STATE OF MICHIGAN

IN THE SUPREME COURT

RYAN MENARD, by his conservator SHELLY MENARD

Plaintiff,

v

TERRY R. IMIG, SHARYLL ANN EVERSON,

ST,

and

MACOMB COUNTY DEPARTMENT OF ROADS AND MACOMB COUNTY,

Defendants.

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

APPLICATION FOR LEAVE TO APPEAL FILED BY DEFENDANTS MACOMB COUNTY AND MACOMB COUNTY DEPARTMENT OF ROADS (CORRECTED)

*****FILED UNDER AO 2019-6*****

MARK R. GRANZOTTO (P31492) ATTORNEY FOR PLAINTIFF 2684 11 MILE RD., SUITE 100 BERKLEY, MI 48072-3050 (248) 546-4649 mg@granzottolaw.com	CARSON J. TUCKER (P62209) LEX FORI, PLLC ATTORNEY FOR DEFENDANT (MACOMB COUNTY DEPARTMENT OF ROADS AND MACOMB COUNTY) 117 N. FIRST ST., SUITE 111 ANN ARBOR, MI 48104-1354 (734) 887-9261 cjtucker@lexfori.org
JASON R. MATHERS (P66022) HARVEY KRUSE, PC ATTORNEY FOR DEFENDANT (IMIG) 1050 WILSHIRE DR., SUITE 320 TROY, MI 48084 (248) 649-7800 jmathers@harveykruse.com	DONALD C. BROWNELL (P48848) VANDEVEER GARZIA, PC ATTORNEY FOR DEFENDANT (EVERSON) 840 W. LONG LAKE RD., SUITE 600 TROY, MI 48098-6340 (248) 312-2800 dbrownell@vgpclaw.com

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STATEMENT OF JUDGMENT APPEALED

Macomb County and the Macomb County Department of Roads (Macomb County) seeks leave to appeal the January 14, 2020 opinion of the Court of Appeals (Macomb County's Appendix (App) 1a – 6a), which the Court of Appeals issued on remand from this Court's November 15, 2019 order (App 7a) reversing the Court of Appeals' September 6, 2018 judgment in favor of Macomb County (App 8a – 20a).

STATEMENT OF QUESTIONS PRESENTED

In its original appeal Macomb County raised issues, some of which were addressed by the Court of Appeals in its original opinion, and some of which, to some degree, in its opinion after remand by this court. (Macomb's Original Brief on Appeal, App 41a – 107a). The questions presented to this Court are 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 applicable 60-day period. (App 21a) 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), affirmed at 934 NW2d 44 (October 25, 2019), 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. 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 v City of Detroit*, 467 Mich 186, 212; 649 NW2d 47 (2002); *Atkins v SMART*, 492 Mich 707, 710; 822 NW2d 522 (2012); *Fairley v Dep't of Corrections*, 497 Mich 290, 298; 871 NW2d 129 (2015). Accord *Harston*, 321 Mich App at 558-559. Defendant, Macomb County Department of Roads, is *included* within those entities governed by MCL 224.21. By statute, for charter counties with a population of 750,000 or more, the powers and

duties of a road commission may be reorganized by amendment to the charter. MCL 224.5. The Macomb County Department of Roads is such an entity. Macomb County Charter, art XI, § 11.5.2. Thus, because the 60-day provision applies to Macomb County's Department of Roads, Plaintiff has failed to fulfill a condition precedent to lodging a successful claim against the government. See *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919 (1908); *Atkins*, 492 Mich at 714-715 and n 11; *McCahan v Brennan*, 492 Mich 730, 746-747; 822 NW2d 747 (2012); and *Fairley*, 497 Mich at 298.

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* known 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. "Strict", not "substantial" compliance is required for the notice provision in MCL 691.1404(2). Compare *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007), with *Plunkett v Dep't of Transportation*, 286 Mich App 168; 779 NW2d 263 (2009). In both of its opinions below, the Court of Appeals applied the liberalized interpretation of the

notice provision enunciated by the Court of Appeals in *Plunkett*, rather than the "strict compliance" standard enunciated by this Court in *Rowland.* 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. (App 3a, 16a)

While this Court was recently poised to consider the question of *Plunkett's* ostensible continuing viability among the lower courts concerning what, if any, interpretive leeway remains when applying the statutory notice provisions in the GTLA (and particularly under the highway exception), it has yet to answer the question.[1] The *Plunkett* standard is patently contrary to this Court's GTLA jurisprudence.

[1] In its order granting oral argument in the cases of *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit* (Docket No. 157097), the Court directed the parties to address "whether strict or substantial compliance is required with the notice provision contained within MCL 691.1404(2), compare *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007), with *Plunkett v Dep't of Transportation*, 286 Mich App 168 (2009)." However, the Court ultimately did not address the question. *Wigfall v City of* Detroit, 504 Mich 330; 934 NW2d 760 (2019). Indeed, the Court did not even arrive at the interpretive principle stated in *Plunkett*, much less cite the case anywhere in its opinion.

