STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Servitto, PJ, and Fitzgerald and Talbot, JJ)

DEBRA L. HAGERTY, Personal Representative of THE ESTATE OF DEBRA LOUISE HAGERTY-KRAEMER,

Plaintiff/Appellee,

vs.

BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF MANISTEE,

Defendant/Appellant,

Supreme Court Docket No. 146047, 146048
Court of Appeals Docket No. 304369, 304439
Manistee County Circuit Court
Case No. 10-14081-NI

AMICUS CURIAE BRIEF BY MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL, MICHIGAN TOWNSHIPS ASSOCIATION, THE COUNTY OF MACOMB, DEPARTMENT OF ROADS, THE ROAD COMMISSION FOR OAKLAND COUNTY, AND WAYNE COUNTY IN SUPPORT OF DEFENDANT / APPELLANT MANISTEE COUNTY BOARD OF COUNTY ROAD COMMISSIONERS' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Amicus curiae agree with Defendant / Appellant Manistee County Board of County Road Commissioners' Statement of Jurisdiction. Defendant / Appellant is hereafter referred to as "the Board of Road Commissioners" or simply "the Board", as necessary. This Court has jurisdiction over this case pursuant to MICH CONST 1963 ART 6, § 4; MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2), (7); and MCR 7.302(C)(2)(b), (4)(a).

ADDITIONAL QUESTIONS PRESENTED

Amicus curiae agree with the statement of issues presented in the Board's Application for Leave to Appeal. *Amicus curiae* respectfully propose this appeal presents additional questions of law as follows:

I. WHETHER THE NARROW "HIGHWAY DEFECT" EXCEPTION TO GOVERNMENTAL IMMUNITY CAN BE IMPLICATED IN A CASE MERELY ALLEGING TRANSIENT, NON-PERMANENT AND OTHERWISE ORDINARY CONDITIONS OF AN UNPAVED ROADWAY IN MICHIGAN?

Plaintiff / Appellee Answers: Yes.

Defendant / Appellant Answers: No.

Court of Appeals Answers: Yes.

***Amicus Curiae* Answer: No.**

II. WHETHER THIS COURT'S ORDER IN *PALETTA V. OAKLAND COUNTY*, 491 MICH. 897 (2012), FULFILLS THE REQUIREMENTS NECESSARY TO DETERMINE PRECEDENTIAL AND THEREFORE BINDING EFFECT OF AN ORDER DISPOSING OF AN APPLICATION WITH NEARLY IDENTICAL FACTS AND A LEGAL RULING APPLIED TO THOSE FACTS WHICH WAS DISCERNIBLE AS A CONTROLLING RULE OF LAW APPLICABLE TO THE INSTANT CASE AND THEREFORE SUFFICIENT TO WARRANT REVERSAL OF THE TRIAL COURT'S DECISION?

Plaintiff / Appellee Answers: No.

Defendant / Appellant Answers: Yes.

Court of Appeals Answers: No.

***Amicus Curiae* Answer: Yes.**

STATEMENT OF INTEREST BY *AMICUS CURIAE*

Amicus curiae Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments, of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The MML operates the Legal Defense Fund through a board of directors. The purpose of the legal defense fund is to represent the interests of member local governments in litigation and appeals concerning issues of statewide significance for local governments.

Amicus curiae Michigan Municipal League Liability & Property Pool (MMLLPP) was established by 1982 P.A. 138[1] to develop and administer a group program of liability and property self-insurance for Michigan municipalities. The MMLLPP's principal objectives are to establish and administer municipal risk management service, reduce the incidents of property and casualty losses occurring in the operation of local government functions, and defend members against liability claims.

Amicus curiae Michigan Townships Association (MTA) is a Michigan non-profit corporation consisting of more than 1,230 townships within the State of Michigan (including both general law and charter townships). The MTA provides education, exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the state of Michigan.

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[1] MCL 124.5. The 1982 amendment added § 5 to this statute, authorizing the creation of MMLLPP as a separate legal entity.

Amicus curiae Wayne County maintains more than 1000 miles of county primary and secondary highway. It annually receives dozens of notices under § 4[2] of the Governmental Tort Liability Act (GTLA)[3] in which claims are asserted under § 2, the so-called "highway exception" to governmental immunity.[4] *Amicus curiae* the Road Commission for Oakland County is responsible for nearly 2700 miles of highway, over 670 miles of which is gravel or unpaved. *Amicus curiae*, Macomb County, through its Department of Roads, is responsible for approximately 1888 miles of highway, approximately 317 miles of which is gravel or unpaved. As with Wayne County, the counties of Macomb and Oakland receive many notices each year asserting claims under the highway exception.[5]

The opinion of the Court of Appeals in the case *sub judice* involves an issue of significant importance to *amicus curiae*. Given the nature of gravel (or unpaved) roadways, they can be and often are significantly and negatively affected by weather conditions (such as rain, dry spells,

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[2] MCL 691.1404.

[3] MCL 691.1401 *et seq.*

[4] MCL 691.1402.

[5] This case presents the issue concerning an alleged duty to maintain an "improved portion of a highway designed for vehicular travel" and therefore applies to all governmental entities represented by *amicus curiae*. MCL 691.1402. See also *Duffy v. Dep't of Natural* Resources, 490 Mich. 198, 207 (2011). It should be noted that MCL 224.21 addresses a county road commission's duty to keep in reasonable repair and maintain highways under its jurisdiction reasonably safe and convenient for public travel. However, the duty expressed in this statute has been held to be subject to and subsumed by the "highway exception" in MCL 691.1402, such that the principles of immunity inherent in the performance by all governmental entities of governmental functions applies equally to county road commissions as to other governmental entities exercising jurisdiction over highways. See *Potes v. Dep't of State Highways*, 128 Mich. App. 765, 769-770 (1983); *Moerman v. Kalamazoo County Road Comm'n*, 129 Mich. App. 584, 591-592 (1983), superseded by statute on other grounds as stated in *Ehlers v. Dep't of Transportation*, 175 Mich. App. 232 (1988) (citing *Mullins v. Wayne County*, 16 Mich. App. 365, 373, n. 3 (1969), lv. denied 382 Mich. 791 (1969) and stating MCL 691.1402 (the "highway exception" to governmental immunity "imposes an important limitation on the liability of the...county road commission[s]" as described in MCL 224.21).

wind, and rapid temperature changes); elements which have less or no effect on paved roads. Such conditions are beyond the control of the governmental entities with jurisdiction over these types of roads. Moreover, the conditions and elements on such roadways can change rapidly and differ significantly from one area of a county or locale to another. Governmental entities with jurisdiction over highways with gravel or other unpaved surface material cannot insure such roads will remain free of loose gravel, sand, dust, bumps or ruts, or other road surface conditions resulting from weather conditions and weather changes associated with Michigan's climate.[6] To hold these entities to an absolute legal standard, which essentially requires perfect road conditions at all times is unreasonable, unworkable, and, as demonstrated herein, inconsistent with Michigan jurisprudence on the subject.

Ultimately, "[t]he liability of the state and county road commissions is, of course, properly understood as the liability of state taxpayers, because the state and its various subdivisions have no revenue to pay civil judgments, except that revenue raised from the taxpayers."[7] 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.[8] The opinion below will burden the public fisc because it allows suit for every accident caused by transient, rapidly dissipating, unavoidable and, in some instances, including the present case, unverifiable conditions.

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[6] *Salvati v. State Hwys. Dep't.*, 415 Mich. 708, 716 (1982).

[7] *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143, 148, n. 1 (2000).

[8] *Mack v. City of Detroit*, 467 Mich. 186, 195 (2002).

Amicus curiae herein collectively represent the interests of many governmental entities. The outcome of this case will have an impact on their ability to maintain adequate and serviceable government operations for the support of their respective taxpayers. 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.[9] Therefore, *amicus curiae* urge this Court to carefully consider the disposition and outcome of the Board's Application for Leave to Appeal and peremptorily reverse the Court of Appeals decision or grant the application so the issues can be properly addressed.

I. INTRODUCTION

This case once again presents the Court with the question of the extent to which the "highway exception"[10] to governmental immunity should be construed to allow a claimant to access Michigan Court's via the Legislature's strictly confined waiver of immunity in the Governmental Tort Liailbity Act (the GTLA). The People of Michigan, through the Legislature, vest courts with subject-matter jurisdiction in only a small subset of cases against the government.[11] Otherwise, the common-law immunity that pre-existed the GTLA is retained by

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

[10] MCL 691.1402.

[11] "Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them". *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 (2002). See also *Sanilac County v. Auditor General*, 68 Mich. 659, 665 (1888). *Cf. Mack*, *supra* at 195 (stating "a governmental agency is immune *unless* the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government" and holding that a claimant must plead *and* prove at the outset that a case will fit within the exception to move beyond the summary disposition stage on a motion under MCR 2.116(C)(7)).

the state and its subordinate entities.[12] Unless a party complies with the strict, statutory requirements of the GTLA, which strictly limit when governmental entities may be hailed into Michigan courts, the preexisting immunity inherent in the operations of these entities is not waived – a condition precedent to allowing a court of law to exercise subject-matter jurisdiction over the suit *and* to adjudicate its merits.[13]

In the case *sub judice*, the Court of Appeals applied an overly broad interpretation of the highway exception, concluding that mere transient conditions that exist on any number of Michigan roadways at various times of the year can suffice to invoke the government's strictly confined waiver of immunity. Not only was this broad reading contrary to the principle that exceptions to governmental immunity are strictly construed and narrowly applied, but the panel also erred by essentially concluding, contrary to this Court's jurisprudence, that governmental entities must maintain nearly perfect roadbed conditions at all times to avoid what can be an omnipresent, albeit fleeting occurrence on a Michigan highway at any given time. In sum, the Court of Appeals opinion allows litigants to avoid governmental immunity by alleging facts that do not constitute defects within the meaning of the highway exception and this Court's jurisprudence interpreting same. *Amicus curiae* respectfully submit that the Court of Appeals

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[12] *Greenfield Constr. Co. v. Mich. Dep't of State Hwys.*, 402 Mich. 172, 193, 194 (1978), accord *Pohutski, supra* at 688. See also *Ross v. Consumers Power Co.*, 420 Mich. 567, 596-97 (1984) and *Ballard v. Ypsilanti Township*, 457 Mich. 564, 567-69 and 573-76 (1998) (explaining the history of common law immunity, the Legislature's statutorily created exceptions and the fact that immunity must be expressly waived by statute because Michigan adheres to the jurisdictional view of governmental immunity).

