STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THOMAS LA MEAU, as personal representative, of the ESTATE OF JOHN M. CRNKOVICH, Deceased,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK, a municipal corporation,

Defendant-Appellant,

and

DETROIT EDISON COMPANY, GAGLIO CORPORATION, a Michigan Corporation, ELDEN DANIELSON and BRYAN WARJU,

Defendants. /

Supreme Court No. 141559-60

Court of Appeals' No. 290059

Lower Court No. 07-083761-NO

AMICUS BRIEF OF MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE & PROPERTY POOL, PUBLIC CORPORATION LAW SECTION OF THE STATE BAR (PCLS), AND THE MICHIGAN TOWNSHIPS ASSOCIATION (MTA)

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STATEMENT OF APPELLATE JURISDICTION

On July 13, 2011, the court of appeals issued an opinion affirming the circuit court's order denying the City of Royal Oak, Elden Danielson, and Brian Warju summary disposition, notwithstanding their assertion of the governmental immunity defense. On March 9, 2011, this Court directed the Clerk to schedule oral argument on whether to grant Defendants' Application for Leave to Appeal or to take peremptory action. Pursuant to MCR 7.301 and MCR 7.302, jurisdiction in this Court is therefore proper. This Court may exercise its jurisdiction by hearing oral argument on the application and peremptorily reversing the majority decision in the court of appeals and adopting the dissenting opinion without the need for a full merits process or decision.

STATEMENT OF THE QUESTIONS PRESENTED

I.

Is the City of Royal Oak entitled to governmental immunity?

Defendant-Appellant City of Royal Oak answers "Yes."

Plaintiff-Appellee Thomas LaMeau answers "No."

The trial court would presumably answer "No."

The Court of Appeals would presumably answer "No."

Amicus Curiae answer "Yes."

II.

Are the individual public defendants entitled to governmental immunity where their conduct was neither grossly negligent nor was it "the" proximate cause of the decedent's injury?

Defendant-Appellant City of Royal Oak answers "Yes."

Plaintiff-Appellee Thomas LaMeau answers "No."

The trial court would presumably answer "No."

The Court of Appeals would presumably answer "No."

Amicus Curiae answer "Yes."

STATEMENT OF FACTS

Amicus Curiae[1] rely upon the statements of facts set forth in Defendants' Application for Leave to Appeal.

[1] The Michigan Municipal League is a non-profit Michigan Corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages.

The Michigan Municipal League & Property Pool was established under 1982 PA 138 to develop and to administer a group program of liability and property self-insurance for Michigan municipalities. The principal objectives of the Pool are to establish and to administer municipal risk management service, to reduce the incidents of property and casualty losses occurring in the operation of local government functions, and to defend the Pool's members against liability losses.

The Michigan Townships Association (MTA) is a non-profit organization with over one thousand Michigan townships as members. The heart of the MTA's mission is to provide a unified voice for Michigan's township governments by representing townships before the Legislature, the executive office and state agencies.

The Public Corporation Law Section of the State Bar of Michigan (PCLS) provides information, education, and analysis about issues of concern to the State Bar, through meetings, seminars, public service programs, and the like.

INTRODUCTION

Michigan's broad immunity was enacted to protect governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity had historically protected the state. See generally *Ross v Consumers Power Co*, 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all kinds. The statute was intended to protect governmental parties against the burdens of discovery and trial, as well as against the potential for liability. *Odom*, 482 Mich at 479.

Justice Robert H. Jackson's words offer a vitally important perspective on this case and perhaps some insight into the court of appeals majority's error. He referenced the old legal maxim that hard cases make bad law, but then observed, "We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law." *American Communications Commission v WOKO*, 329 US 223, 229 (1936). An unusual case

ought not be allowed to distort long-standing legal principles that have resulted in a comprehensive, clear, governmental immunity doctrine in Michigan that effectuates the broad protection afforded by Michigan's legislature. Nor should it be used to announce a rule or series of rules that will weaken the statutory grant of protection by creating exceptions to the statutory provisions or by reading them to impose fuzzy standards rather than the bright line rules they were intended to create.

