict compliance with the statutory requirements. It must provide timely notice to give the government an opportunity to quickly remedy any potential hazard, and to allow it the opportunity to investigate while evidence is fresh. It must provide the exact location for the same reasons. And, it must provide the exact nature of the defect – the exact problem alleged to have caused injury to the claimant. Regarding the latter, the claimant will be confined to this defect. Subsequent efforts to change the character or nature of the defect are not allowed.

1. Exact Location

The notice must provide the "exact location" of the defect. So precise must this identification be that this Court has held a street address even one house over from the location of a defect is insufficient. See *Jakupovic v City of Hamtramck*, 489 Mich 939, 939; 798 NW2d 12 (2011) (holding plaintiff's notice submission insufficient under MCL 691.1404 because it provided an address for the defect that was one house away from the defect's actual location). "exact location".

Plaintiff's original notice merely identified a large swath of Hipp Road as containing the alleged defect. The extent of the "location" specified in the notice, was that it was "*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…." **ATTACHMENT A**, pp. 4-5 (pages 1-2 of the October 2, 2013 letter) (emphasis added).

This was insufficient. Descriptions that place a defect "near to" an intersection are too vague; approximate locations are too vague to identify the place of injury and to comply with the statute. *Dempsey v Detroit*, 4 Mich App 150, 151-152; 144 NW2d 684 (1966). In *Rowland*, 477 Mich at

219, the Court found MCL 691.1404 to be straightforward, clear, unambiguous, and constitutionally sound. It concluded that the statute must be enforced as written. Accordingly, the Court held that, "the statute requires notice be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*." *Id*. (emphasis in original).

The inclusion of the term "exact" before "location" negates any possibility that the Legislature intended erroneous, or even approximate, locations to suffice. Here, as in *Jakupovic* and *Rowland*, plaintiff's undisputed failure to strictly comply with the notice provision bars Plaintiff's claims. As a failure of notice is a failure of a condition precedent to bringing suit against the government, the trial court did not even have jurisdiction to proceed to address the merits of the substantive tort claims. This Court must therefore dismiss the suit. *Fox v Bd of Regents of Univ of Michigan*, 375 Mich 238, 242-43; 134 NW2d 146 (1965).

The exact location of the occurrence and defect simply cannot be determined. Plaintiff's own highway experts acknowledged this. (**ATTACHMENT N**, Novak Dep., p. 27; **ATTACHMENT O**, Cleveland Dep., p. 51). Novak stated that nobody knows where the accident took place. (**ATTACHMENT N**, p. 27).

The notice only gave an approximate range of locations. Testimony to-date indicates potential locations within the range furnished in the notice and outside the range furnished in the notice. Additional evidence has not established a location, but rather expanded the possible ranges of locations. Imig testified that he thought the occurrence took place within a half mile to a quarter mile of 36 Mile Road, an excessive range of ¼ of a mile. (**ATTACHMENT E**, pp. 69-70). Some

witnesses had the resting position of his vehicle north of the Apel drain. While other witnesses have it south of the Apel drain. Plaintiff himself could not furnish evidence as to the location of the defect. No photographs or measurements of any road conditions from the night of the occurrence have been furnished. The notice simply does not contain the "exact location" of the defect, and indeed, it is still unknown where, much less what the defect was at the time of the accident.

Even if this Court were to accept that the third amended complaint, which added a new defect "the claim regarding the berms and the berms claim", see (**ATTACHMENT K**, p. 5, ll. 1-12), was proper, it does not identify the exact location. The Plaintiff's motion to amend stated only that "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." (**ATTACHMENT J**, ¶ 3).

Finally, an exhibit attached to Macomb's Motion for Summary Disposition summarized the lack of knowledge on the part of anyone as to "exact location" of the alleged defect. (**ATTACHMENT P**, Exhibit 8 to Macomb's Motion for Summary Disposition).