[13] "[S]tatutory relinquishment of common law sovereign immunity from suit must be strictly construed." *Greenfield, supra* at 197, citing *Manion v. State Hwy. Comm'r*, 303 Mich. 1 (1942), *cert den'd* at 317 U.S. 677 (1942). See also *Maskery v. Bd. of Regents of Univ. of Michigan*, 468 Mich. 609, 613-14 (2003) (stating "[a]bsent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function"). See MCL 691.1401(b) defining "governmental function".

decision must be reversed, or, in the alternative, that the Board's Application for Leave to Appeal be granted so the Court can address the issues raised by its errant opinion.

A. The Court of Appeals Opinion

A brief explanation of the Court of Appeals' opinion and its reasoning is warranted. First, the Court of Appeals held the highway exception to governmental immunity applies because Litzen Road, an unpaved road in Manistee County, was a "highway" within the meaning of MCL 691.1401(c). The Court reasoned it was not an "unimproved" roadway contrary to Plaintiff's expert and Defendant's argument.[14] The Court based this conclusion on Freedom of Information Act (FOIA) records obtained by Plaintiff from the County demonstrating the Board "regularly graded Litzen Road with a blade and applied clay and brine to its surface."[15]

Second, the Court ruled that Plaintiff's allegation that a cloud of dust allegedly kicked up by a motorist traveling in the opposite direction obscured decedent's vision and caused her to crash stated an actionable defect under the highway exception.[16] According to the panel, a "dust

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[14] *Hagerty ex rel. Hagerty-Kraemer v. Board of Manistee County Road Commissioners*, Unpublished Opinion of the Michigan Court of Appeals, issued September 11, 2012 (Docket Nos. 304369; 304439).

[15] Slip Op. at p. 4. The term "highway" as used in the highway exception encompasses "every public highway, road, and street which is open for public travel...." See also *Duffy v Dep't of Natural Resources*, 490 Mich. 198, 223-225 (2011). Without conceding the point, *amicus curiae* acknowledge the Board has raised the issue of the propriety of the trial court's conclusion, in light of Plaintiff's expert's determination that Litzen Road was not an "improved" roadway, whether it was a covered "highway" within the meaning of the highway exception. *Amicus curiae* assume the conclusion, and therefore focus here only on the impact of the underlying Court of Appeals decision as applied to Michigan "highways" within the meaning of MCL 691.1401(c).

[16] As noted on page 1 of the Board's Application for Leave to Appeal, there were no surviving witnesses to the crash. Plaintiff merely alleged that an oncoming motorist kicked up the cloud of dust, which is said to have then been the catalyst for a chain of subsequent encounters with additional alleged defects, i.e., ruts in the roadbed, a soft sand shoulder, causing decedent's ultimately fatal crash.

cloud" that originates from the surface of the roadbed constitutes a sufficient defect to invoke the exception in MCL 691.1402(1). With respect to this ruling, the Court reasoned that "roadbed" was defined as material of which a road is composed.[17] According to the panel, the dust cloud occurred because the surface of the road is composed of "*in situ*" soil which is gravelly sand containing a significant quantity of dust sized particles and nothing to bind the particles together.[18]

Thus, the Court of Appeals reasoned, while it was on the surface of the road, the gravelly sand was part of the roadbed. "[T]he 'movement' of the roadbed surface to the area just above the roadbed surface" did not transform the material from part of the roadbed surface into a substance existing outside the roadbed surface.[19] The Court of Appeals concluded the instant case was analogous to the outcome in *Moser v. Detroit*.[20] In *Moser*, plaintiff was injured when concrete from an overpass "fascia" fell on his windshield as he passed beneath. The Court of Appeals held "[p]ieces of the bridge structure (which were part of the improved portion of the highway designed for vehicular travel) falling onto the highway below, created an unsafe condition on the traveled portion of the roadbed actually designed for vehicular travel."[21]

In this case, the Court of Appeals reasoned that "if part of the roadbed structure travels and leaves the roadbed [like the piece of concrete overpass fascia held in be an "improved portion of the roadway" in *Moser*], it does not transform into something other than the roadbed

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[17] *Id.* at p. 5, citing Random House Webster's College Dictionary (2001).

[18] *Id.*

[19] *Id.*

[20] *Moser v. Detroit*, 284 Mich. App. 536, 537 (2009).

[21] Slip Op. at p. 5, quoting *Moser*, *supra* at 542.

surface." The panel concluded: "Accordingly, the dust cloud, which originated from the roadbed surface, was arguably a defect in the physical surface of the roadbed, [which] does not negate the applicability of the highway exception."[22]

The panel rejected the argument that the dust cloud was a temporary occurrence equivalent to mud, water, algae, or other natural substances that accumulate above or on the roadbed surface.[23] The panel construed this argument as the assertion by the Board of the "natural accumulation" doctrine, citing *Haliw v. City of Sterling Heights*.[24] The Court reasoned "the natural accumulation doctrine provides that 'a governmental agency's failure to remove the natural accumulation[] of ice and snow on a public highway does not signal negligence....'"[25] The panel distinguished the natural accumulation doctrine stating that it "only applies if there is a persistent defect in the highway that renders it unsafe for public travel at all times that, in combination with the accumulation of a natural substance, caused the accident."[26] From this articulation of the natural accumulation doctrine, the Court reasoned that "[h]ere, the defect in the roadbed surface was the *in situ* soil that easily disbursed in a dust cloud."[27]

The Court concluded that "[t]o the extent that the Board argues the dust cloud is the natural accumulation that is suspended temporarily above the roadbed surface, the Board's argument is without merit" because, the Court reasoned, "the dust is part of the roadbed surface,

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[22] *Id.*

[23] *Id.*

[24] 464 Mich. 297 (2001).

[25] Slip Op. at 5, citing *Haliw*, *supra* at 305.

[26] *Id.*

[27] *Id.* at p. 6.

there is no additional accumulation of a natural substance on top of the road." *Id.* In this regard, the Court stated:

> [P]art of the roadbed surface was kicked into the air by traffic. The dust was still part of the roadbed surface when it was temporarily suspended above the road, and it was still part of the roadbed surface when it settled back to the ground. Further, to the extent that the Board argues that the four foot edge of soft sand is a natural accumulation, the same problems exist. The soft sand allegedly occurs because traffic erodes the roadbed surface. Thus, it is part of the roadbed surface, not the accumulation of a foreign natural substance like ice or snow.[28]

In a footnote to this passage, the Court "notes [this Court's] order in *Paletta v. Oakland County Road Commission*,"[29] which the Board had provided the Court as supplemental authority, "lacks the requisite factual statement to be binding precedent on the instant case."[30] The Court then adds "this case is distinguishable from *Paletta*, as there was no accumulation of any substance on the roadbed." *Id.*

B. Grounds for Appeal

The Board filed an Application for Leave to Appeal in this Court pursuant to MCR 7.302(B), which provides grounds justifying this Court's acceptance of an application. Many of the reasons stated in this court rule are present in the instance case. The expansive reading by the Court of Appeals of the "highway exception", which this Court has mandated be narrowly construed in accordance with the broadly applied and preexisting immunity to which the government is entitled, threatens the very purpose of the GTLA.

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[28] *Id.*

[29] 491 Mich. 897 (2012).

[30] *Id.*, at n. 31, citing *Dykes v. William Beaumont Hospital*, 246 Mich. App. 471, 483-484 (2001).

In virtually any case in which there is no witness, as here, a plaintiff can allege a set of factual circumstances sufficient to avoid summary disposition under MCR 2.116(C)(7) merely by pleading a transient, non-provable condition upon a public highway existed at the time of the accident, but not at any time before or after. Indeed, the "dust cloud" theory advanced by Plaintiff and accepted by the Court of Appeals is the epitome of a fleeting, non-permanent and varying *condition* (rather than a true defect) that might exist on a roadway (paved or unpaved) at any given time. If this is a proper interpretation of *the exception* to the government's broad immunity under MCL 691.1402, then hardly a case will exist in which the exception cannot be invoked to proceed with a full trial on the merits. Thus, the *exception* will become the rule, and the Legislature's broad and uniform grant of immunity will cease to exist in these cases. Therefore, the validity of MCL 691.1402 is threatened by the Court of Appeals' ruling. MCR 7.302(B)(1).

As noted previously, this Court in *Nawrocki*[31] and, more recently, in *Costa*,[32] stressed that the financial burden of a full trial on the merits in a suit against the government always provides sufficient cause to narrowly construe the statutory exceptions to immunity. Indeed, in these cases it is the state that bears the ultimate burden because the state's taxpayers provide the revenue to defend civil lawsuits and pay judgments rendered therefrom.[33] Thus, the Board's Application for Leave to Appeal fulfills the requirements of MCR 7.302(B)(2) and (B)(3) in that the public's interest is directly implicated and the matter is of major significance to the state's jurisprudence, respectively.