III. Did the Court of Appeals err in concluding that Plaintiff was allowed to amend his complaint nearly three years after the initial notice to change the nature and character of the defect alleged in this case against a governmental entity where MCR 2.116(I)(5) actually prohibits allowing a party to amend a complaint in challenging a motion for summary disposition filed on the grounds of governmental immunity under MCR 2.116(C)(7)?

Defendant Macomb Answers: Yes. In its original brief on appeal, Macomb argued that a claimant should not be allowed to amend a complaint in response to a governmental entity's motion on immunity grounds under MCR 2.116(C)(7). (App 77a) (stating, in part, "[i]f 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.") *Id*. MCR 2.116(I)(5) actually prohibits a court allowing a party to amend its pleadings under MCR 2.118 to counter grounds for a summary disposition motion based on immunity. Macomb continued to assert this jurisdictional argument in its answer to Plaintiff's first application for leave to appeal, see inter alia, p 38 of Macomb's Answer filed on March 28, 2019 and in its Supplemental Brief before this Court filed on September 18, 2019 at p 20.

In its first opinion, the Court of Appeals deemed the issue moot (App 9a) and did not specifically address this precise argument in its

second opinion. (App 5a) Macomb continues to assert that the amendment allowed three years after the initial notice and suit was error as it pertains to Macomb's motion for governmental immunity because such amendments are simply not allowed by this Court's rules.

IV. Did the Court of Appeals err in approving the trial court's applied standard of review to Macomb's motion for summary disposition under MCR 2.116(C)(7)?

Defendant Macomb County Answers: Yes. 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 or her 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.

In its initial opinion, the Court of Appeals 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. (App 10a). In its opinion on remand from this Court, the Court of Appeals glossed over the substance of this argument concluding that even if it was jurisdictional, the Court of Appeals could nonetheless exercise its discretion to hear the appeal as on leave granted. (App 2a) Obviously, because the government has a right to appeal from any order denying a motion for summary disposition on grounds of immunity, the question cannot be resolved simply by a Court of Appeals decision granting leave when the government is the party appealing. Macomb continues to argue that if trial courts of this state do not apply a gatekeeping function determining whether at the initial stage of litigation analyzing the notice and the complaint against the

government, whether the claimant had both pleaded and proved his or her case sufficiently to proceed to litigate the questions of tort liability, allowing mere allegations of "genuine issues of material fact" to suffice as on an ordinary defendant's motion under MCR 2.116(C)(10) is directly contrary to this Court's enunciated review of governmental immunity defenses lodged by governmental entity defendants. No evidence exists in this case of the "exact location" or "exact nature" of the defect at the time of the accident – Plaintiff's own experts were only able to speculate as to the exact location, the nature of the defect, and the width of the roadbed surface. Yet, the trial court found these allegations sufficient, and the Court of Appeals now apparently agrees with that analysis. (App 3a) The mere assertion of these defects and expert opinion on their existence (when the experts could point to no evidence of the exact location or the exact defect at the time of the accident) is now sufficient to submit the government to endless litigation.

V. Whether the Court of Appeals erred in concluding that Plaintiff had plead and proved in avoidance of immunity in that the "width" of the roadway caused by alleged debris and/or lack of a shoulder was an "actionable defect" within the meaning of the Highway Exception to Governmental Immunity?

Defendant Macomb County Answers: Yes. In its original 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.

INTRODUCTION AND GROUNDS FOR REVIEW

With the passage of the Governmental Tort Liability Act (GTLA), MCL 691.1401, et seq., in 1964, the Michigan Legislature reaffirmed that all governmental entities in Michigan are prima facie immune from tort liability *unless* an exception to that immunity has been *granted* by the people of the state of Michigan. This restored the historical hierarchy and position of governmental immunity in the state's jurisprudence. MCL 691.1407(1) (providing that the GTLA "shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed."). This was an historical principle deeply rooted in the concept of the inherent, presumed, and naturally preexisting immunity of the state from all liability. *Michigan State Bank v Hastings*, 1 Doug 225, 236 (1844) (the state cannot be sued unless it consents to subject itself to the jurisdiction of the courts); *Bd of Supervisors of Sanilac County v Auditor General*, 68 Mich 659, 665 (1888) (the state is not liable except in strict compliance with the legislature's waiver of immunity from suit). "Sovereign immunity exists in Michigan because the state created the courts." *County Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118; 782 NW2d 784 (2010), citing *Pohutski v City of*

Allen Park, 465 Mich 675, 681; 641 NW2d 219 (2002). "[T]he state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment". *Ballard v Ypsilanti Twp*, 457 Mich 564, 568; 577 NW2d 890 (1998) (KELLY, J) (emphasis supplied).

In the past four decades, this Court has established that this preexisting state of immunity is broad and the statutory exceptions are to be narrowly construed. *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193, 194; 261 NW2d 718 (1978); *Nawrocki v Macomb County Rd Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000).