This Court has set forth in its order calling for oral argument on the application a series of questions relating to aspects of the Governmental Tort Liability Act, MCL 691.1401 et seq. Amici will offer an approach to answering each of these questions as the Court has directed. But to reach a reversal, this Court need not answer all of the questions. And to the extent some of them may be difficult to answer without creating "bad law," that is, law that lacks a clear basis in the statutory text, this Court should predicate its decision on the answers that are based on the statute without risking issuance of a decision that creates confusion and inconsistency. In order to support summary disposition in favor of the governmental agency, the City of Royal Oak need only persuade this Court that it is correct on one of the first three questions. Likewise, in order to support summary disposition in favor of the individual government employees who are defendants in this case, they need only succeed in persuading the Court that they are correct on one of the last two questions. Clarity in the law is essential for the governmental immunity statute to be effective; but clarity in the law's

application to each and every unusual fact pattern is not necessary when similar factual circumstances are unlikely to arise.

ARGUMENT I

The City Of Royal Oak Is Entitled To Governmental Immunity.

A. The presence of the anchored guy wire at issue was not a breach of the City of Royal Oak's duty to keep the sidewalk in "reasonable repair" under MCL 691.1402.

Under MCL 691.1407(1), a governmental agency is immune from suit for tort liability when engaged in the exercise or discharge of a governmental function. *Ross v Consumers Power Co (On Rhg)*, 420 Mich 567; 363 NW2d 641 (1984). The broad immunity granted to governmental agencies, such as municipalities, under Michigan's governmental immunity statute is limited by narrowly drawn statutory exceptions. *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995). One of those is found at MCL 691.1402, under which a governmental agency remains liable for injuries resulting from a highway that is not maintained in reasonable repair and in a reasonable safe condition fit for travel:

> (1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Through the enactment of MCL 691.1402, the Michigan Legislature

authorized the broad grant of governmental immunity to be lifted where bodily injury or property damage results from a highway that is not in "reasonable repair." Resolution of the issue presented in this appeal requires interpretation of the "reasonable repair" language of MCL 691.1402, which must be construed narrowly to afford protection to governmental agencies such as the City of Royal Oak. See *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) ("the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed"). The court of appeals' majority opinion, in concluding that the highway exception was applicable, improperly interprets and extends "repair and maintain" to a situation where the City alters the unimproved right-of-way to install a new sidewalk that is ultimately found defective because of an unremoved guy wire. (Majority opinion, pp 8-9, 11). This conflicts with this Court's decision in *Hanson v Board of County Road Comm'rs of the County of Mecosta*, 465 Mich 492, 502; 638 NW2d 396 (2002), which made it abundantly clear that the duty applicable to all governmental agencies, including municipalities, as set forth in the first and second sentences of the highway exception, does not extend to claims of defective design or lack of sight distance, but only relates to actual maintenance and repair.

In *Hanson*, the plaintiff's decedent's vehicle collided head-on with another vehicle as both approached the crest of a hill. *Id.* at 494. The plaintiff sued the road commission contending that the highway was unsafe because of the limited sight distance created by

the curvature in the hill. *Id.* The plaintiff maintained that the slope of the road prevented drivers from seeing each other in time to avoid a collision. *Id.* at 494-495. Specifically, the plaintiff alleged that the road commission breached its duties by failing to grade and profile the street to conform to applicable standards for sight distance, provide adequate warning to motorists of the limited sight distance, failing to reduce the speed limit to take into account the limited sight distance, and failing to provide a proper or adequate shoulder area for emergency use by motorists. *Id.* at 495.

The road commission argued that the plaintiff's claim was precluded because it was not within the highway exception. *Id.* The circuit court agreed and granted the road commission's motion for summary disposition. *Id.* at 496. Relying on *Pick v Szymczak,* 451 Mich 607; 548 NW2d 603 (1996), the court of appeals reversed, holding that a genuine issue of material fact existed as to whether the hill crest was a point of special danger or hazard requiring the road commission to erect warning signs or traffic control devices. *Id.* at 496-497. The road commission filed a motion for rehearing. *Id.* While that motion was pending *Nawrocki* was decided, clarifying the highway exception and overruling *Pick. Hanson, supra* at 497. In light of *Nawrocki,* this Court granted rehearing and reversed itself. *Hanson, supra* at 497. The plaintiff then filed an application for leave to appeal to the Michigan Supreme Court which was granted. *Id.*