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[31] 463 Mich. 143 (2000).

[32] 475 Mich. 403 (2006).

[33] *Nawrocki*, supra at 148, n. 1.

Finally, the Court of Appeals' ruling nullifies any meaningful right of the Board's interlocutory appeal under MCR 7.202(6)(a)(v). If a plaintiff only has to plead that some non-permanent, fleeting condition falls within the highway exception, then a full trial on the merits will always occur. against the Board. The litigation of this suit absent this Court's clarification of the issues it presents will result in substantial harm to the Board, and governmental entities in future cases. MCR 7.302(B)(4) and (5).[34] This is because the ruling allows a question of fact to arise after every accident occurring on unpaved (and, indeed, paved) roadways where there is no witness (or perhaps only the injured claimant), based simply on allegations that a transient condition (or a combination of conditions, e.g., a dust cloud, loose dirt or gravel, sand, and bumpy or unsmooth road surfaces) existed at the precise moment of, and was therefore the cause of, the accident.

Amicus curiae urge the Court to grant the Board's application or peremptorily reverse the Court of Appeals. In addition to the grounds justifying this Court's review, the decision below is based on suspect reasoning in light of this Court's body of jurisprudence interpreting and applying the plain language of the highway exception. As this Court has consistently held, only permanent defects integrated in and constantly present, i.e., *at all times*, and which are the proximate cause of the injury complained of, are actionable under the highway exception.[35]

If a duty is imposed in this case, then it may be contended there is a duty to maintain constant patrols searching for dusty, dry and uneven road-surface conditions. Indeed, every pock mark, pot hole, and indentation in the traveled portions of paved and unpaved highways would

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[34] *Costa, supra* at 410(the purpose of immunity is to avoid the expense of having to contest claims against the government); *Mack, supra* at 203, n. 18.

[35] *Haliw, supra* at 307-08 and 312 (expressing that a *defect* in a highway, to be actionable, must be persistent and be present "at any time" and "at all times", respectively).

subject the governmental entity with jurisdiction over it to suit and potential liability. Apparently, the duty would extend 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.[36] 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 frozen and freezing roads in the winter – another naturally occurring and expected condition and an expected hazard of driving in Michigan. Dusty 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 dusty and dry roadbeds 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.

Every dislodged stone, every new pothole, every branch or piece of 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 and they are already aspirated of funds. As this Court noted long ago:

> If a liability exists, it is because of *a defect in the highway*; and, if ice frozen upon a sidewalk is a defect when it is caused by water flowing from a roof, why should it not be when it flows from a

[36] See MCL 691.1403.

> vacant lot, or when it falls upon the walk, or is caused by the melting of snow upon or adjoining such walk? If from a failure to keep its highways in a reasonably safe condition for travel extends to cases where such condition is not ascribable to defects in the construction and maintenance of the way, or to the action of the officers of the city or their negligence in the performance of a duty, it may be contended that cities must cause the streets to be patrolled, in search of bricks or coals that fall from wagons, for the treacherous banana peel, upon which the unwary are sure to slip, and for tacks or bits of glass or other rubbish, which puncture the tires of bicycles…such are not *defects in the highway.*[37]

To impose a duty to prevent the conditions described in Plaintiff's complaint would be tantamount to requiring virtually perfect roadbed surfaces at all times, a proposition soundly rejected by this Court's jurisprudence.[38]

There is considerable and legitimate concern among the *amicus curiae* parties who are represented in this brief that the Court of Appeals' ruling will be detrimental to the public *fisc*. Virtually every unpaved roadway, like Manistee County's Litzen Road in this case, falls within the definition of "highway" in the statutory exception.[39] 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 complaint. Yet, these relatively ordinary conditions have now been held to be actionable by the Court of Appeals under the highway exception.

Even though this particular case arose out of alleged conditions on an unpaved road, there is no reason that similar allegations could not survive even if the road was paved. Dust, loose

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[37] See *Mayo v. Village of Baraga*, 178 Mich. 171, 173-174 (1913) (emphasis added).

[38] See, e.g. *Wilson v. Alpena County Rd. Comm'n*, 474 Mich. 161, 167-169 (2006).

[39] MCL 691.1401(c). See also footnote 15, *supra*.

gravel and/or sand, and "bumpy" conditions exist on many paved and unpaved roads at any given time. In the three counties participating as *amicus curiae* in this brief, there are over 5,500 miles of roadways which constitute "highways" within the meaning of the statutory exception. Untold additional miles of roadways exist in the other governmental entities represented herein. Needless to say, the Court of Appeals decision, if left to stand, will have substantial economic consequences.

Such consequences will be realized in the cost of liability imposed for a failure to maintain these roadways, or in expenditures made for the latter to avoid the former. This forced mandate is directly contrary to this Court's jurisprudence establishing that governmental entities have duty only to keep highways in *reasonable* repair.[40] Ultimately, the sweeping ruling of the Court of Appeals is contrary to the basic notion that exceptions to governmental immunity are to be narrowly construed and the immunity extended to all governmental entities is to be broadly conferred.[41]

Second, the Court of Appeals appears to have skirted the application of this Court's binding order in *Paletta v. Oakland County Road Commission*,[42] which, by all accounts does appear to contain a discernible ruling with respect to similar, if not legally identical facts. It is therefore binding precedent that the Court of Appeals should have followed.[43]

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[40] *Wilson v. Alpena County Rd. Comm'n.* 474 Mich. 161, 168 (2006).

[41] *Nawrocki*, *supra* at 159.

[42] 491 Mich. 897 (2012).

[43] MICH CONST 1963, ART 6, § 6. See also *DeFrain v. State Farm Mut. Auto Ins. Co.*, 491 Mich. 359 (2012).

II. ARGUMENT AND ANALYSIS

ARGUMENT I

TRANSIENT, NON-PERMANENT CONDITIONS THAT ARISE ON MICHIGAN ROADWAYS ARE INSUFFICIENT AS A MATTER OF LAW TO STATE A CLAIM IN AVOIDANCE OF GOVERNMENTAL IMMUNITY UNDER THE HIGHWAY EXCEPTION AND THEREFORE PLAINTIFF'S ALLEGATIONS THAT A "DUST CLOUD" AROSE SUDDENLY ON AN UNPAVED ROAD AND CAUSED DECEDENT'S ACCIDENT IS NOT ACTIONABLE REQUIRING REVERSAL OF THE COURT OF APPEALS' DECISION

A. Standard of Review

The Court of Appeals based its decision on the trial court's ruling on a motion brought by the Board pursuant to MCR 2.116(C)(7). Rulings on such motions are reviewed *de novo* by this Court.[44] MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties.[45] The Court of Appeals interpreted MCL 691.1402 of the GTLA. Review of its interpretation is also *de novo*.[46]

B. Applicable Law

Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, which limits imposition of tort liability upon a governmental agency.[47] Under the GTLA, governmental agencies are immune from tort liability when engaged in a

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[44] *Maiden v. Rozwood*, 461 Mich. 109, 118 (1999).

[45] *Haliw v. Sterling Heights*, 464 Mich. 297, 301-302 (2001), quoting *Glancy v. Roseville*, 457 Mich. 580, 583 (1998).

[46] *Maiden, supra* at 119. See also *Mitan v. Campbell*, 474 Mich. 21, 23 (2005).

[47] *Ross v. Consumers Power Co.*, 420 Mich. 567, 621 (1984).

governmental function.[48] Immunity from tort liability is expressed in the broadest possible language – immunity is extended to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function.[49]

1. Michigan Adheres to the Jurisdictional Notion of Governmental Immunity

Michigan courts originally recognized that the state cannot be sued unless it consents to the jurisdiction of the courts. An act of the Legislature conferring such jurisdiction is the usual means by which the state agrees to submit itself to the judgment of the judicial branch.[50] Immunity from suit is an inherent characteristic of government.[51] The GTLA preserved the doctrine as it existed at common law.[52] A necessary predicate of this retained immunity is the lack of a court's jurisdiction over claims not perfected in strict compliance with the Legislature's *express*, but *limited*, waiver thereof.[53]

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[48] MCL 691.1407(1); *Duffy*, *supra*.

[49] *Ross*, *supra* at 618.

[50] *Dermont v. Mayor of Detroit*, 4 Mich. 435, 441 (1857), *accord City of Detroit v. Blackeby*, 21 Mich. 84, 113, 117 (1870) (CAMPBELL, J.) (stating "there is no common law liability against towns and counties and they cannot be sued except by statute"), overruled in part by *Williams v. City of Detroit*, 364 Mich. 231 (1961), which was later limited by this Court in *McDowell v. State Hwy. Comm'r*, 365 Mich. 268 (1961), and then completely disavowed by the Legislature's enactment of the GTLA, which restored sovereign immunity uniformly to all governmental entities. See also the discussion in *Odom v. Wayne County*, 482 Mich. 459, 467-468 (2008).

[51] *Mack v City of Detroit*, 467 Mich 186, 203 (2002). See also *Ballard v. Ypsilanti Township.*, 457 Mich. 564, 567 (1998).

[52] *Id.* at 202, accord *Pohutski*, *supra* at 705 (by enacting the GTLA the Legislature retained the sovereign immunity that existed at common law in Michigan and extended that immunity to all other governmental entities encompassed within the act, including transportation authorities).