In keeping with the prima facie and "inherent" characteristic of government functioning as immune from suit unless a claimant has both pleaded and proved his or her case, this Court has also established, beyond doubt, that state courts lack jurisdiction to proceed to even consider the liability of a governmental entity if the preconditions to suit have not been demonstrated. These necessary preconditions include strictly abiding by the time limits for providing notice and complying with the plain terms of the notice statute.

In this case, as recently confirmed by the Court of Appeals the 60- not 120-day time limit applies. See *Streng v Bd of Mackinac County Rd Comm'n*, 315 Mich App 449, 463; 890 NW2d 680 (2016), lv den'd 500 Mich 919; 887 NW2d 802 (2016) (the 60-day notice provision applies to actions against counties under MCL 224.21). For this reason alone, the case should be peremptorily dismissed.

Moreover, MCL 691.1404(1) requires, as a "condition precedent" to accessing the circuit court that the notice precisely identify the "exact location" and the "exact nature" of the defect at the time of the accident, the exact nature of the injuries, and all the actual witnesses. These foundational principles have been established law in this state. *Rowland*, *supra*; *Atkins*, *supra*; *McCahan*, *supra*; *Fairley*, *supra*. None of these can be satisfied in this case. No one has demonstrated where the exact location of the alleged defects existed at the time of the accident. Therefore, no one can identify what precise, static, and permanent defects existed (as is required to be pleaded and proved under the Highway Exception). Moreover, since the exact location and exact nature cannot be proved (even Plaintiff's experts could not attest to these allegations), the alleged width of the unreasonably narrow roadbed also cannot be proved. No photographs or measurements were

taken. Plaintiff's case utterly fails in all particulars to satisfy the preconditions and pleading requirements of the Highway Exception under the GTLA.

The standard of review applied allowed the case to return to the trial court in direct contravention of the stated policy goal of governmental immunity – to shield the government not only from liability but from the onerous burdens of litigation. This was an erroneous hybrid standard that has been previously questioned by this Court, but which continues to be applied by the lower courts to require the government to prove its immunity, rather than to require, as *Mack* requires, the claimant to both plead and prove his or her case in avoidance of immunity.

In the instant case, Macomb County also raised the issue concerning the interpretive principle to be applied to the notice provision. The Court of Appeals erred by applying a standard of interpretation to the notice provided by Plaintiff that is inconsistent with *Rowland*, and which, in fact relies on pre-*Rowland* case law, which was reversed or severely limited by that decision. (App 3a) This Court has previously indicated that the standard of review applied under *Plunkett*

should be reviewed. Again, this implicates a sufficient point of public interest to warrant this Court's review.

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. The Department receives many notices each year asserting claims under the highway exception. Given the nature of gravel (or unpaved) roads, and despite reasonable efforts to maintain them, they can be and often are significantly and negatively affected by constant, changing, and ever-present traffic and weather conditions typical in southeast Michigan throughout the year, e.g., snow, ice, rain, drought, wind, and rapidly fluctuating conditions and temperatures. These are environmental elements which have less or no immediate effect on paved roads. With respect to unpaved roads, however, such conditions are beyond the control of all governmental entities that have a statutory duty to keep all roads in *reasonable* repair so that they are *reasonably* safe for public travel. See MCL 224.21(2). See also *Wilson v Alpena County Rd Comm'n*, 474 Mich 161, 168-169; 713 NW2d 717 (2006).

Governmental entities with jurisdiction over highways with gravel or other unpaved surface material can never ensure that such roads will

remain in a constant state of perfect repair and therefore free from debris, berms, loose gravel, sand, dust, potholes, bumps, ruts, and other commonly experienced and transient road surface conditions attendant to constant use by motor vehicles and subject to the variations of Michigan's climate. *Wilson*, *supra*. Accord *Scheurman v Dep't of Transportation*¸434 Mich 619, 631; 456 NW2d 66 (1990) (counties are not bound with "an unrealistic duty to ensure that travel upon the highways will always be safe."). 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.

Indeed, for over a century, Michigan has recognized this practical reality and has protected governmental entities accordingly. Importantly, such protections are necessary to guarantee a minimum level of overall public safety, while at the same time guard against frivolous raids on the public treasury. *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. If the goal of government is truly to keep and maintain the roads in reasonably safe condition, then the protective principles of governmental immunity that have adhered in this state must be maintained.

STATEMENT OF THE CASE

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

Plaintiff testified that he and his friends had been passed by several vehicles. Each time he would observe the cast of the vehicle's headlights approaching from his rear and he would move to the right side of the road. (App 124a – 126a; 146a – 147a) He testified that he saw the cast of headlights from the pick-up truck driven by Terry Imig (Imig) approaching and was expecting to be passed. (App 126a) He further testified that he gotten as far to the right as he could. (App 124a – 125a) Plaintiff stated that he was dodging potholes at the time of the occurrence. (App 124a – 125a)

Instead of passing him, Imig's truck ran into the rear wheel of Plaintiff's bicycle. Plaintiff suffered serious injuries as a result of the collision.