2. Exact Nature

"Statutory notice requirements must be interpreted and enforced as plainly written." *Atkins v SMART*, 492 Mich 707, 710; 822 NW2d 522 (2012). Here, Plaintiff's notice fails to identify the exact nature of any defect. Plaintiff's notice described the "defect" in general terms including "the improved portion of the highway/roadway designed for public/vehicular travel *was not in a condition reasonably safe and fit*"; "said highway/roadway being *substantially defective and hazardous such that a permanent defect existed at all relevant times*"; "*there was neither a shoulder nor adequate roadway/highway width to allow safe two-way public/vehicular travel*";

there was "*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*." (**ATTACHMENT A**, pp. 1-2 of Notice Letter). In the amended complaint, Plaintiff added "berms" as another defect, claiming that the roadway was narrowed as a result. None of these descriptive terms and phrases satisfies the plain language of the provision's reference to "exact nature", much less the strict interpretation it is to be given by courts. *Atkins*, *supra*; *Nawrocki*, 463 Mich at 158. Plaintiff failed to satisfy the statutory requirement to identify the exact nature of the alleged defect.

3. Witnesses Known "At the Time"

The plain and unambiguous language of MCL 691.1404(1) names of the witnesses known *at the time* by the claimant." (emphasis added). Prior to the notice being filed, the Plaintiff obtained written statements from Keith and Kristin Czerwinski, on September 26, 2013. A similar statement was obtained from Andy Meinhard on the same date, who in fact is listed as a witness on the Notice of Intent. Omitted as listed witnesses are Keith and Kristin Czerwinski on the Notice of Intent. Mr. and Mrs. Czerwinski were listed in Plaintiff's Answers to Interrogatories as witnesses. They also have been listed in each of the Witness Lists filed by Plaintiff. It is indisputable that the Czerwinski's were witnesses known to the Plaintiff prior to the time the notice was submitted on October 2, 2013. Additionally, Plaintiff had retained its experts who had visited the site in September of 2013. These witnesses were listed as experts and were known to the Plaintiff prior to filing the Notice of Injury, October 2, 2013, but they were not listed in the notice.

Cases from this Court interpreting notice provisions have uniformly applied the strict construction required for provisions allowing suits to proceed against the government. See, e.g.,

Rowland, 477 Mich at 212; *Atkins*, 492 Mich at 710, 714-715 and n 11; *McCahan*, 492 Mich at 746-747; *Fairley*, 497 Mich at 298; *Jakupovic*, 489 Mich at 939. In *Atkins*, this Court reiterated that "[s]tatutory notice requirements must be interpreted and enforced as plainly written." *Atkins*, 492 Mich at 710. However, in *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 158; 615 NW2d 702 (2000), this Court reiterated the one basic principle that must guide its approach to such interpretation. "The immunity conferred upon governmental agencies is broad and the statutory exceptions thereto are to be narrowly construed." *Id*.

Finally, the Court has agreed to address extension of the natural consequences of these principles to *all aspects* of the content requirements. The Court will consider "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)." *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit*, (Docket No. 157097). In its opinion below, the panel cited the liberalized interpretation of the notice provision enunciated by the Court of Appeals in *Plunkett*. (**ATTACHMENT B**, unpub op at 9, n 7). In doing so, the Court of Appeals disagreed with Macomb's argument that Plaintiff in this case did not strictly comply with provision's requirements. In the event this Court were to grant Plaintiff's application, it would, of necessity, have to consider the sufficiency of the notice in this case.

III. PLAINTIFF SHOULD HAVE BEEN PROHIBITED FROM AMENDING HIS COMPLAINT ESSENTIALLY AMENDING THE NOTICE TO ADD A NEW DEFECT NEARLY THREE YEARS AFTER THE ORIGINAL NOTICE WAS FILED.

The trial court allowed Plaintiff to file a third amended complaint to add the berms as a new defect to his claim. (**ATTACHMENT L**). The Court of Appeals ruled this issue was moot. (**ATTACHMENT B**, unpub op at 2, n 2).

A. Standard of Review

Generally, courts review a trial court's decision on a motion to amend a pleading for an abuse of discretion. *Hamed v Wayne Co*, 284 Mich App 681, 699; 775 NW2d 1 (2009), rev'd 490 Mich 1 (2011). "Leave [to amend a pleading] shall be freely given when justice so requires." MCR 2.118(A)(2). "[A] motion to amend should ordinarily be denied only for particularized reasons, including undue delay, bad faith or a dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

B. Analysis

Where the defense to a motion for summary disposition is based on immunity under MCR 2.116(C)(7), a party is not allowed to amend their pleadings. MCR 2.116(I)(5). A trial court is to give a party an opportunity to amend under MCR 2.118(A)(2) only when the grounds for summary disposition are based on (C)(8), (C)(9) or (C)(10), but not (C)(7). *Id*. Allowing the claimant in a case against the government to amend his or her complaint each time pleading deficiencies are apparent in the stated case has the effect of placing the same litigation burdens on the government that are supposed to be prohibited. *Costa*, 475 Mich at 409-410, accord *Walsh*, 263 Mich App at 622-624.