The Court in *Hanson* began its analysis by reaffirming the basic tenet set forth in both *Ross* and *Nawrocki* that the immunity afforded governmental agencies is broad

with narrowly drawn exceptions. *Hanson, supra,* at 498-499. The *Hanson* Court looked to *Nawrocki* for guidance with respect to the statutory duty created by MCL 691.1402(1). The Supreme Court in *Hanson* read the rule in *Nawrocki* to be an interpretation of the first sentence of the highway exception, that all governmental agencies, including municipalities, have a duty to repair and maintain, rather than a duty to make the highway reasonably safe. *Hanson, supra* at 502-503. In other words, there are not two duties; both sentences create a single duty which is to repair and maintain the highway. *Id.*

The *Hanson* Court analyzed what it means to repair and maintain -- the duty imposed on all governmental agencies under the highway exception. *Id.* at 502-503. This Court reasoned that the words "repair" and "maintain" have no technical meaning under the statute. Considering the common usage of the words, the Court concluded that the duty to repair and maintain under the plain language of the statute does not impose a duty on governmental agencies to construct a highway free of defects or to correct dangerous or defective designs in the original construction. *Id.* at 502-503. *Hanson* "disagree[d] with dicta in cases . . . [that stated] that the duty to maintain a road in a reasonably safe condition includes the duty to correct defects arising from the original design or construction of highways." *Id.*, 501, n7. The *Hanson* Court emphasized the fact that "[n]owhere in the statutory language are there phrases such as 'known points of hazard' or 'points of special danger.'" *Id.*, at 502-503. The highway

exception statute does not impose a duty to design or redesign a roadway to make it safer by eliminating points of special danger or hazard. *Id.* Thus, the plaintiff's claims of poor design and inadequate sight distance were insufficient to plead a claim in avoidance of governmental immunity. *Id.* at 503-504. Embracing the court of appeals' decision in *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 587-588; 546 NW2d 690 (1996), the *Hanson* court read MCL 691.1402 to create a single limited duty.

The court of appeals reaffirmed and reiterated the exclusion of a duty to design or redesign from the scope of the highway exception in *Plunkett v Dep't of Transportation*, 286 Mich App 168; 779 NW2d 263 (2009). Of particular note, the *Plunkett* Court observed:

> "[T]he focus of the highway exception is on maintaining what has already been built in a state of reasonable repair so as to be reasonably safe and fit for public vehicular travel." The plain language of the highway exception to governmental immunity provides that the road commission has a duty to repair and maintain, not a duty to design or redesign. *Id.* at 184, quoting *Hanson, supra,* at 503.

Like the plaintiff in *Hanson*, here Plaintiff alleges that the City of Royal Oak breached its duty with regard to installing a new sidewalk in the path of a guy wire. Plaintiff's criticisms of the City are as follows:

> i. it planned, oversaw, and executed a sidewalk in the direct path of a Detroit Edison guy wire which stretched across the sidewalk. (Plaintiff's Third Amended Complaint, ¶ 41).

ii. it executed a sidewalk with a missing concrete slab and which contained a metal turnbuckle and/or anchor to which was attached a metal guy wire which extended from the sidewalk up to the utility pole, directly in the path of public travel. (*Id.*, ¶ 20).

iii. it failed to include a warning guard or proper illumination in the sidewalk which it designed. (*Id.*).

iv. it approved of and consented to the construction of a sidewalk in a defective pathway. (*Id.*, ¶ 31).

These allegations set forth a claim that the City's design of the sidewalk in the path of a guy wire was defective. In short, Plaintiff complains that the City altered the unimproved right-of-way to install a new sidewalk in an area that was not "reasonably safe and convenient for public travel." (Plaintiff's Third Amended Complaint, ¶ 23). Just as the plaintiffs' theory of liability against the City of Cadillac was rejected by this Court in *Hanson*, so also Plaintiff's theory of liability against the City of Royal Oak should be rejected as design defect claim not encompassed by the "repair" and "maintain" language of the highway exception.