Imig, the driver of the vehicle who struck Plaintiff, testified he would always drive as close to the right side of the road as possible. (App 183a – 184a) 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. *Id*. He also testified he was focusing his vision on the "grass line" because of the bright lights of oncoming vehicles. *Id*. Imig stated that the width of the road was sufficient for two vehicles to pass in the opposite direction with four to six feet between them if both were driving as close to the outer edge of the road as possible. (App 183a) ("Four to six feet probably both biased out.")

When he first saw Plaintiff on his bike, Imig testified he was so close that he had no time to do anything except try to stop. He estimated he was 20 feet from Plaintiff when he first saw him and was traveling at 25 mph. (App 182a, 192a) He testified that he had no time or room to steer to the left (to avoid Sharryl Everson's oncoming vehicle which was about even with his truck at the time he struck Plaintiff) and that he was only able to brake which occurred at the same time he struck the

Plaintiff. (App 192a) Imig testified he did not encounter significant potholes and he did not affirm that road conditions affected his driving. (App 180a – 181a; 193a – 194a) Imig did not recall the condition of the road so he would not speculate (App 193a) Imig stated he was blinded by approaching headlights from the vehicle operated by Everson. (App 184a – 185a) He "could not see because of the bright lights." (App 194a)

Everson testified it was completely dark out. Everson denied that her bright lights were on long enough to interfere with Imig's operation of his vehicle. (App 204a – 205a; 212a – 213a) Neither Everson or Imig testified that they had any loss of control of or extraordinary interference with the operation of their vehicles because of any aspect of Hipp Road. (App 180a, 181a ("nothing significant"); 206a – 207a, 211a ("no potholes"); 235a).

Plaintiff's two friends, Logan Ganfield and Jeffrey Fietsam both testified they had no difficulty navigating the road on their bicycles. (App 260a; 278a – 279a ("some small potholes"; "nothing more than a usual dirt road"; "maybe some loose gravel and smaller potholes, but nothing too ridiculous"))

No photographs or measurements of the road exist from the date of the occurrence or from the following days prior to any regrading of the road to establish the exact location or conditions of the road at the time and on the date of the occurrence. (App 414a – 416a) In fact, no photographs or measurements were ever taken of Hipp Road or the accident scene that evening, or within the days following. *Id*. The first photographs were not taken until after the road had been regraded and it was never established that the photographs showed the exact location of the alleged defect or of the accident. (App 523a – 524a) The "exact location" of the accident, as acknowledged by Plaintiff's two experts, cannot be determined. (Plaintiff's Expert Donald Cleveland, App 523a – 524a ("I can't say as I have it at a specific point"; "the exact location is an issue"); Plaintiff's Expert Ed Novak, App 418a)

Mr. Novak testified:

> There's one thing that I can say about my opinion on where the accident took place, and that is that you don't know where it took place, the man that hit the child doesn't know where it took place, the respondents[sic] indicated they didn't know where it took place. And I don't think from reading the depositions that anybody knew – could say here's where it took place; ***therefore, I can't say where it took place either***. (App 418a) (emphasis added).

On October 3, 2013, Macomb received a "notice of intent". (App. 21a – 41a). The notice purported to identify the location of the accident, the nature of the defect, the witnesses, and the nature of the injuries. Regarding 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. [(App 23a – 24a) (emphasis added).]

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

> For a period of at least 30 days or longer before the injury of June 7, 2013 took place, the improved portion of the highway/roadway designed for public/vehicular travel *was not in a condition reasonably safe and fit* beginning in the area of 76000 Hipp Road extending north to the vicinity of Apel drain [where the collision occurred] and extending further north on Hipp Road to its intersection with 36 Mile Road; said highway/roadway being *substantially defective and hazardous such that a permanent defect existed at all relevant times* which the Macomb County Road Commission and/or Macomb Department of Roads had or should have had notice. *There was neither a shoulder nor adequate roadway/highway width to allow safe two-way public/vehicular travel*.
>
> Further, for a period of at least 30 days or longer before the injury of June 7, 2013 took place, subject

> highway/roadway, in the area described above, had *advanced deterioration (i.e., extensive pot holes and washboard surfaces) caused by poor and/or inadequate maintenance/poor drainage and/or use of inferior roadway materials such that the roadway was not in reasonable repair and/or not in a condition reasonably safe for public and/or vehicular travel*. Subject highway/roadway deterioration was accelerated by very heavy traffic volumes on Hipp Road as Hipp Road was being used by motorists as an alternate/detour/bypass to avoid adjacent M-53 road closure [M-53 – 34 Mile Road to Bordman Road reconstruction] which began in March/April 2013. [(App 24a) (brackets in original) (emphasis supplied).]

On August 11, 2014, Plaintiff filed a complaint against Imig, the driver of the pickup truck that struck Plaintiff. A subsequent complaint, filed on March 18, 2015, added Everson and Macomb, and alleged that on the date of the accident, Hipp Road was not in reasonable repair, which caused the accident. (App 312 – 322a) The complaint further alleged that Imig failed to properly control his vehicle, striking Plaintiff, and causing the accident. Finally, the complaint alleged that Defendant, Everson, approaching in the opposite direction from Imig through improper use of her bright lights also caused the accident.