Allowing amendment in this case over three years after the accident, and nearly three years from the original notice to correct the deficiencies in Plaintiff's notice on the basis of additional evidence obtained during discovery, is not appropriate. If a party can "cure" defects in pleading against the government by simply pleading more specifically the facts needed to defeat the (C)(7)

motion, then the purpose of immunity from trial, as well as liability, is defeated. *Costa*, *supra*; *Walsh*, *supra*.

The trial court erred in allowing Plaintiff to *amend* the complaint after Macomb's motion for summary disposition was filed. The jurisdiction of the government is not ceded to give the claimant enough time to probe the government's defense and come up with another claim realizing the defects in the original notice. This would completely defeat the purpose of the notice, and more importantly, it goes against the fundamental jurisdictional reason that notice provisions must be strictly complied with in the first instance. The addition of a new alleged "defect", the "berms" into the amended complaint after Macomb's motion for summary disposition was filed was error.

While the trial court found that plaintiffs were not required to identify all legal theories in their notice, the specification of the exact nature of the defect is not a legal theory but is a statutory mandate. In mischaracterizing this issue, the trial court essentially found that a notice providing the identification of one defect gives the agency notice of *any* defect in the highway at that location. Neither case law nor the statute supports such an interpretation. See, e.g., **ATTACHMENT Q**, *Karwacki v MDOT*, unpublished per curiam opinion of the Court of Appeals, issued August 29, 2013 (Docket No. 308772). Further, stating:

> The trial court also referenced that defendant did not challenge the order allowing the amendment of the complaint, and plaintiffs argue that enforcing the notice provision in the instant case "flies directly in the face of Michigan's longstanding history of liberal allowance of amendments" and would "mean that a plaintiff could never, ever, amend a pleading to add an allegation of negligence against a governmental entity." Plaintiffs, like the trial court, are conflating the concepts of notice and legal theories for recovery. While the notice provisions of MCL 691.1404(1) require a plaintiff to specifically describe the location and nature of the defect within the allotted time, that does not prevent a plaintiff from later amending a complaint to accommodate evolving legal theories as the basis for recovery. Moreover, provisions regarding amending complaints, such as MCR 2.118(A), provide that a trial court should grant amendments freely when justice requires. Yet, those are separate and distinct requirements, wholly unrelated to the notice requirement set forth in MCL 691.1404(1). The notice provisions preclude

> an action when there has been deficient notice, regardless of whether plaintiffs could have added a claim under amendment rules
>
> [Id. at 6-7.]

At note 6, the Court continued: "We also note that adopting plaintiffs' argument would eviscerate the notice requirement of MCL 691.1404(1). A plaintiff could specify the exact location and nature of a potential defect and then *purposefully take advantage of the liberal amendment rules to add claims for additional defects*, outside of the statutory notice period, thereby subverting notice requirements." (emphasis added). Judge Beckering concurred in that part of the opinion, stating: "I concur with the majority's conclusion that the trial court erred by allowing plaintiffs to add to their highway defect claim – nearly one year into the litigation—an allegation of excessive rutting of the highway because nothing in plaintiffs' notice pursuant to MCL 691.1404(1) provided even a lay description of a rutting defect." *Id*. at p. 2 (Beckering, J., concurring).

Plaintiff argued that the rule for amendment states the court shall allow amendment, but as the *Karwacki* panel noted (3-0), this does not apply to an attempt to add an entirely different "notice of defect" for a different defect to the highway exception claim defended under MCR 2.116(C)(7). See also MCR 2.116(I)(5). This provision provides no allowance for an amendment when the opposing party's motion for summary disposition is based on MCR 2.116(C)(7).