The Legislature has decided that governmental entities are entitled to immunity from their highway design choices. This legislative choice makes sense because state juries are not properly equipped to challenge the polycentric design decisions made in connection with highway design. Local government entities can easily conduct broad-based studies through the use of experts, hearings, and in-depth research, before making design choices regarding streets and highways. State courts trying to regulate

through individual litigation do not have these tools. Most notably, juries are ill-equipped to evaluate overall regulatory policy or to determine whether a particular design choice is proper. Stated another way, a lay jury does not examine design choices from the broader perspective of the governmental entity; a jury conducts an exercise that is entirely retrospective, and looks at design choices from the perspective of their impact on a particular accident. Juries do not do well with the kind of polycentric balancing that municipalities must do, when considering competing considerations inherent in regulating a complex area such as public travel. Without immunity afforded to governmental entities for design/redesign defects, state juries will be asked to do just that. Yet, juries notoriously fare poorly when attempting to adjudicate individual safety risks in the context of overall public benefits – quintessentially the kind of issue municipalities must confront every day. This polycentric municipal decision-making problem is reflected in the facts here, where running the sidewalk closer to the street would have posed a danger to passersby from street traffic; and running the sidewalk where it did raised a temporary issue with respect to the utility pole and guy wire placement until the responsible utility removed it as planned. Any choice the government made with respect to design created some potential risk. A retrospective analysis by a lay jury is problematic in these circumstances.

In contrast, a jury is well-situated to determine whether a highway is in "reasonable repair." And this is precisely the Legislative choice made and reflected in

the limited lift of immunity to keep highways in "reasonable repair." Careful adherence to this Legislative choice can most easily be accomplished by adopting Judge Talbot's dissent, or alternatively, by granting leave to appeal.

B. An anchored guy wire is a necessary structural component of a utility pole, and thus constitutes a "utility pole" within the meaning of MCL 691.1401(e).

Even if MCL 691.1402 is applicable, the City of Royal Oak is nonetheless entitled to summary disposition because the exclusion to the highway exception for "utility poles" found at MCL 691.1401(e) removes the guy wire from that exception. The Legislature expressly excluded "utility poles" from the definition of a "highway:"

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

MCL 691.1401(e) (emphasis added). Notwithstanding this express exclusion, the court of appeals' majority determined in this case that the guy wire and anchor supporting the utility pole did not fit within the definition of "utility poles." (Majority opinion, pp 9-10). Rather, the majority determined that because the anchor and guy wire were in place prior to the construction of the sidewalk, and were incorporated into the sidewalk, the anchor and wire constitute a "sidewalk" and thus a "highway." *Id.* Judge Talbot dissented, reasoning that "it is disingenuous to suggest that any appendage extending from [the utility] pole should be treated as a separate or distinguishable entity." (Dissenting opinion, p 5).

Judge Talbot's dissent represents the proper analysis that should be adopted by this Court. The majority's opinion overlooks that items which it previously found not to constitute "utility poles" typically involve completely separate items that serve separate purposes apart from the utility pole, such as streetlights. *Ridley v Detroit (On Remand),* 258 Mich App 511; 673 NW2d 448 (2003) (for purposes of action alleging that city negligently failed to maintain proper lighting on street where fatal automobile accident occurred, street lighting was not a "*utility pole,*" within meaning of highway exception to statute establishing governmental tort immunity excluding alleys, trees, and utility poles from definition of highway). But until now, never have the appellate courts of this State determined that the supportive framework of a utility pole is not part and parcel of the pole itself. The wire and anchor are a natural and necessary part of the utility pole since they provide structural support; without the wire and anchor, the utility pole could not properly stand. (See pictures of pole). Thus, of necessity the guy wire and anchor fall within the definition of "utility poles" and thus are outside the scope of the highway exception to governmental immunity.

The majority's focus on the placement of the wire and anchor near the edge of the temporary asphalt patch is misplaced. (Majority opinion, pp 8-9). The location of the anchor placement does not somehow alter the characteristics and purpose of the guy wire and morph it from part of the utility pole's structural support to part of the sidewalk itself. The sidewalk does not need the utility pole, wire, or anchor to function;

conversely, however, the utility pole is dependent upon the guy wire and anchor for support. In short, the anchor and guy wire are not a part of the sidewalk any more than a streetlight pole that falls onto the highway is part of a "highway." *Weaver v City of Detroit*, 252 Mich App 239; 651 NW2d 482 (2002).