On July 14, 2016, Macomb filed a motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10) arguing they were entitled to summary disposition because Plaintiff had failed to plead

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

On August 12, 2016, more than 3 years after the accident and nearly three years since the submission of the original notice, Plaintiff filed a motion to file a third amended complaint to "add the claim regarding berms and the berms claim". (App 323a – 344a) Plaintiff filed this

motion as a direct response to Macomb County's motion for summary disposition on immunity grounds. The Circuit Court conducted the hearing on Macomb's motion for summary disposition and the Plaintiff's motion to amend at the same time. (App. 345a – 386a)

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

> Plaintiff explained in the [original] notice that "there was neither a shoulder nor adequate roadway/highway width to allow safe two-way public/vehicular travel" along with "advanced deterioration (i.e., extensive pot holes and washboard surfaces) caused by poor and/or inadequate maintenance/poor drainage and/or use of inferior roadway materials such that the roadway was not in reasonable repair and/or not in a condition reasonably safe for public and/or vehicular travel" which existed for a period of at least 30 days or longer before the injury of June 7, 2013 took place." *Further, evidence disclosed through discovery revealed that due to lack of maintenance and repair, berms were allowed to exist or caused to exist on the traveled portion of the roadway at the edges of the gravel roadway, such that it narrowed the roadway down from twenty feet to approximately 15 feet on June 7, 2013*. [(App. 326a – 327a (emphasis added)).]

Plaintiff further stated that "[w]hen a motion is brought pursuant to MCR 2.116(C)(8), (9), or (10), "the court ***shall*** give the parties an opportunity to amend the pleadings as provided in MCR 2.118, unless

the evidence then before the court shows that amendment would not be justified." (App. 327a – 328a) (emphasis in original), citing MCR 2.116(I)(5).

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

> [T]he purpose of amending the Complaint, *in response to the defendant's motion for summary there was an argument made in one of the arguments about what was or was not included in the Complaint in the original notice*. What we are asking the Court to do is let us incorporate the original notice that was sent into the Complaint and *add the claim regarding berms and the berms claim*, as you are well aware of what happened and it came out through multiple depositions. It does not change in any way any need for any additional discovery or anything else. [(App. 349a) (emphasis added)]

Macomb challenged the amendment on the basis, *inter alia*, that amendment would be futile and that Plaintiff was seeking to amend the complaint to set forth "a defect that was not in their original notice". (App. 349a – 350a) Macomb's counsel continued: "[T]hey are obligated under the notice statute, MCL 691.1404(1) to set forth the names of known witnesses, the exact location and nature of the defect." *Id*. Macomb's counsel then explained that Plaintiff had not

complied with the notice statute by identifying the precise defect and it was not proper to amend and restate the claim. *Id*.

The trial court issued its opinion on October 12, 2016. (App. 387a – 401a) In addressing Macomb's motion for summary disposition, the trial court applied both MCR 2.116(C)(7) and MCR 2.116(C)(10), citing *Dextrom v Wexford Cty*, 287 Mich App 406, 428; 789 NW2d 211 (2010) 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." The trial court then went on to apply the standard for summary disposition motions under MCR 2.116(C)(10).

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

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

With respect to the naming of witnesses in the notice, the trial court concluded that Plaintiff had satisfied the "known witness" requirement of MCL 691.1404(1). The trial court reasoned that Plaintiff was not required to list *all known* witnesses, but rather those witnesses that saw the accident and what caused the accident. (App. 393a – 394a), 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. The trial court reasoned that there was "conflicting evidence" about whether Plaintiff was avoiding potholes at the time of the accident, and whether Imig could have avoided the collision "but for the condition of the road where the accident occurred."

Finally, while the trial court had already incorporated the "berms" as a potentially actionable defect, even though they were not mentioned by Plaintiff until the filing of his motion to file a third amended complaint to rehabilitate the deficiency in the original

notice, the trial court granted Plaintiff's motion to amend. In regard to Macomb's argument that this changed the "notice" to allege a new "defect", the trial court superficially concluded, without critical analysis, that there was "very little difference" between Plaintiff's "pre-suit notice" and the requested amendments.

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

The trial court denied Macomb's motion for reconsideration. (App. 402a – 406a). 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".

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."

Macomb appealed and the Court of Appeals reversed. In a 2-1 opinion the majority ruled that the "alleged defects in the road were not a proximate cause of [Plaintiff's] injury." (App 8a – 20a). Judge Meter dissented. He concluded that the alleged defects in the road's physical structure, particularly the "berms" foreseeably led to Plaintiff's injuries.