[53] *Greenfield Constr. Co. v. Mich. Dep't of State Hwys.*, 402 Mich. 172, 193, 194 (1978), accord *Michigan State Bank v. Hastings*, 1 Doug 225, 236 (1844).

Therefore, the immunity retained by the GTLA is jurisdictional.[54] "[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".[55] Moreover, the Legislature, not the judiciary, is the body that expresses the will of the sovereign, i.e., the People, and must therefore be the means by which subject-matter jurisdiction is conferred.[56] The highway exception to governmental immunity, like the few exceptions that exist, is to be strictly construed and narrowly applied because it vests the courts with the People's jealously guarded waiver of immunity and acquiescence to suit.[57]

2. *General Principles of Statutory Interpretation*

When this Court reviews interpretation of legislative provisions, its primary goal is to consider whether the reviewing court properly discerned the Legislature's intent as expressed in the statute's language.[58] In doing so, it is the Court's "duty to accept [a] statute as expressing the will of our people and to give it complete effect."[59] "[T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives."[60] "The Legislature is

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[54] *Ballard*, *supra* at 568, citing *Ross*, *supra* at 598.

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

[56] *Hastings*, *supra*; *Greenfield Constr. Co.*, *supra*; *Pohutski*, *supra*; *Odom*, *supra* at 477.

[57] *Nawrocki*, *supra* at 158. *Atkins v. SMART*, 492 Mich. 707, 714-715 and n. 11 (2012), quoting *Moulter v. Grand Rapids*, 155 Mich. 165, 168-169 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred any limitations it chose").

[58] *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 76 (2006), citing *DiBenedetto v. West Shore Hosp.*, 461 Mich. 394, 402 (2000).

[59] *Knight Morley v. Mich. Employment Security Comm'n*, 350 Mich. 397, 417 (1957).

[60] *Rowland v. Washtenaw County Road Comm'n*, 477 Mich. 197, 214, n. 10 (2007).

presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written."[61]

The meaning of the Legislature "is to be found in the *terms and arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense."[62] Statutory language should thus be given a reasonable construction "considering the provision's purpose and the object sought to be accomplished."[63]

Additionally, when parsing a statute, it is to be presumed "every word is used for a purpose" and effect will be given "to every clause and sentence."[64] Therefore, courts are to avoid an interpretation that makes any part of a statute surplusage or nugatory.[65] Further, a court "may not assume that the Legislature inadvertently made use of one word or phrase instead of another."[66] Arbitrary substitution of words and phrases in a statute to fit a different meaning or to attribute a greater or lesser significance to the provision is prohibited.[67]

It follows that a court may not impose its own policy choices when interpreting a statute.[68] "[C]ourts may not rewrite the plain statutory language and substitute [its] own policy

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[61] MCL 8.3a; *Robertson v. Daimler Chrysler Corp.*, 465 Mich. 732, 748 (2002).

[62] *Gross v. General Motors Corp*, 448 Mich. 147, 160 (1995) (emphasis added).

[63] *Michigan Humane Society v. Natural Resource Comm'n*, 158 Mich. App. 393, 401 (1987).

[64] *Pohutski, supra* at 683.

[65] *Id.* at 684.

[66] *Robinson v. City of Detroit*, 462 Mich. 439, 459 (2000).

[67] *Pohutski, supra* at 687-688, 688.

[68] *People v. McIntire*, 461 Mich. 147, 152 (1999).

decisions for those already made by the Legislature."[69] In short, a court has no authority to add words, conditions or restrictions to a statute.[70]

3. Statutory Interpretation and the GTLA

The Court of Appeals interpreted § 2 of the Governmental Tort Liability Act (GTLA), MCL 691.1402, also known as the "highway exception" to governmental immunity. With respect to the GTLA, [this Court's] duty is to interpret the statutory language in the manner intended by the Legislature which enacted [the GTLA]."[71] Thus, in construing the GTLA, "courts may not speculate about an unstated purpose," *e.g.*, the creation of a common-law exception or an overly broad application of a statutory exception, "where the unambiguous text plainly reflects the intent of the Legislature."[72]

Specific provisions in the GTLA prevail over general statements in other parts of the statute.[73] The GTLA provisions granting immunity are broadly construed and the exceptions thereto are narrowly drawn.[74] As a result, "[t]here must be strict compliance with the *conditions*

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[69] *Rowland, supra*, citing *Mayor of Lansing v. Michigan Public Service Comm'n*, 470 Mich. 154, 167 (2004).

[70] *Id.*

[71] *Reardon v. Dep't of Mental Health*, 430 Mich. 398, 408 (1988), citing *Hyde v. Univ. of Mich. Bd. of Regents*, 426 Mich. 223, 244 (1986).

[72] *Gladych v. New Family Homes, Inc.*, 468 Mich. 594, 597 (2002), citing *Pohutski, supra* at 683.

[73] *Jones v. Enertel Inc*, 467 Mich. 266, 270 (2002).

[74] *Nawrocki, supra* at 158.

and *restrictions* of the [GTLA]."[75] In 1986, "the Legislature put its imprimatur on this Court's giving the exceptions to governmental immunity a narrow reading."[76]

a. The Necessity of Deciding Immunity At the Earliest Stage of Litigation

"[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.'"[77] Thus, merely allowing governmental entities to assert immunity "while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare [a] defense, would render illusory the immunity afforded by the [GTLA]."[78] Therefore, it is essential that motions for summary disposition based on the government's claim of immunity from suit be carefully considered.

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[75] *Nawrocki, supra* at 158-59 (emphasis added). See also *Scheurman v. Dep't of Transportation*, 434 Mich. 619, 629-630 (1990).

[76] *Id.* at n. 16. The principle of statutory construction that requires strict or narrow interpretation of certain statutes has a distinguished pedigree as applied to exceptions to governmental immunity. 3 Sands, Sutherland Statutory Construction (4th ed.), § 62.01, p. 113 (stating that "the rule has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit" and "the standard of liability is strictly construed even under statutes which expressly impose liability"). The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign. *Manion v. State Hwy. Comm'r*, 303 Mich. 1 (1942), *cert den'd Manion v. State of Michigan*, 317 U.S. 677 (1942). See also *United States v. Sherwood*, 312 U.S. 584, 590 (1941) (the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted); *Shillinger v. United States*, 155 U.S. 163, 166, 167-68 (1894) ("the congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted"; "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government"; this is "a policy imposed by necessity").

[77] *Costa*, 475 Mich. at 410.

[78] *Id.*

b. The Burden is on the Plaintiff to Demonstrate (Plead and Prove) An Exception to Immunity

It follows from the GTLA's protective structure that a plaintiff must "allege facts justifying the application of an exception to governmental immunity".[79] Further, if a plaintiff alleges that governmental immunity *does not apply*, the burden is on the plaintiff to proffer material facts to the contrary.[80] Indeed, the burden is on plaintiff at the outset to both *plead* and *prove* facts in avoidance of immunity.[81]

c. The Jurisprudential Theme in Addressing Governmental Immunity Cases

Finally, and perhaps most important, this Court has developed a theme in addressing the overarching public policy concerns and importance of governmental immunity. As such, this Court strives for the following: (1) to faithfully interpret and define the GTLA "to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability"; (2) to "formulate an approach which is faithful to the statutory language and legislative intent"; and (3) develop a consensus of "what the Legislature intended the law to be" in the realm of governmental immunity.[82] Applying these principles of interpretation and application of the GTLA, this Court has developed a well-established jurisprudence concerning interpretation and application of MCL 691.1402, the "highway exception" to the government's broadly retained immunity from suit.

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[79] *Fane v. Detroit Library Comm'n*, 465 Mich. 68, 74 (2001); *Mack, supra* at 203, 204.

[80] *Mack, supra* at 204, 205.

[81] *Id.* at 199.

[82] *Nawrocki, supra* at 148-49.

4. The Highway Exception to Governmental Immunity

The construction and maintenance of highways is the discharge of a governmental function for which the governmental entity with jurisdiction over a particular highway is generally immune from suit.[83] Interpreting and applying the highway exception requires a court to parse each sentence of the statute to ascertain the scope of the exception, as determined by the stated policy considerations of the Legislature.[84]

MCL 691.1402 provides, in pertinent part:

> 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. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in ...MCL 224.21.[85] [T]he duty of a governmental agency to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel....[86]

The GTLA additionally defines the term "highway" as follows:

> "Highway" means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway,

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[83] *Braun v. Wayne County*, 303 Mich. 454 (1942) (addressing C.L. 1929, § 3996, a predecessor to MCL 691.1402 of the GTLA). See also *Thomas v. Dep't of State Highways*, 398 Mich. 1 (1976).

[84] *Nawrocki*, *supra* at 159-160.

[85] See footnote 5, *supra*.

[86] MCL 691.1402(1) (emphasis added).

> crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.[87]

MCL 691.1401(c) and MCL 691.1402 are to be read together as a single, comprehensive law.[88] When construing the terms of these provisions together, as required, the Court must give effect to *all* terms and phrases used in the exception.[89] In determining whether a particular governmental defendant has a duty to maintain a highway in a particular case, this Court has stated it is "cognizant of the challenges presented by the drafting of the highway exception and mindful that [it is] 'constrained to apply the statutory language as best as possible as written....'"[90]

Three directly pertinent principles have emerged from this Court's jurisprudence interpreting the exception. First, the responsible governmental agency has only a duty of maintaining highways in *reasonable* repair and in a *reasonably safe* condition. Second, from this first principle, the responsible governmental agency does not have to maintain perfect roadway conditions to fulfill its duties. Third, the actionable defect must be a persistent defect existing within and be integral to the actual roadbed at all times. From these principles, a workable interpretation of sentence 1 and sentence 2 of MCL 691.1402(1) has emerged.