The majority's conclusion in *LaMeau* will subject governmental entities to liability for supportive and integral structures of objects expressly excluded from the definition of a "highway." For example, under the majority's analysis a tree stump would arguably not fall within the definition of "trees" as set forth in MCL 691.1401(e), even though a stump is a natural extension of the tree and part of the tree's supportive structure. Correctly so, this exact argument was rejected by a panel of the court of appeals. *Walford v City of Kingsford*, 2004 WL 515481 (Mich App 3/16/04). In *Walford*, the court of appeals reasoned that even though a tree stump is not expressly excluded from the definition of "highway," "[s]omething is not included in the definition of highway merely because it has not been specifically excluded." *Id.* at *2, citing *Weaver v Detroit*, 252 Mich App 239, 246; 651 NW2d 482 (2002). The *Walford* Court continued that because "a tree is specifically excluded from the definition" of highway, so also a tree stump is excluded from the definition. *Id.*

Applying that same analysis here, even though a guy wire and anchor are not expressly excluded from the definition of "highway," they are not part of the highway but of the utility pole. Because utility poles have been expressly excluded from the

definition of "highway," the poles' supportive structures are also excluded. Peremptory reversal is necessary to correct this error and to adhere to the principle that exceptions to immunity must be narrowly construed. *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995). Failing to do so would create an expansion of liability that the Legislature did not intend. And it would inject uncertainty and confusion into the law.

C. The fact that the sidewalk was not open for public travel and that the City barricaded the sidewalk against public use supports a finding of governmental immunity.

Another flaw in the majority's opinion is its finding that a fact question exists as to "whether Royal Oak had closed the sidewalk to the public." (Majority opinion, p 10). In so doing, the majority improperly interprets the facts that "the remainder of the new sidewalk was open to the public and that Royal Oak ordered Gaglio Cement to pave the missing sidewalk flag with asphalt." (*Id.*). As to the latter, the majority takes the temporary asphalt to mean that the City did not want that portion of the sidewalk closed. But the record reveals that the City filled the space with a temporary asphalt patch in an abundance of caution, to minimize any potential danger caused by the height differential between the poured concrete sidewalk slabs and the empty space next to the guy wire anchor in the event someone traversed the site. (Asst Eng 10/1/08 Affidavit, ¶¶ 9-10; S. Gaglio Dep, pp 23-24). As to the former, the majority disregards the numerous barricades placed on and around the asphalt area to prevent public access. Not only does it fly in the face of logic to conclude that one portion of a

sidewalk cannot be closed where the rest of the sidewalk is open, the majority's opinion directly contradicts its previous recognition that a road is deemed not open to the public where a portion of the road is barricaded during reconstruction. See *Grounds v Washtenaw Co Rd Comm'n*, 204 Mich App 453, 454; 516 NW2d 87 (1994); compare with *Pusakulich v Ironwood*, 247 Mich App 80; 635 NW2d 323 (2001).

From a policy standpoint, the majority's opinion creates a system in which liability falls on the government rather than on the actual wrongdoer. It is undisputed in this case that if barricades were removed, it was done so by unknown third parties rather than any of the City defendants. The City should not be responsible for the acts of third parties. To uphold a finding that the government should bear the burden of liability rather than the third party who removed the barricades amounts to nothing more than a conclusion designed to enable a plaintiff injured by a third party to reach a deeper pocket.

For these reasons, peremptory reversal, or alternatively leave to appeal, is proper.

ARGUMENT II

The Individual Public Defendants Are Entitled To Governmental Immunity Because Their Conduct Was Neither Grossly Negligent Nor Was It "The" Proximate Cause Of The Decedent's Injury.

A. When evaluating the conduct of the public defendants individually, rather than cumulatively, their individual conduct does not show a substantial lack of concern for whether an injury results, as the gross negligence standard requires.

Under the Government Tort Liability Act, an officer, employee, agent, or volunteer of a governmental agency is immune from tort liability if the person was acting, or reasonably believed himself to be acting, within the scope of his authority, was engaged in the exercise or discharge of a governmental function, and did not engage in conduct amounting to gross negligence. *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999). The Government Tort Liability Act defines "gross negligence" as conduct that is "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c).