Plaintiff filed an application for leave to appeal in this Court and the Court reversed only as to the Court of Appeals' analysis of

proximate cause. This Court remanded to the Court of Appeals for consideration of the issues raised in Macomb's appeal. The Court of Appeals then issued an opinion on remand affirming the denial of summary disposition and affirming the trial court's allowance of amendment to Plaintiff's complaint. (App 1a – 6a). The Court remanded to the trial court concerning the factual disputes about the existence of potholes and whether the road was of adequate width to allow safe two-way vehicular travel. The Court specifically rejected Macomb's argument that the wrong interpretation of the notice provision applied and that the wrong standard of review had been applied in excess of the trial court's jurisdiction.

Macomb seeks leave to appeal on the issues raised in its original appeal and in its appeal from the Court of Appeals opinion after remand by this Court.

ARGUMENT AND ANALYSIS

I. PLAINTIFF'S STATUTORY 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). *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). The Court also reviews grants and denials of summary disposition de novo *Id.* Interpretation of the governmental tort liability act is also reviewed de novo. *Wigfall v City of Detroit*, 504 Mich 330, 337; 934 NW2d 760 (2019). De novo review means that the Court reviews the legal issue independently, without required deference to the courts below. *Wright*, 504 Mich at 417.

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. (App 21a – 40a) The accident underlying plaintiff's suit occurred on June 7, 2013. *Id.* Plaintiff provided notice on October 2, 2013 and Macomb County acknowledged receipt on October 3, 2013. *Id.*

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 also *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), affirmed at 934 NW2d 44 (October 25, 2019), 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.

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. 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.

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. The claim should be dismissed on these grounds alone, as is required in any case a state court faces in which the conditions precedent to bringing suit against the government have not been met. The state is not subject to the courts unless the claimant has satisfied the conditions precedent to a waiver of the government's suit immunity. This is an elementary proposition in Michigan jurisprudence concerning governmental entity immunity from suit. *County Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118 (2010), citing *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). "[T]he state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment". *Ballard v Ypsilanti Twp*, 457 Mich 564, 568; 577 NW2d 890 (1998) (KELLY, J) (emphasis supplied).

II. PLAINTIFF'S NOTICE, CONFINED AS IT MUST BE TO ITS CONTENTS, WAS DEFICIENT BECAUSE IT FAILED TO STRICTLY COMPLY WITH THE HIGHWAY EXCEPTION'S NOTICE PROVISION, MCL 691.1404(1) IN THAT IT FAILED TO IDENTIFY THE "EXACT LOCATION" AND "PRECISE NATURE" OF THE DEFECT, AND IT FAILED TO IDENTIFY "ALL WITNESSES"

A. Standard of Review

Whether governmental immunity applies is a question of law that is reviewed de novo by this Court. *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). The Court also reviews grants and denials of summary disposition de novo *Id.* Interpretation of the governmental tort liability act is also reviewed de novo. *Wigfall v City of Detroit*, 504 Mich 330, 337; 934 NW2d 760 (2019). De novo review means that the Court reviews the legal issue independently, without required deference to the courts below. *Wright*, 504 Mich at 417.

B. Analysis

The Court of Appeals concluded that Plaintiff's notice was sufficient, citing the liberalized "substantial compliance" standard to interpret the statutory notice provision of the highway exception as enunciated by the Court of Appeals in *Plunkett v Dep't of Transportation*, 286 Mich App 168, 174; 779 NW2d 263 (2009).

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 v City of Hamtramck*, 489 Mich 939, 939; 798 NW2d 12 (2011), *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 or refine the descriptions upon further discovery. 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).

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…." (App 23a – 24a) (emphasis supplied)

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. No photographs or measurements of the road exist from

the date of the occurrence or from the following days prior to any regrading of the road to establish the exact location or conditions of the road at the time and on the date of the occurrence. (App 414a – 416a) In fact, no photographs or measurements were ever taken of Hipp Road or the accident scene that evening, or within the days following. *Id*. The first photographs were not taken until after the road had been regraded and it was never established that the photographs showed the exact location of the alleged defect or of the accident. (App 523a – 524a) The "exact location" of the accident, as acknowledged by Plaintiff's two experts, cannot be determined. (Plaintiff's Expert Donald Cleveland, App 523a – 524a ("I can't say as I have it at a specific point"; "the exact location is an issue"); Plaintiff's Expert Ed Novak, App 418a)

Mr. Novak testified:

> There's one thing that I can say about my opinion on where the accident took place, and that is that you don't know where it took place, the man that hit the child doesn't know where it took place, the respondents[sic] indicated they didn't know where it took place. And I don't think from reading the depositions that anybody knew – could say here's where it took place; ***therefore, I can't say where it took place either***. (App 418a) (emphasis added).

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 one quarter of a mile (that is 1320 feet of roadway). (App 188a) 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" it does not identify the exact location, much less what the width of the road actually was. 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." (App 326a – 327a)

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*." (App 23a – 25a) 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.

In sum, to date, Plaintiff has failed to satisfy the plain and unambiguous language of the notice provision and is unable to identify the "exact location" and "exact nature" of the defect that is alleged to have caused his injuries. The Plaintiff has also failed to comply with the statute's plain requirement that the notice identify the witnesses.