IV. PLAINTIFF'S STANDARD OF REVIEW FOR IMMUNITY CLAIMS ASSERTED BY GOVERNMENTAL ENTITIES IS WRONG.

Plaintiff begins with a false premise. His application jumps straight to the "summary disposition" standard applicable to motions brought by ordinary civilian defendants under MCR 2.116(C)(10), thereby ignoring this Court's long-standing jurisprudence that ordinary civilian defendants and governmental entity defendants are treated differently under the law of governmental immunity embodied in the GTLA as interpreted by this Court's robust jurisprudence on the subject. *Costa v Community Emergency Med Servs*, 475 Mich 403, 409-410; 716 NW2d

236 (2006), citing *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 07 (2000) and *Mack v City of Detroit*, 467 Mich 186, 203, n 18; 649 NW2d 47 (2002). In *Costa*, this Court stated of this principle:

> [W]e have repeatedly observed that governmental immunity legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated differently." We have also observed that a "central purpose" of governmental immunity is to "prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits *any* claim barred by governmental immunity."
>
> ***
>
> It would be incongruous to conclude that the failure to comply with a pleading requirement of this nature would subject a defendant to tort liability, where such a defendant is *already immune* from tort liability by virtue of his or her status as a governmental employee.
>
> [*Costa*, 475 Mich at 409-410 (internal citations omitted) (emphasis added).]

Mack clarified that because governmental immunity is an inherent characteristic in the functioning of governmental entities, the defense of immunity does not even have to be raised as an affirmative defense to a suit. *Mack*, 467 Mich at 202-203 and n 18. The burden is on the claimant to plead and prove in avoidance of that preexisting immunity. *Id*. "The presumption is, therefore, that a governmental agency *is immune* and can only be subject to suit if a plaintiff's case falls within a statutory exception." *Id*. at 202 (emphasis added). This Court would later hold that this presumption also applies to the requirements that a claimant satisfy the notice requirements of governmental immunity legislation. *Rowland v Washtenaw County*, 477 Mich 197, 212; 731 NW2d 41 (2006); *Atkins*, 492 Mich 707, 714-715 and n 11; 82 NW2d 522 (2012); *McCahan v Brennan*, 492 Mich 730, 732; 822 NW2d 747 (2012), *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015).

Thus, while Plaintiff criticizes the two Court of Appeals' judges in the majority (Judges O'Brien and Riordan) claiming they have "little or no understanding of the limited role that judges

are to play in the summary disposition process", he ignores the requirement that *even before* this process is undertaken, the judiciary actually has "*no authority* to restrict or amend" the terms upon which the Legislature has determined the government is to be subjected to suit in the courts of this state. *McCahan*, 492 Mich at 732, citing *Rowland*, *supra*. This prohibition on judicial encroachment starts at the very inception of a claim lodged against a governmental entity. Thus, all aspects of statutory notice provisions are to be strictly construed. *Rowland*, 477 Mich at 212. Indeed, they serve as a "condition precedent" to the government's waiver of immunity. *Id*. See also *Atkins*, 492 Mich at 710, 714-715 and n 11 and *Fairley*, 497 Mich at 290.

If a claimant must both plead and prove their case against the government and the burden is on the plaintiff in this regard, see *Mack*, 467 Mich at 202-203 and n 18, then there is a prima facie hurdle that must be cleared *before* the basic elements of a tort claim against the government, here, particularly, causation, can even be litigated. *Suttles v State Dep't of Transportation*, 457 Mich, 635, 653; 578 NW2d 295 (1998).

Otherwise, as demonstrated by the largely successful litigation strategy employed by the Plaintiff in this case, Macomb was "simultaneously requir[ed" to "disrupt their duties and expend time and taxpayer resources to prepare" their defense and litigate this case. *Costa*, 475 Mich at 410. The "immunity" afforded by the GTLA is rendered illusory when a trial court applies the standard of review that Plaintiff would have this Court apply to Macomb's summary disposition motion. Plaintiff provided his original notice to Macomb in October of 2013, but did not name Macomb as a defendant until March of 2015. At that time, Plaintiff had gathered evidence through discovery, including additional witnesses, and most likely determined that, without more, it did not have a case against Macomb. Under the guise of an amended complaint, Plaintiff amended its notice and added a new defect, something that would be impossible if a proper standard of review

would have been applied to Macomb's summary disposition motion. Indeed, Plaintiff admitted at the hearing on the motion to amend, which was filed nearly three years after the initial notice was submitted, that it was doing so to address Macomb's motion for summary disposition. (**ATTACHMENT K**, p. 5, ll. 1-12). This renders the notice procedures meaningless and leads directly to the precise consequence that are supposed to be avoided by the governmental entity's immunity defense.