A review of the case law analyzing the gross negligence standard demonstrates that Danielson and Warju's conduct does not satisfy the statutory standard for gross negligence. In the companion cases of *Maiden v Rozwood*, 461 Mich 109, 121-122; 597 NW2d 817 (1999) and *Reno v Chung*, 220 Mich App 102; 559 NW2d 308 (1996), the Court analyzed the gross negligence standard. The Court determined that pursuant to the plain language of the governmental immunity statute, the legislature limited

governmental employee liability to situations where the contested conduct was "substantially more than negligent." Also, in citing *Jackson v Saginaw County*, 458 Mich 141; 580 NW2d 870 (1998), the *Maiden* court ruled that evidence of ordinary negligence does not create a material question of fact.

Similarly, this Court affirmed a grant of summary disposition in favor of a government employee in *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002). Although the employee drove a forklift without a valid license and after he knew that the brakes were faulty, the Court concluded that he was qualified to drive the lift and had reported the problem with the brakes. Thus, no reasonable mind could conclude that his conduct amounted to gross negligence. 466 Mich at 513.

This Court again concluded that reasonable minds could not differ in finding that the defendant's conduct was not grossly negligence in *Jackson v Saginaw County*, 458 Mich 141; 580 NW2d 870 (1998). The plaintiff sued a physician for failure to diagnose the plaintiff's throat cancer. But the Supreme Court determined that, although evidence had been submitted that the physician violated the standard of care, "no testimony at all [was] offered to support a notion that his conduct would be so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Maiden*, 461 Mich at 122 citing *Jackson*. The Court determined that the "logical import of *Jackson*, consistent with the statutory definition of gross negligence does not create a material question of fact concerning gross negligence." *Id.* The Court reasoned that absent such

evidence the court would be creating "a jury question premised on something less than the statutory standard." Thus, summary disposition was required.

Vermilya v Dunham, 195 Mich App 79; 489 NW2d 496 (1992) illustrates the application of the high standard necessary to set forth a claim for gross negligence on closely analogous facts. In *Vermilya*, the court of appeals held that a school principal was entitled to summary disposition on the basis of governmental immunity despite his failure to obtain repairs to dangerous playground equipment before the plaintiff's injury occurred. The *Vermilya* court rejected the notion that summary disposition is not appropriate in "every case in which a plaintiff alleges that negligent conduct by a defendant government employee resulted in injury." 195 Mich App at 83. The court noted that the school principal was aware that soccer goals could be tipped over approximately two weeks before the plaintiff's injury. The school principal then took steps to try to avoid injury. In the *Vermilya* court's view, the undisputed facts precluded a finding that the defendant was grossly negligent.

Here, the majority's analysis does not satisfy the requirements for circumventing immunity. Instead of evaluating the conduct of each defendant individually to determine whether that individual's conduct alone rises to the level of gross negligence, the majority looked at the actions of Danielson and Warju in the cumulative and concluded that together, they were grossly negligent. (See Majority opinion, pp 12-14). But a proper analysis of the actions taken by Warju and Danielson individually reveals

just the opposite. As to Assistant Engineer Warju, Plaintiff alleges that the following actions demonstrated his reckless conduct:

A. In planning to build a sidewalk wherein existed a known and hazardous defect and obvious harm to the public at large, that being the guy wire located where the sidewalk was to be built.

B. In failing to give notice to and in failing to follow up regarding giving notice to Defendant, DETROIT EDISON, in regards to removal of the buy [sic] wire.

C. Actually constructing or having caused to have constructed the sidewalk wherein the guy wire constituted a hazard to the public.

D. In failing to inspect the construction site, especially that which is the subject matter of this Complaint to determine that the hazard, that being the guy wire, had not been removed.

E. In failing to heed the warnings given him directly or through his assistants of the employees of Defendant, GAGLIO PR CEMENT CORPORATION, as to the obvious dangers in putting a sidewalk in where this guy wire existed and in failing to heed Defendant, GAGLIO'S warnings of not to complete the project until the guy wire was removed.