Indeed, because of this inability to satisfy the exactitude and precision required by this Court's jurisprudence when considering notice provisions establishing a claim against the government, Plaintiff cannot even demonstrate what the actual width of the roadbed was at the supposedly "too narrow" location – no measurements were ever taken. So, even if the Court were to agree that berms on top of a roadbed causing temporary narrowness states a permanent, integral defect in the roadbed surface that exists at all times – a requirement enunciated in *Haliw* – the Plaintiff has never been able to point to a specific location, and therefore a specific width in the roadbed, where the accident occurred.

All of these deficiencies of proof were documented in Exhibit 8 in support of Macomb's motion for summary disposition and nothing has ever been produced or demonstrated to satisfy these failures. (App 590a – 596a)

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. Further, 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*.

This Court has recently indicated it must address extension of the natural consequences of these principles to *all aspects* of the content requirements. In its order granting oral argument in the cases of *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit* (Docket No. 157097), the Court directed the parties to address "whether strict or substantial compliance is required with the notice provision contained within MCL 691.1404(2), compare *Rowland v Washtenaw*

County Road Commission, 477 Mich 197 (2007), with *Plunkett v Dep't of Transportation*, 286 Mich App 168 (2009)." However, the Court did not address the question. Indeed, the Court did not even arrive at the interpretive principle stated in *Plunkett*, much less cite the case anywhere in its opinion.

The Court of Appeals here applied the *Plunkett* standard in both of its opinions (App 2a and 16a) Of course, Macomb prevailed in the first case so the issue was not one with respect to which Macomb had any reason to seek leave to appeal (although Macomb quite conspicuously raised the issue as an alternative grounds for the Court of Appeals' original opinion in both its Answer to the Plaintiff's original application and in its Supplemental Brief filed with this Court. *Plunkett* runs directly contrary to *every other case* that this Court has had occasion to address on the subject of the interpretative principles to be applied to notices of claims against the government under the GTLA. *Rowland*, *supra*; *McCahan*, *supra*; *Atkins*, *supra*; *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011); *Fairley*, *supra*. *All* of this Court's cases from *Rowland* forward, addressing this issue have specifically held, confirmed, and reconfirmed, that a *strict* not *liberal* interpretation of the notice

requirements of statutes waiving the government's suit immunity must apply. See inter alia, *id*. Concepts like "substantial compliance", "prejudice", and "judicial" or "equitable estoppel" cannot be invoked to save the claimant's cause of action. *Id*. In fact, despite acknowledging *Rowland's* requirements of a strict interpretation of the notice provisions preceding claims against governmental entities, the panel in *Plunkett* cited pre-*Rowland* case law. See *Plunkett*, 286 Mich App at 177, nn 10 through 16, all of which have been overruled or significantly limited by *Rowland's* oft-repeated and sweeping admonition. "Statutory notice requirements must be interpreted and enforced as plainly written." *Atkins*, 492 Mich at 710. One cannot "substantially" comply when they must "strictly" comply. No equitable or saving interpretations can be applied to the plain and unambiguous language of the notice provisions in the GTLA. *Rowland*, 477 Mich at 212. See also *Jakupovic*,489 Mich at 939 (strict compliance is required and a claimant must identify the "exact location" of a defect in the highway in order for the claim to survive. Importantly, as reiterated by this Court time and again, in context of governmental immunity cases, courts simply do not have the authority to apply judicial gloss to the

language of notice provisions precisely because doing so is judicial usurpation of the Legislature's charge to protect the government from suit on behalf of the people by defining the terms and conditions of the waiver of *suit* immunity in the first place. "When, under the guise of statutory construction, this Court ignores the language of the statute to further its own policy views, it wrongly usurps the power of the Legislature." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 07 (2000). Indeed, in such instances, the court exceeds its constitutional authority. *Id*.

If the judiciary can ignore the technical requirements of the provisions and in doing so apply liberal, flexible or forgiving interpretations, it can subvert the will of the people because the *notice* is the means through which the people have *consented* to allow a court to exercise jurisdiction over a claimant's case in the first place and to have the government waive its immunity, answer in the lawsuit, and expend the resources necessary to defend the claim. As this Court stated long ago, the Legislature can place whatever conditions it wants on the waiver, with the result being that a failure of a claimant to satisfy them deprives the court of jurisdiction over the case altogether. *Hastings*, 1 Doug at 236.

If the *Plunkett* standard applies, which Macomb explicitly challenges, then it eviscerates all of the other cases from this Court that have required strict compliance with the statutory notice provisions that the Legislature has put in place to allow suits against the government to proceed. Moreover, if the proper strict interpretation of the notice provision was applied as it should have been, the Plaintiff would have been deemed to have failed to satisfy the conditions precedent to haling the government into court and subjecting it to onerous litigation expenses. Michigan roads are not improved by the constant necessity of defending suits under the improper standards of review and interpretation. Indeed, the money spent defending the government, as it is money that comes directly from the taxpayer, is money that would otherwise go to improve road conditions.