Moreover, as explained in Macomb's counter-statement of jurisdiction, and in Macomb's Brief on Appeal, even if the Court of Appeals incorrectly addressed or deemed moot the issues Macomb raised concerning the errant standard of review applied by the trial court, the deficiencies in Plaintiff's notice, the late amendment to Plaintiff's complaint adding another defect over three years since the original notice, and the Plaintiff's failure to identify a persistent defect in the roadbed surface, were all issues that must, of necessity, be addressed *before* the actual elements of Plaintiff's tort claim, e.g., causation. *Suttles*, 457 Mich at 653. With this *proper* and orderly orientation of approach to the Plaintiff's application established, Macomb submits its counter-arguments.

V. PLAINTIFF PROVED NO "ACTIONABLE" DEFECT.

A plaintiff suing under the highway exception to governmental immunity must prove that his or her injuries resulted from a precise and static defect incorporated into the roadbed surface. *Haliw v Sterling Hts*, 464 Mich 297, 308; 627 NW2d 581 (2001). A plaintiff who cannot establish a defect in the surface of the highway cannot establish that a defective highway proximately caused his or her injury. *Id.* at 311.Moreover, there must be "a persistent defect in the highway . . . rendering it unsafe for public travel at all times, ..." *Id.* at 312.

The defects described in Plaintiff's notice and amended complaint, adding the "berms" as an additional defect, do not satisfy this standard. Berms do not constitute defects in the roadbed surface itself. Instead, they are transient conditions or an accumulation of material on the roadbed surface. See, inter alia, *Haliw*, *supra*; *Hagerty*, 493 Mich at 933; *Palletta*, 491 Mich at 897. See also **ATTACHMENT R**, *Diem v Home Owners Ins Co et al*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2018 (Docket No. 337335), pp 3-4 (citing *Haliw* and stating berms of snow created by plowing roads in the winter creating narrower roadway for travel not a defect).

None of these transient, speculative conditions were proved to have actually existed at the exact location and on the date of the accident. These were merely generalized statements of non-permanent, non-structural conditions of the roadway that one can expect to encounter on a highway of this type anywhere in Michigan. If a duty is imposed in this case, then it may be contended there is a duty to maintain constant patrols searching for berms, dusty, dry and uneven road-surface conditions. Indeed, every rut, pock mark, pot hole, and indentation in the traveled portions of paved and unpaved highways would subject the governmental entity with jurisdiction over it to suit and potential liability. Apparently, if such generalized statements were allowed, the government's duty would arise immediately once the condition became present anywhere, regardless of the ability of the government to know of it in advance, thus dispensing with the fundamental prerequisite to liability that the government have actual or constructive notice of the condition. Moreover, there is virtually nothing the government can do to ensure that such conditions, when present, can be uniformly quelled and instantaneously remedied, if at all.

Road maintenance crews already spend entire days attempting to suppress the constant and ever-changing dangers associated with the changing conditions of roads during all seasons –

another naturally occurring and expected condition and an expected hazard of driving in Michigan. Dusty, freshly graded roads and "washboard" or "pock-marked" surfaces are no different. If such a duty extends to these conditions, then no amount of diligence could ensure it is fulfilled in every case. The efforts made to constantly reduce such conditions coupled with the slow and precise measures necessary to grade and re-grade these road surfaces would exceed a safe volume and would constitute a hazard fraught with danger and sufficient in itself to constitute a basis for liability against the government under one or more exceptions to immunity. Every dislodged stone, every new pothole, every berm, pile, or other debris suddenly appearing on roadways would be the responsibility of governmental entities charged with keeping the roadbeds safe. Governmental entities expend a great deal of resources maintaining public roads and highways every year. To impose a duty to prevent the conditions described in this case would be tantamount to requiring virtually perfect roadbed surfaces at all times, a proposition soundly rejected by Michigan jurisprudence. See, e.g. *Wilson v. Alpena County Rd. Comm'n*, 474 Mich. 161, 167-169; 713 NW2d 717 (2006).