(Plaintiff's Third Amended Complaint, ¶ 81(A)-(E)). These allegations do not support a viable claim for gross negligence against Warju, when compared against the record facts demonstrating that Warju (1) sent a letter to SBN, DTE, and the contractors notifying them of a "Preconstruction Meeting," in which the topics to be discussed included utility conflicts (5/5/05 letter, Warju Affidavit, ¶¶ 5, 8; Agenda), (2) instructed a temporary asphalt patch fill in the area next to the utility pole anchor to minimize any

potential danger caused by any height differential between the ground and the concrete slabs (Warju Affidavit, 10/08, ¶¶ 9-10; S. Gaglio Dep, p 23-24), (3) considered and rejected a suggestion to redesign the curve away from and around the guy wire because of the danger street traffic would pose to those using the sidewalk (R. Gaglio Dep, pp 27-28), (4) mandated that Gaglio keep barricades at the constructive site until DTE moved its wire (S. Gaglio Dep, p 24; R. Gaglio Dep, pp 15, 18-20), and (5) contacted Gaglio to replace the barricades if he ever saw barricades missing (Warju Affidavit, ¶¶ 9-12, 13). Warju cannot be said to have shown a substantial lack of concern for whether an injury resulted, particularly where he provided notice to the owner of the guy wire of the preconstruction meeting, considered foremost the safety of those using the sidewalk when rejecting alternative sidewalk designs, ordered Gaglio to keep the area barricaded to prevent public use, and required the barricades to be replaced if they were removed by a third party.

Similarly, City Engineer Danielson's conduct does not rise to the level of gross negligence. Plaintiff makes the exact same allegations against Danielson as he makes against Warju. (Plaintiff's Third Amended Complaint, ¶ 66(A)-(E)). And yet the record reflects that Danielson (1) verbally reminded DTE representatives that the wire needed to be relocated (Danielson Affidavit, ¶¶ 7-13; Danielson Dep, pp 101-102), and (2) contacted Gaglio to replace any barricades he observed missing (Danielson Affidavit,

¶¶ 14-17). Accordingly, to the extent Plaintiff states any claim against Danielson, it cannot be one for gross negligence.

Individual government actors regularly engage in dangerous work where they are exposed to potential liability. MCL 691.1407(2)(c) reflects the careful balance struck by the Legislature to allow for some recovery as an incentive for careful conduct, but to limit that recovery to only a small portion of instances where the government actor's conduct falls below an unacceptable level. The high standard to sustain a gross negligence claim also recognizes the limited resources governments have, ever prevalent in Michigan's economic recession. Where individual government actors try do to "the right thing," the Legislature – through its enactment of § 1407(2)(c) – has decided not to hold the actor liable. This is one of those cases.

B The alleged conduct of the individual public defendants was not "the" proximate cause of the decedent's injury.

Moreover, to satisfy the gross negligence exception to governmental immunity for individuals, a plaintiff must establish that the individual's gross negligence was "the proximate cause" of injury. This Court has defined "the proximate cause "as the sole cause of a plaintiff's damage. *Robinson v Detroit*, 462 Mich 439, 458-462; 613 NW2d 307 (2000). In *Robinson*, the Court noted that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) "the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate

cause." *Id.* Thus, if another cause is attributable to a plaintiff's damages, the individual defendant's gross negligence cannot be "the" proximate cause. 462 Mich at 458-459; *Smith v Jones*, 246 Mich App 270, 279-280; 632 NW2d 509 (2001); *Kruger v White Lake Twp*, 250 Mich App 622; 648 NW2d 660 (2002); *Curtis v Flint*, 253 Mich App 555; 655 NW2d 791 (2002). In order to show that an individual defendant's conduct was the proximate cause of the accident, a plaintiff must show that the defendant's conduct amounted to gross negligence that was "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson, supra*, at 462.

In *Paige v City of Sterling Heights*, 476 Mich 495; 720 NW2d 219 (2006), the Court was asked to determine the proper meaning of the phrase "the proximate cause," as contrasted with "a proximate cause," the former being found in the Worker's Disability Compensation Act ("WDCA), MCL 418.101 et seq. In so ruling that "the proximate cause" contemplated but one sole proximate cause, this Court appreciated the significant difference between "a" and "the":

> Traditionally to our law, to say nothing of classrooms, we have recognized the difference between 'the' and 'a.' 'The' is defined as 'definite article. 1. (used, esp. before a noun, with a specifying or particularizing effect as opposed to the indefinite or generalizing force of the indefinite article a or an)...' Random House Webster's College Dictionary, p. 1382. Further, we must follow these distinctions between 'a' and 'the' as the Legislature has directed that 'all words and phrases shall be construed and understood according to the common and approved usage of the language...' MCL 8.3(a); MSA 2.212(1). Moreover, there is no indication that the

> words 'the' and 'a' in common usage meant something different at the time this [Worker's Disability Compensation] statue was enacted...(emphasis added).