The issue remains extant and continues to significantly prejudice and affect the government's ability to carry out its day-to-day functions free from the burdens of constant, unnecessary litigation in courts that do not even have jurisdiction to address the claims in the first instance because the latter survive based solely on an errant and legislatively prohibited interpretive principle.

III. PLAINTIFF SHOULD HAVE BEEN PROHIBITED FROM AMENDING HIS COMPLAINT AS THIS COURT'S RULES DO NOT ALLOW AMENDMENT IN RESPONSE TO A MOTION ON GROUNDS OF IMMUNITY UNDER MCR 2.116(C)(7)

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 on other grounds 490 Mich 1 (2011).

B. Analysis

"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).

However, 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 v Taylor*, 263 Mich App 618, 622-624; 689 NW2d 506 (2004).

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.

MCR 2.116(I)(5) provides no allowance for an amendment when the opposing party's motion for summary disposition is based on MCR 2.116(C)(7). Macomb asserted this argument in its initial appeal (App 77a), on page 38 of its March 28, 2019 answer to Plaintiff's application in this Court. The Court of Appeals was supposed to address the arguments remaining in Macomb's original appeal on remand. It failed to address this argument.

IV. THE COURT OF APPEALS APPROVED OF AN ERRONEOUS STANDARD OF REVIEW FOR IMMUNITY MOTIONS ASSERTED BY GOVERNMENTAL ENTITIES

The "hybrid" MCR 2.116(C)(10) / MCR 2.116(C)(7) standard of review approved by the Court of Appeals was also erroneous because it improvidently allows allegations of fact to proceed to litigation of a governmental entity's potential liability on less than a showing that the claimant has both pleaded and proved his or her case. See *Mack*, 467 Mich at 199. *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 are proved to 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.

Otherwise, applying the MCR 2.116(C)(10) "summary disposition" standard applicable to motions brought by ordinary civilian defendants effectively ignores this Court's long-standing and robust jurisprudence that ordinary civilian defendants and governmental entity defendants are treated differently under the law of governmental immunity embodied in the GTLA. *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."
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> ***
>
> 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).

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 the applicable statutory tort claim against the government 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's lawyers 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 court applies the standard of review that Plaintiff would have this Court apply to Macomb's summary

disposition motion because well-pleaded *allegations* are allowed to substitute for the requirement that in a case against the government, to survive the summary disposition stage and plead in avoidance of immunity, the claimant must both plead and prove his or her case why immunity does not apply. *Mack*, 467 Mich at 202-203 and n 18; *McCann*, 398 Mich at 77, n 1.

V. PLAINTIFF PROVED NO "ACTIONABLE" DEFECT

After applying the erroneous interpretive principles of *Plunkett* to the statutory notice provision to conclude that the notice provided by Plaintiff was sufficient, and after applying the erroneous standard of review (under MCR 2.116(C)(10)) to conclude that issues of material fact arose from the allegations (both lay and expert) (with absolutely no proofs ever provided of the exact location and exact nature of the defect and, thus, even less, where the roadbed was supposed to be unreasonably narrow or impaired by unreasonably dangerous conditions (potholes, berms, washboarding, etc.), the Court of Appeals concludes that the width of the roadbed; berms and materials accumulated on the roadbed surface; the existence of potholes and/or washboard surface are sufficient defects in and of themselves to warrant further onerous litigation. (App 4a).

However, this ostensible supposition ignores a very basic fact about what defects are "actionable" under the highway exception. A plaintiff suing under the highway exception must prove that his or her injuries resulted from a fixed and permanent defect that is integrally incorporated into the roadbed surface. *Haliw v Sterling Hts*, 464 Mich 297, 308; 627 NW2d 581 (2001). A plaintiff who cannot establish a permanent defect in the surface of the highway cannot establish that a defective highway proximately caused his or her injury. *Id.* at 311. 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 *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) (App 616a – 617a)

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, pothole, 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 Court of Appeals' 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.

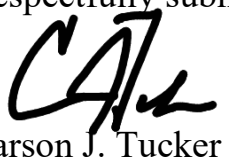
CONCLUSION AND RELIEF REQUESTED

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*. Finally, the Court of Appeals applied the wrong interpretive principle to the Plaintiff's notice and the wrong standard of review to Macomb's immunity motion.

For the foregoing reasons, Macomb, respectfully requests that this Court reverse the Court of Appeals decision, and order that summary disposition be granted in Macomb's favor. Alternatively, Macomb requests the Court to grant its application so that the outstanding and critical issues of law raised herein and touching upon matters of utmost importance to the general public be finally settled.

Respectfully submitted by:



Carson J. Tucker (P62209)
Lex Fori, PLLC
Attorneys for Defendant
Macomb County Department of
Roads and Macomb County
117 N. First St., Suite 111
Ann Arbor, MI 48104
(734) 887-9260
cjtucker@lexfori.org

Dated: February 25, 2020

CERTIFICATE OF COMPLIANCE

In accordance with Administrative Order No. 2019-6, this brief contains 13,349 words (as identified by the Microsoft Word "word count" function) and was prepared using the proportional font typeface Times New Roman set at 14-point.