There is considerable and legitimate concern that an affirmation of the trial court's reasoning will be detrimental to the public fisc. Virtually every unpaved roadway, like Hipp Road in this case, falls within the definition of "highway" in the statutory exception. MCL 691.1401(c). It is well-established that such roads are frequently traveled and well-used throughout the year. Various elements of Michigan's climate, its latitude in relation to the sun at various times of the year, and the natural consistency of Michigan's soil types inevitably, and often, lead to the conditions described in Plaintiff's notice. Yet, these relatively ordinary conditions have now been held to be actionable under the highway exception.

VI. PLAINTIFF'S CAUSATION THEORY FAILS.

The Court of Appeals ruled Plaintiff could not establish the causation necessary to hold Macomb liable for his injuries. (**ATTACHMENT B**, unpub op at 9). The Court of Appeals applied the proper, modern duty-breach-foreseeability-proximate cause analysis.

Plaintiff's critique of the Court of Appeals' analysis is lacking in several critical respects. Plaintiff cites *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977), 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 liable for Plaintiff's injuries. He also challenges the Court of Appeals' treatment of the issue of "proximate cause" as one of law.

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*." *Id*. (emphasis added). As already established, the GTLA represents a legislative directive that governmental entity defendants are to be treated differently than civilian defendants. *Costa*, 475 Mich at 409-410. 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. *Rowland*, 477 Mich at 222-223. There 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 in the hands of the Legislature." 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." *Id*. at 223. The public policy factors sewn into the fabric of Michigan governmental immunity law by this Court's decade 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, 479 Mich 498, 501-502; 740 NW2d 206 (2007), 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." *Id*. at 508 (emphasis added). 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." *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.

Ultimately, the factors of any tort analysis must include foreseeability, proximate cause *and* public policy. 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).

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." *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). This in turn must be answered with reference to the public policies at issue.

In addition, the Court of Appeals' majority's analysis of proximate cause was also consistent with Michigan jurisprudence. This Court has defined proximate cause as "a *foreseeable*, *natural*, and *probable* cause" of the defendant's negligence. *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). Such causation is distinct from factual or "but for" causation. *Moning,* 400 Mich at 439. 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. *Jones v Detroit Med Ctr*, 490 Mich 960, 960; 806 NW2d 304 (2011).

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. *In re Certified Question*, 479 Mich at 501-502; *Valcaniant v Detroit Edison*, 470 Mich 82; 679 NW2d 689 (2004), the courts may retain the issue as a matter of law. 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*." *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 85 (1981) (emphasis added). To

close the point, this Court stated in *Moning*, 400 Mich at 438, that "the court decides questions of duty, general standard of care and proximate cause".

The majority's treatment of the proximate cause question as one of law was entirely consistent this Court's jurisprudence. A mere possibility of such causation is not sufficient; and when the matter remains one of pure 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. *Skinner*, 445 Mich at 165. 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. *Jones*, 490 Mich at 961. Thus, even assuming the negligence of Macomb, can that negligence in this case be deemed to have been the proximate cause of the particular injury? Was the harm foreseeable to this plaintiff in this case? *In re Certified Question*, 479 Mich at 501-502. See also *Hidden Legacy*, *supra* at 1875, accord *Tort Law in America*, *supra* at 97-98.

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." (**ATTACHMENT B**, unpub op at 8. 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).

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.

CONCLUSION AND RELIEF REQUESTED

As governmental immunity is jurisdictional, it must always be determined first whether a claimant has satisfied the Legislature's established preconditions and limitations in the GTLA to effectuate the waiver of that immunity. Here, as Macomb demonstrates, Plaintiff's notice was deficient as to both timing and content. The trial court had no jurisdiction, much less the authority, to allow amendment to *add* a new defect. None of the alleged defects, even if they could be located and precisely identified were *actionable*. The trial court applied the wrong standard of review to Macomb's immunity motion. And, finally, if all these deficiencies are overcome, Plaintiff cannot prove that his injuries were the proximate cause of the alleged defects.

For the foregoing reasons, Macomb respectfully requests that this Court deny Plaintiff's application. In the alternative, Macomb respectfully suggests that disposition of Plaintiff's application be held in abeyance pending the outcome in *WA Foote* and *Wigfall*. If the Court were to grant Plaintiff's application, Macomb respectfully suggests that abeyance would still be required while awaiting these decisions.

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