MCL 691.1402(1) requires the responsible governmental agency to repair and maintain the improved portion of the highways designed for vehicular travel that are within their

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[87] MCL 691.1401(c). See also footnote 15, *supra*.

[88] *Robinson v. City of Lansing*, 486 Mich. 1, 8, n. 4 (2010).

[89] *Id.* at 213 and n. 5, citing *People v. Jackson*, 487 Mich. 783, 791 (2010); *Sun Valley Foods Co. v. Ward*, 460 Mich. 230, 237 (1999).

[90] *Duffy*, 490 Mich. at 206, quoting *Nawrocki*, *supra* at 171.

jurisdiction.[91] This duty is measured by a standard of reasonableness applied to the governmental entity and the duty arises only when it can be shown that there were permanent and persistent defects within the portion of the roadway designed for vehicular travel.[92] As confirmed by this Court in *Nawrocki*, only injury occasioned by a defect that is the result of the responsible governmental entity's failure to keep a highway in reasonable repair and in a condition reasonably safe for public travel is actionable.[93] The case *sub judice* presents the Court with the opportunity to apply this rule of law.

a. The Duty of Reasonable Repair and Maintenance

The first sentence of the exception describes the basic duty imposed on all governmental agencies having jurisdiction over any highway: "[to] maintain the highway in *reasonable* repair so that it is *reasonably* safe and convenient for public travel."[94] As stated, this sentence establishes a duty to keep the highway only in *reasonable* repair. *Id.* As explained by the Court, the phrase "so that it is reasonably safe and convenient for public travel" "refers to the duty to maintain and repair". *Id.* Importantly, the Court noted this provision's plain language expresses only "the desired outcome of reasonably repairing and maintaining the highway; *it does not establish a second duty to keep the highway 'reasonably safe'*".[95]

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[91] See *Evens v. Shiawassee County Road Commission*, 463 Mich. 143, 183-184 (2000) (*Evens* was a case that was consolidated with and addressed in *Nawrocki*).

[92] *Id.*

[93] *Id.* at 160, citing *Pick v. Szymzak*, 451 Mich. 607, 635-637 (1996) (Riley, J., dissenting).

[94] *Id.* at 160; MCL 691.1402(1) (emphasis added).

[95] *Id.* (emphasis added), citing *Pick*, *supra*.

b. The Duty to Keep Highways in Reasonable Repair Does Not Require Perfection in Roadbed Conditions

In *Wilson v. Alpena County Rd. Comm'n*,[96] the Court elaborated on what *Nawrocki* meant for the government's duty to maintain highways in reasonable repair and to keep them reasonably safe and convenient for public travel. The Court noted that pursuant to MCL 691.1403 "in order for immunity to be *waived*, the agency must have had actual or constructive notice of 'the defect' *before the accident occurred.*"[97] In determining what constitutes such a "defect" in the roadway, the Court concluded that this inquiry is dictated by the "reasonably safe and convenient for public travel" language of MCL 691.1402(1).[98]

In this regard, the Court stated that "[a]n *imperfection* in the roadway will only rise to the level of a compensable 'defect' when that imperfection is one which renders the highway not 'reasonably safe and convenient for public travel,' *and* the government agency is on notice of that fact."[99] Thus, MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair'...."[100] The Court explained "[t]he governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an

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[96] 474 Mich. 161, 167-69 (2006). The Court in *Wilson* addressed the issue of "what notice of a defect in a road the governmental agency responsible for road maintenance and repair must have before it can be held liable for damage or injury incurred because of the defect." *Id.* at 162-163.

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

[98] *Id.*

[99] *Id.* at 168 (emphasis added).

[100] *Id.*

unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair."[101]

Thus, conditions may exist on a highway which, while unsafe and hazardous, do not rise to the level of the type of defect that a governmental agency is expected to address. As stated by Justice Coleman, speaking to the concept of holding the government only to the duty to keep highways reasonably safe for public travel, stated: "We will not require of [the government] more than what is reasonable under the circumstances; nor will we make [it] an insurer of the travelers of the roadway."[102]

c. The Defect Must be Integrated and Inherent in the Actual Roadbed, Be Persistent and Exist At All Times

When analyzing liability under the highway exception the question is whether the actual, physical condition of the highway is "otherwise reasonably safe and convenient" for public travel.[103] *Nawrocki* cautioned that an impermissibly "broad, rather than a narrow, reading of the highway exception is required in order to conclude that it is applicable to anything *but the highway* itself" and that such interpretations that did not "'limit[] governmental responsibility for public roadways to factors that are physically part of the roadbed itself'" would be a "complete abrogation of this Court's duty to *narrowly* construe exceptions to the broad grant of immunity."[104] The Court continued:

> Unless we construe the highway exception narrowly, as mandated by *Ross,* and in accordance with the language of the statutory

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[101] *Id.* (emphasis in original).

[102] *Salvati v. State Hwys. Dep't.*, 415 Mich. 708, 716 (1982).

[103] *Haliw*, *supra* at 307, citing *Newton v. Worcester*, 174 Mass. 181, 187 (1899).

[104] *Id.* at 174-175 (emphasis in original) (internal quotation marks omitted), citing *Horace v. Pontiac*, 456 Mich. 744, 749-750 (1998).

> clause, every accident and every injury, occurring on an otherwise unexceptional highway, containing no dangerous or defective conditions in the actual roadbed itself, will become the potential basis for a lawsuit against the state or county road commissions. This is an extraordinary proposition not contemplated, in our judgment, by the Legislature's narrowly drawn highway exception. There is potentially no end to the creative and innovative theories that can be raised in support of the proposition that a highway accident, occurring upon even the most *unremarkable thoroughfare* was, in fact, the result of [***add descriptive as needed***]. Courts possess no greater insight than the state or county road commissions into matters involving [roadbed conditions]. Maintenance of an appropriate deference for, and application of, the public policy choices made by the Legislature, as reflected in the plain language of the statutory highway exception, ensures that determinations regarding how to best allocate limited public highway funds are left to the proper authorities....[105]

Dust, dirt, gravel and other naturally occurring substances, like ice and snow, for example, which have no relation to the actual physical condition of a roadway "*otherwise reasonably safe* and *convenient*" for public travel cannot serve as the basis for a cause of action under the highway exception to governmental immunity.[106]

This Court in *Estate of Buckner v. City of Lansing*,[107] clarified the meaning of the statutory highway exception in regards to the inherent and persistent nature of the defect required to be present. While *Haliw* addressed the necessity that an inherent, preexisting defect exist in combination with a natural accumulation, *Buckner* addressed the contention that accumulations (whether natural or otherwise) on an otherwise non-defective highway constituted a defect within

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[105] *Id.* at 177-179.

[106] *Id.*

[107] 480 Mich. 1243, 1244 (2008). See also Judge Talbot's dissent in *Lameau v. City of Royal Oak*, 289 Mich. App. 153, 184-194 (2010), reversed at 490 Mich. 949 (2011) (peremptory order reversing the Court of Appeals and adopting the dissent of Judge Talbot as the opinion).

the meaning of the exception.[108] The Court held the accumulation of ice or snow alone, whether such accumulation was through natural causes or otherwise, did not constitute a "defect" that gave rise to a duty on the part of the defendant to repair or maintain the *highway* at issue.[109] "[T]he focus of the highway exception is the *actual physical roadbed.*"[110]

Accordingly, a plaintiff must, in keeping with the obligation to plead in avoidance of immunity, demonstrate the highway contained "an existing defect... rendering it not reasonably safe for public travel" *at all times.*[111] Transient and randomly occurring conditions are insufficient to constitute an actionable defect because some degree of permanency is necessary to serve the purpose underlying the exception.

Although not addressed in the Court of Appeals opinion, it bears noting that before liability can attach, notice to the governmental agency is required to be given of the precise defect encountered in the underlying action.[112] This principle strengthens the requirement that an actionable defect be persistent and a permanent aspect of the highway. The governmental agency must have actual or constructive knowledge of "the *existence* of *the defect* and...a reasonable time to repair *the* defect before the injury took place."[113]

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[108] *Id.*

[109] *Id.*

[110] *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 92 (2006), citing *Nawrocki*, *supra.*

[111] *Haliw*, *supra* at 308, accord *Plunkett v. Dep't of Transp.*, 286 Mich. App. 168, 186-187 (2009) (Zahra, J. on the panel in the *per curiam* decision), lv. denied at 488 Mich. 1055-1057 (affirming the Court of Appeals decision and with a statement by MARKMAN, J., joined by YOUNG, J., reaffirming the principle that a persistent, permanent defect in the actual roadbed must exist and be *the* proximate cause of the accident in order to invoke the highway exception).

[112] MCL 691.1403

[113] *Id.* (emphasis added). See also *Plunkett*, *supra* at 188; *Wilson*, *supra* at 163.