Id. at 4. Adopting this analysis, this Court determined that the phrase "the proximate cause," as used in MCL 418.375(2) of the WDCA referred to the sole proximate cause. *Id.* at 5.

Here, in concluding that a fact question exists regarding the one most immediate, efficient, and direct cause of the decedent's injuries, the majority in *LaMeau* essentially ignores the precedent set forth in *Robinson* and *Paige* and interprets the definite article "the" as the indefinite article "a." (Majority opinion, pp 14-15). The majority opinion also ignores that the court of appeals has routinely declined to find a defendant's conduct "the" proximate cause of the injury where the decedent's own conduct was more directly and casually related to the injury sustained. For example, in *Scott v Charter Township of Clinton*, 2002 WL 31160298 (Mich App 9/27/02), the court of appeals held that the defendant police officers' alleged conduct of failing to obtain medical treatment for a jail inmate, disobeying department policies on how to treat suicidal inmates, and failing to find and remove the drawstring on the inmate's pants, was not "the" proximate cause of the inmate's suicide by hanging himself with the drawstring from his pants. Rather, "the one most immediate, efficient, and direct cause preceding [his] injury was [the decedent's] act of hanging himself." Similarly, in *Perez v Oakland County*, 2007 WL 914669 (Mich App 3/27/07), the court of appeals rejected the argument

that the defendant's alleged conduct in clearing the decedent inmate for single cell housing without watch for his serious mental illness was "the" proximate cause of the inmate's suicide. A like result should issue here, where the decedent's conduct in driving a motorized scooter on the sidewalk, in violation of Michigan statute, without any headlights and while intoxicated, arguably constituted "the one most immediate, efficient, and direct cause" preceding his injury.

The majority's analysis also minimizes the significance of DTE's failure to move the guy wire and anchor – even after it received notice of the Preconstruction Meeting during which utility conflicts were to be discussed. (Majority opinion, p 15). Rather than considering DTE's failure to relocate the guy wire as "the" proximate cause of the decedent's injury, the majority excuses DTE's failure to timely act as a result of the City's "failure to formally request the relocation of the anchor and guy wire." (Majority opinion, p 15). In so doing, the majority ignores that DTE had an office in Royal Oak (Koski Dep, pp 7-9). The majority also improperly places the onus of ensuring relocation of the guy wire and anchor on the City – who had no jurisdiction or control over the wire/anchor – rather than on DTE as the owner of the guy wire. (Majority opinion, p 15).

If the majority's opinion is left to stand, all governmental defendants whose conduct constitutes "a" proximate cause will be subjected to a jury trial – even where there is a more "direct" and "immediate" cause of the injuries. This Court can

preemptively remedy this error by adopting Judge Talbot's dissent. The dissent provides a careful and balanced analysis of the distinction between "a" proximate cause and "the" proximate cause in the factual context of a governmental defendant's initiation of a chain of events that arguably led to the plaintiff's injury, and the subsequent actions of other actors, including the plaintiff himself. (Dissenting opinion, pp 14-15).

CONCLUSION

For these reasons, Amicus Curiae respectfully request this Court peremptorily reverse the court of appeals' majority opinion and adopt Judge Talbot's dissent, or alternatively, grant leave to appeal.

Respectfully submitted,

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Dated: April 20, 2011

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THOMAS LA MEAU, as personal representative, of the ESTATE OF JOHN M. CRNKOVICH, Deceased,

Plaintiff-Appellee,

v

CITY OF ROYAL OAK, a municipal corporation,

Defendant-Appellant,

and

DETROIT EDISON COMPANY, GAGLIO CORPORATION, a Michigan Corporation, ELDEN DANIELSON and BRYAN WARJU,

Defendants. /

Supreme Court No. 141559-60

Court of Appeals' No. 290059

Lower Court No. 07-083761-NO

PROOF OF SERVICE

MARJORIE E. RENAUD, states that on April 20, 2011, a copy of Amicus Brief of Michigan Municipal League, Michigan Municipal League & Property Pool, Public Corporation Law Section of the State Bar (PCLA), and the Michigan Townships Association (MTA) and Proof of Service, was served on:

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