A plain reading of this provision, strictly construed and narrowly applied as required,[114] indicates that a transitory condition (even in combination with an arguably persistent condition) could never satisfy the permanency required because the government agency must be put on notice of *the defect* and if *the defect* is a mere cloud of dust, it is not something of which anyone could be placed on reasonable notice. Courts are cautioned not to replace specific articles like "the" with general articles like "a" or "any" in construing statutes.[115] Moreover, the case law interpreting MCL 691.1403, or its predecessors, indicate that a degree of permanency far in excess of that which is alleged to have been present here is required.[116]

Thus, *Haliw* demonstrates that the alleged defect must be persistent and must exist in the highway at all times.[117] *Buckner* shored up the rationale of *Haliw* by establishing that accumulations of substances simply on an otherwise ordinary roadbed surface were not

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[114] *Nawrocki, supra.*

[115] *Robinson v. City of Detroit*, 462 Mich. 439, 458-459 (2000). It bears noting that as in *Robinson, supra*, which addressed the necessity that the government defendant's conduct, there, "gross negligence" within the meaning of MCL 691.1407(c), be *the* proximate cause of the alleged injury, strict construction and narrow interpretation of the exceptions to immunity would require a similar conclusion with respect to the highway exception where the cause is said to be an alleged "combination" of factors, some, which may or may not constitute actual, permanent *defects* in the roadway which exist at all times, which, in act in tandem with factors that are not such *defects*, i.e., dust, dirt, gravel, sand, ice, snow, etc. MCL 691.1402(1) and MCL 691.1403.

[116] See, e.g., *VanStrien v. City of Grand Rapids*, 200 Mich. App. 56 (1993), application for leave to appeal denied at 444 Mich. 979 (1993) (unsafe condition in street caused by abandoned manhole cover not actionable where city was unaware). Indeed, it appears that any condition that is caused in whole or in part by a third party (even an unknown third party like the alleged motorist traveling in the opposite direction in the instant case) would not be actionable. See, e.g., *Burgdorf v. Holme-Shaw*, 356 Mich. 45 (1950) (intermittent dangerous condition caused by clothesline stretched across public way by a third person not actionable).

[117] *Haliw, supra* at 311.

actionable *defects*.[118] "[T]he only permissible claims are those arising from a defect in the actual roadbed itself."[119]

5. Summary of Applicable Principles

"[T]he highway exception applies when a plaintiff's injury is proximately caused by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel".[120] The first sentence and second sentence of MCL 691.1402(1) must be read and applied together such that the government's duty, as expressed in the first sentence, must be shown to have been breached, and the breach must be shown to have been the direct cause of the defect that was then the direct and only cause of the accident.[121]

Haliw and *Buckner*, when read together, instruct that to be actionable the defect must be persistent, of a permanent nature, and in existence at all times. "In the absence of a *persistent* defect in the highway... rendering it unsafe for public travel at all times...a plaintiff cannot prevail against an otherwise immune municipality."[122] Further, "[t]he highway exception...is limited exclusively to dangerous or defective conditions *within the improved portion of the highway* designed for vehicular travel; that is, the *actual roadbed*, paved or unpaved, designed for vehicular travel."[123] *Wilson* provides the measure of what constitutes a breach of the

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[118] *Buckner*, *supra* at 1244.

[119] *Hanson v. Mecosta Co. Rd. Comm'rs*, 465 Mich. 492, 503 (2002), citing *Nawrocki*, *supra* at 161-162.

[120] *Nawrocki*, *supra* at 151.

[121] *Id.* at 160-161.

[122] *Haliw*, *supra* at 312 (emphasis added).

[123] *Nawrocki*, *supra* at 151-52 (emphasis added).

government's duty to repair and maintain highways. Perfect road conditions are not required, and only reasonable measures must be taken.

In keeping with his or her burden to plead and prove facts in avoidance of immunity,[124] a plaintiff pursuing a cause of action under the highway exception must demonstrate the existence of a true defect, and that the government's failure to fulfill its duty with respect to that defect was *the* proximate cause of the injury complained of.[125] *Amicus curiae* respectfully submit that Plaintiff cannot sustain this burden.

C. Analysis

Although the Court of Appeals acknowledged that *Pick v. Szymczak*[126] was overruled,[127] it nonetheless reverts to the "points of hazard" analysis in that case, which was explicitly rejected by this Court in *Nawrocki.*[128] The panel finds that the dust cloud was part of the roadbed in a dispersed state. From this, the Court reasons that "the dust cloud, which originated from the roadbed surface, was arguably a defect *in the physical surface* of the roadbed...."[129] The panel concludes that had the dust cloud not been present, the *roadbed* would not have been defective, i.e., there was no defect *otherwise present*. The fact that the dust cloud, which is part of the roadbed, rose above the road surface was therefore the defect in the roadbed itself. Yet, the very nature of what allegedly transpired in this case demonstrates the alleged defective *condition* did

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[124] *Mack, supra* at 195.

[125] *Nawrocki, supra.*

[126] 451 Mich. 607 (1996).

[127] Slip Op. at 4, n. 22.

[128] 463 Mich. at 160-161.

[129] Slip Op. at 5.

not exist at all times – it was a dust cloud allegedly kicked up by a motorist passing in the opposite direction of decedent. This reasoning ignores the requirement that true defects must be persistent, permanent, and exist in the roadbed designed for vehicular traffic *at all times*.

Pick held that "*any* condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe" was sufficient to implicate the statute's exception.[130] Indeed, the Court went so far as to conclude that any such condition "is not reasonably safe."[131] As this Court noted in *Nawrocki*, this was an unwarranted expansion of the meaning of the statutory language and contrary to the principle that the highway exception is to be strictly construed and narrowly applied. Indeed, Justice Riley and Justice Weaver pointed this out in their dissent to the majority's opinion in *Pick*.[132]

To delve into a discussion about what does and what does not constitute an unsafe "*condition*" at any given time obscures the plain meaning of the statute's emphasis on the "permanency" of the defect required to be shown and "reasonableness" – the government's duty is limited to keeping the highways in *reasonable* repair so that they are *reasonably safe* for public travel. Thus, the necessity that *both* sentence 1 and sentence 2 must be implicated to state a cause of action. In other words, the government's *failure to keep the highway in reasonable repair such that it is not reasonably safe and not reasonably convenient for public travel* (sentence 1) must be *the cause* of *the defect* making the highway unreasonably safe and not reasonably convenient for public travel and such defect must be the cause of the injury (sentence 2 – "[a] person who sustains bodily injury or damage…by reason of failure of a governmental

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[130] *Pick, supra* at 624 (emphasis added).

[131] *Id.*

[132] *Id.* at 635 (Riley, J., dissenting, Weaver, J. joining).

agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover....").

This requisite combination cannot exist in situations in which transient, non-permanent *conditions* alone or in combination with alleged *defects* are said to be *a cause* of the claimed injury because it is impossible to demonstrate fulfillment of the strict conditions and limitations created by reading sentence 1 and sentence 2 of MCL 691.1402(1) together, as they must be construed.[133] In her dissent in *Pick*, Justice Riley explained:

> The Legislature created this duty to achieve a particular end 'so that [the highway] is reasonably safe and convenient for public travel.' [MCL 691.1402(1) (sentence 1)]. This is *the value* that the Legislature hoped to realize by creating the duty. However, the statutory duty is not violated *whenever* the statute's end is not achieved. In other words, there is not a violation of this duty by the lone fact that a highway is not 'reasonably safe and convenient for public travel.' The Legislature did not require that the governmental agency ensure that all highways were reasonably safe. Only when the governmental agency fails to "maintain the highway in reasonable repair' is there a violation of the statute.
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> The point of identifying the statute's desired end with the duty it created in [the second sentence of MCL 691.1402(2)] is to indicate that a person will recover only when the government's failure to perform its duty *creates [the] unsafe condition.* Thus, even if there is a breach of the duty (failure to maintain in reasonable repair), an injured person will not recover unless the breach of the duty *created [the] unsafe condition.*[134]

Removed from this analysis in the case *sub judice*, liability against the government is freed from the tether of the precise legal *causation* required to be shown. If the allegations that a dry, dusty roadbed might, under the proper circumstances give rise to a cause of action where, as here, there

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[133] *Robinson v. City of Lansing*, 486 Mich. 1, 15 (2010), citing *Apsey v. Mem. Hosp.*, 477 Mich. 120, 132, n. 8 (2007).

[134] *Pick v. Szymzak*, 451 Mich. 607, 635-637 (1996) (Riley, J., dissenting) (emphasis added).

was no witness and no survivors, does this mean that in every such case a presumption can be expected that a sufficient claim has been alleged to waive the government's suit immunity? What if the accident was caused by some other cause or combination of causes, a myriad of which can be easily imagined? Perhaps a driver simply fell asleep or succumbed to some other health-related ailment. Perhaps a deer or some other animal crossed suddenly into the driver's path. Indeed, here it is *alleged*, without the ability to prove it, that an oncoming motorist kicked up the "dust cloud" that is said to have been the catalyst for the chain of encounters with other alleged defects that ultimately caused decedent's accident. Yet, among the other unknown causes above, the cause could have just as easily been a reckless or careless driver veering into decedent's lane of travel causing her to lose control of her vehicle.

It is one thing to say that an extant, preexisting and permanent condition, i.e., existing in the roadbed "at all times" prior to an accident and which is the single, factual and legal cause of a motorist's injury and resulting damages, is also a sufficient *defect* to state a cause of action under the highway exception. It is quite another thing to say that a possible temporary condition (the sudden swirl of a dust cloud), which cannot even be proved, existed because of the occurrence of another unproven event (a motorist traveling in the opposite direction), which in turn caused the plaintiff to lose control of her car and thereby encounter other alleged defects (ruts in the roadway, soft sand shoulders, etc.), are circumstances sufficient factually and legally to implicate *only the liability of the government, which is, unless expressly waived, otherwise immune from suit*. Simply put, such *conditions* are necessary but not sufficient to constitute a *defect* within the meaning of sentence one and sentence two of MCL 691.1402(1).

Such factual speculations, easily crafted in the mere allegations of a well-drafted and creative complaint, directly implicate this Court's admonitions in *Skinner v. Square D. Co.*, which appear throughout that opinion, but which are sufficiently summarized in the following passages: "[T]he mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation [in the given case]."[135] The Court continued:

> That there was no eyewitness to the accident does not always prevent the making of a possible issue of fact for the jury. But the burden of establishing proximate cause...always rests with the complaining party, and no presumption of it is created by the mere fact of an accident.[136]

Plaintiff's theory of what befell the decedent here is woefully inadequate to implicate the government's potential liability under the highway exception.

Moreover, as noted, it is the plaintiff's burden to both plead and prove the necessary prerequisites to a cause of action against the government.[137] If the mere allegation that an individual encountered certain conditions, which, *amicus curiae* submit, do not even rise to the level of actionable defects, requires the hiring of experts, the conducting of expensive, time-consuming and burdensome discovery, and the possibility that a case will be pressed all the way to this Court, the goal and purpose of immunity is lost.[138] This is why the Court has consistently stressed governmental immunity is not an affirmative defense.[139] To survive an immunity

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[135] *Skinner v. Square D. Co.*, 445 Mich. 143, 163 (1994).

[136] *Id.* at 164, citing *Howe v. Michigan C.R. Co.*, 236 Mich. 577, 583-584 (1926), cert denied 274 U.S. 738 (1927).

[137] *Mack, supra* at 193-195, 199.

[138] *Costa*, supra at 410; *Mack*, supra at 193.

[139] *Mack, supra* at 199, citing *McCann v. Michigan*, 398 Mich. 65 (1976).

defense, the plaintiff must *plead* and *prove* facts in avoidance of immunity.[140] A complaint averring only temporary, non-permanent *conditions* and not a true defect is deficient. Likewise, a complaint averring the government's activity or its non-activity, as the case may be, without proof that it undertook *and breached* a duty in regard to such a defect is equally inadequate.[141]

Indeed, every roadway that fits the description of the one described in this case must be dangerous. Given the right weather conditions and time of year many roads are in a similar state. Yet, to conclude, as the Court of Appeals did here, that every potential cloud of dust implicates the government "would impose a burden upon the public treasury that, if it is to be imposed, must be imposed only by the representative institutions of government."[142] "Government is not the insurer of highway safety".[143] The Court of Appeals here "misconstru[es] the statutory duty to maintain highways in a condition *reasonably safe* and fit for public travel as tantamount to an obligation to create the safest possible highway system."[144]

The duty is to keep highways *reasonably* safe – not absolutely insure protection by promising to prevent conditions that are not ascribable to true defects in the construction or maintenance of highways. Suppressing dust particles and maintaining smooth unpaved roadways is not something that can be measured and addressed with the degree of precision necessary to allow the government to know with certainty that a response is needed. To be certain, measures are taken to suppress these naturally occurring conditions. Natural soil

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[140] *Id.*

[141] *Id.* at 195.

[142] *Wecshler v. Wayne County Road Comm'n*, 215 Mich. App. 579, 595 (1996) (Markman, J.)

[143] *Pick, supra* at 632 (Boyle, J. concurring in part and dissenting in part).

[144] *Wecshler, supra* (emphasis added).

conditions and types; Michigan's ever-changing climate; and the volume, speed and nature of vehicular traffic are all factors that make precise control over the immediate condition of all roads at any given moment impossible.[145]

It is evident that in its undisturbed state, on any given day, and most likely on the day of decedent's accident, Litzen Road would appear no different that any other of the thousands of similar highways in Michigan. In this regard, while the "defect" as here alleged, and as found to be possibly existing by the Court of Appeals, would be present – it would not be visible nor evident until the right combination of traffic, speed, temperature, etc., occurred to create the situation that allegedly led to the accident. A county road crew might drive over the exact same stretch of road several times in a given day and be unaware that, given the right circumstances, an accident may occur. To hold the government liable is to exact from it a greater duty than one measured by reasonableness.

The panel reliance on *Moser v. City of Detroit*[146] to extend its reasoning that a defect not within the roadbed, i.e., not a permanent, persistent defect that exists at all times, may suffice to survive summary disposition under the highway exception is unconvincing. In *Moser*, plaintiff was injured when concrete from an overpass "fascia" fell on his windshield as he passed beneath. The Court of Appeals held "[p]ieces of the bridge structure (which were part of the improved portion of the highway designed for vehicular travel) falling onto the highway below, created an unsafe condition on the traveled portion of the roadbed actually designed for vehicular travel."[147]

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[145] *Mayo*, 178 Mich. at 173-74.

[146] 284 Mich. App. 536, 537 (2009).

[147] Slip Op. at 4, quoting *Moser*, *supra* at 542.

Judge Wilder dissented. He persuasively argued that an overpass fascia "is not a part of the 'improved portion of the highway designed for vehicular travel' within the meaning of MCL 691.1402(1)."[148] More importantly, Judge Wilder correctly pointed out that in *Grimes v. Dep't of Transportation*,[149] this Court held "only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1)." Quoting *Nawrocki*,[150] Judge Wilder noted this Court's statement that "if the [alleged defect] condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable." Judge Wilder concludes his dissent by articulating the proper scope of the narrowly drawn highway exception:

> The Supreme Court's reference to 'travel lanes' and 'roadbed' make clear that only the portion of the road upon which vehicles are driven is subject to the narrowly drawn highway exception. Vehicles are not driven on the fascia of a bridge. As such plaintiff has failed to show a defect in the improved portion of the highway that would subject the state to liability in this case. I would reverse.[151]

Amicus curiae submit Judge Wilder's analysis in dissent in *Moser* is the proper analysis.

Further, the Court of Appeals use of an ordinary dictionary definition is contrary to the rule that terms acquiring a specific legal meaning by the development of jurisprudence defining them are to be given that meaning. "Roadbed" within the meaning of the highway exception to governmental immunity is a legal term of art. Although the Court of Appeals used an ordinary dictionary definition to define "roadbed," this particular term within the "highway exception" as

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[148] *Moser*, *supra* at 542 (Wilder, J., dissenting).

[149] 475 Mich. 72, 91 (2006).

[150] 463 Mich. at 180.

[151] *Moser*, *supra* at 543.

defined in MCL 691.1402 has acquired a unique legal meaning in this Court's jurisprudence addressing the exception. Where a term or phrase has acquired specific meaning through its usage in jurisprudence developed over time with respect to a particular and unique subject matter, the term or phrase is regarded as having acquired a particular legal meaning when discussed or considered in a similar case.[152]

As such, while a common dictionary definition may be a useful interpretive tool, the term "roadbed" must be considered and applied with its acquired legal meaning.[153] In the GTLA, the Legislature provided its own internalized definition of "highway".[154] The "roadbed" as used in MCL 691.1402 is further defined by this Court's significant jurisprudence as the traveled portion of the roadway, paved or unpaved, actually designed for public, vehicular travel.[155] This Court has otherwise rejected attempts to expand the meaning of the term "roadbed" to "conditions, the source of which do not originate *on the surface* of the roadbed...."[156] Given the narrow interpretation mandated for statutes waiving the government's suit immunity and the broad grant of immunity, and the fact that the definition of "highway" provided by the Legislature suffers from "no apparent ambiguity",[157] resort to speculation about what should or should not be included as "part" of a highway is prohibited.

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[152] See MCL 8.3a ("technical words and phrases, and such as may have acquired a peculiar meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"); *People v. Thompson*, 477 Mich. 146, 152 (2007).

[153] *Id.*

[154] MCL 691.1401(c); *Grimes v. Mich. Dep't of Transp.*, 475 Mich. 72, 87 (2006).

[155] See *Nawrocki*, *supra* at 179.

[156] *Id.* at 176 (emphasis added), citing *Scheurman v. Michigan Dep't of Transportation, et al.*, 434 Mich. 619, 631, n. 22 (1990).

[157] *Grimes*, 475 Mich at 87.

Indeed, engaging in such an exercise is nothing more than substituting one Court of Appeals' panel's policy choices for that of the Legislature – it is an expression of what the particular panel thinks should and should not be included as part of a highway.[158] Such policy choices (or speculating about what should or should not be included as waiving the government's inherent immunity) are best left to the Legislature.[159] This is especially true when addressing provisions that lift the broad veil of immunity and subject the government to suit in its own courts.[160]

Mere transitory conditions in or upon highways that motorists might be expected to ordinarily encounter, as the conditions here, bumpy roads, uneven pavement, dust, etc., without more permanency, are insufficient to invoke the exception.[161] It may be that a particular highway is rendered unreasonably safe for public travel due to a persistent condition that exists at all times, but there must be a showing that the entity with responsibility for that highway was made aware of (or should have been aware of) this alleged "defect" before a duty may attach to allow a finding of liability for a failure to fulfill the duty.[162] Transient, ever-changing conditions that are not inherent *permanent* aspects of the roadway are not true "defects" within the meaning of the statute and this Court's jurisprudence interpreting it.

With respect to true defects the government is supposed to be able to be allowed some leeway in receiving notice. In Wilson, this Court stated:

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[158] *McIntire*, 461 Mich. at 152.

[159] *Rowland, supra* at 214.

[160] *Mack, supra.*

[161] *Wilson*, 474 Mich. at 170-71.

[162] *Id.* at 169.

> In other words, an *imperfection* in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the government agency is on notice of that fact. Thus, while MCL 691.1402(1) only imposes on the governmental agency the duty to "maintain the highway in reasonable repair," in order to successfully allege a violation of that duty, a plaintiff must allege that the governmental agency was on notice that the highway contained a defect rendering it not "reasonably safe and convenient for public travel." The governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair.[163]

This passage makes clear that transitory conditions that arise (and can reasonably be expected to arise in the day-to-day conditions faced by motorists traveling Michigan highways), but then dissipate, are not the type of "persistent defect in the [highway] rendering it unsafe for public travel *at all times*",[164] which then implicate the government's duty. The Court in *Wilson* continued, speaking to the requirement that the defect be "persistent" and exist "at all times" as was stated in *Haliw*:

> [A]ll parties concede that there was notice of certain problems–that the road was bumpy and required frequent patching–these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel. It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case plaintiff must present evidence that a reasonable road commission, *aware of this particular condition*, would have understood it posed an unreasonable threat to safe public travel and would have addressed it. Over 93 years ago, in *Jones v. Detroit*,[165] this Court made it clear that a road in bad repair, or with rough pavement, is not *per se* one that is not reasonably safe.

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[163] *Id.* at 168 (emphasis in original).

[164] *Haliw*, 464 Mich. at 311 (emphasis added).

[165] 171 Mich. 608 (1912).

As the Court said:

> Nearly all highways have more or less rough and uneven places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel. The most that can be said for the testimony in this case is that it established the fact that the pavement on that part of [the street] was rough, and called for more careful driving than did other portions of it.
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> The purpose of the highway exception is not to place upon the state or the counties an unrealistic duty to ensure that travel upon the highways will always be safe. Looking to the language of the statute, we discern that the true intent of the Legislature is to impose a duty to keep the physical portion of the traveled roadbed *in reasonable repair*.
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> A plaintiff must establish that the defendant knew or should have known about the defect and had notice that the defect made the road not reasonably safe and convenient for public travel.[166]

Any road crew would have notice of the conditions alleged in Plaintiff's complaint. While a cause for caution to the reasonable motorist, and even dangerous under the proper circumstances, these conditions are not the type of inherent, integrated and permanent defects that arise in a highway's roadbed and which thereafter *persist* and *exist* "at all times" thereby triggering the government's duty under the second sentence of MCL 691.1402(1).

Dry and dusty conditions might exist in combination with a rough unpaved road surface on innumerable unpaved roads in Michigan fitting the description of Litzen Road at various times and for intermittent periods given the ever-changing climate and weather conditions in Michigan. Imposing a duty to make such roadways *safe* or *safer*, if these conditions are

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[166] *Wilson, supra* at 169-170.

considered *unsafe defects*, or merely unreasonable,[167] would place an undue burden on the government. It must be remembered 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."[168]

The opinion below allows for potential liability in a scenario that is present on unpaved highways on a nearly daily basis during certain times of the year in Michigan. Moreover, the opinion presumes that a duty exists to somehow suppress or otherwise prevent these ordinarily encountered conditions, which further presupposes that such remedial measures are fiscally and physically possible. This is precisely why such ordinarily encountered conditions are not actionable defects within the meaning of the highway exception to governmental immunity. This is especially true if the allegations are to be accorded verity in the instant case, where the alleged defect was merely the natural dispersion of natural roadbed material into the atmosphere caused by normal usage.

As in *Nawrocki*, the Court of Appeals ruling "disregards the basic principle of *Ross* and contradicts the plain language of the highway exception...."[169]

> [A]llowing [it] to stand...would perpetuate the lack of a principled and consistent application of the law and would permit the continuation of a heightened potential for arbitrary, inconsistent, and highly confused decision making in personal injury or property damage cases involving the state or county road commissions. Such results would be contrary to the statute, undermine other important case law, and impose far more injury upon the judicial process than any effect associated with our decision to apply the

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[167] *Pick, supra* at 624, overruled by *Nawrocki, supra.*

[168] *Costa v. Community Emergency Medical Services*, 475 Mich. 403, 410 (2006) (internal quotation marks omitted), citing *Mack v. City of Detroit*, 467 Mich. 186, 203, n. 18 (2002).

[169] 463 Mich. at 175.

> policy decisions of the Legislature instead of the policy decisions of this Court.[170]

On the heels of *Nawrocki*, this Court decided *Hanson v. Bd. of County Rd. Comm'rs of Mecosta County*.[171] There, the Court addressed the plaintiff's allegations that the defendant failed to properly grade and maintain the profile of an unpaved road according to applicable standards and failed to maintain the grade and profile of the roadway.[172] The accident occurred at the crest of a hill the roadway crossed. The allegations focused on the defendant road commission's breach of a duty to design the roadway to make motorists traveling in opposite directions more visible to one another. In affirming the Court of Appeals' opinion, this Court's reasoning illuminates the error in the Court of Appeals' analysis in the instant case. The Court noted:

> Nowhere in the statutory language is there a duty to *install,* to *construct* or to *correct* what may be perceived as a dangerous or defective "*design.*".... [T]he road commission's duty under the highway exception does not include a duty to design, or to correct defects arising from the original design or construction of highways. In the highway exception, the Legislature has said that the duty of the road commission is to "*maintain* the highway in *reasonable* repair so that it is *reasonably* safe and convenient for public travel." The statute further provides that the specific duty of the state and county road commissions is to "*repair and maintain* " highways. "Maintain" and "repair" are not technical legal terms. In common usage, "maintain" means "to keep in a state of repair, efficiency, or validity: preserve from failure or decline." Webster's Third New International Dictionary, Unabridged Edition (1966), p. 1362. Similarly, "repair" means "to restore to a good or sound condition after decay or damage; mend." Random House Webster's College Dictionary (2000), p. 1119. We find persuasive the analysis of *Wechsler v. Wayne Co.*

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[170] *Id.* at 183 (internal citations omitted).

[171] 465 Mich. 492 (2002).

[172] *Id.* at 499-500.

> *Rd. Comm.*, 215 Mich.App. 579, 587-588, 546 N.W.2d 690 (1996) that [t]he Legislature thus did not purport to demand of governmental agencies having jurisdiction of highways that they improve or enhance existing highways.... The only statutory requirement and the only mandate that, if ignored, can form the basis for tort liability is to "maintain" the highway in *reasonable repair*.[173]

In footnote 7, the Court further rejected the proposition taken from *dicta* in prior cases 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."[174] In footnote 8, the Court explained it used the terms "defect" and "dangerous or defective condition" in *Nawrocki* to describe the status of the highway following a breach of the road commission's specific duty to "*repair and maintain* " the highway.[175] The terms "defect" and "dangerous or defective condition", the Court explained, do not expand the statutory duty, but instead describe the general conditions that trigger the statutory duty to "repair and maintain." In other words, if the road commission's statutory duty is breached, it follows that the highway is in a state of *disrepair*, a synonym of which is "defect."[176]

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[173] *Id.* at 501-503 (some internal citations omitted).

[174] *Id.* at 501, n. 7 citing *Killeen v. Dep't of Transp.*, 432 Mich. 1, 4-5 (1989); *Arnold v. State Hwy. Dep't.*, 406 Mich. 235, 237-238 (1979), and *Peters v. State Hwy. Dep't.*, 400 Mich. 50, 57 (1977).

[175] *Id.* at 503, n. 8.

[176] *Id.* Although this case has proceeded under the theory that Litzen Road contained an "inherent, preexisting defect", it should be pointed out that the Court of Appeals' conclusion that the "dust cloud" the decedent encountered was simply the existing "*in situ*" soil that comprised the roadbed material and that this was an actionable defect, is more akin to cases like *Hanson*, *supra*, in which the allegation centers on an original design defect or a breach of the government's duty to have properly constructed the roadbed in the first place. The Court of Appeals' analysis however fails even in this regard because its adoption of the finding that the dust cloud was merely original roadbed material forecloses even a cause of action under this theory.

As established in *Wilson*, to be in a state of disrepair, there must be permanency to the defect. Even assuming that a defect existed under the conditions alleged in the case *sub judice*, a point explicitly rejected by *amicus curiae*, the circumstances under which the Court of Appeals finds Manistee County may have had a duty significantly, if not totally, undermines the principle that governmental entities must have actual or constructive notice of *the defect* in the roadbed that caused the injury complained of.

ARGUMENT II

THIS COURT'S ORDER IN *PALETTA v. OAKLAND COUNTY*, 491 MICH. 897 (2012), FULFILLS THE REQUIREMENT NECESSARY TO BE BINDING PRECEDENT AS TO THE DISPOSITION OF THE INSTANT CASE BECAUSE IT CONTAINS NEARLY IDENTICAL FACTS AND A LEGAL RULING APPLIED TO THOSE FACTS WHICH IS DISCERNIBLE AS A CONTROLLING RULE OF LAW SUFFICIENT TO WARRANT REVERSAL OF THE TRIAL COURT'S DECISION

A. Standard of Review

The question of whether a decision or order of a higher court is binding precedent is a question of law to be reviewed *de novo*.[177]

B. Applicable Law

An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent.[178] This rule of law derives directly from Article 6, § 6 of the Michigan Constitution, which provides as follows:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise

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[177] *Johnson v. White*, 261 Mich. App. 332, 336 (2004).

[178] MICH CONST 1963, ART 6, § 6. See also *Dykes v. William Beaumont Hosp.*, 246 Mich. App. 471, 483-484 (2001), citing *People v. Crall*, 444 Mich. 463, 464, n. 8 (1993). Reiterated in *DeFrain v. State Farm Mut. Auto Ins. Co.*, 491 Mich. 359 (2012).

> statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

In *People v. Crall*,[179] this Court in a memorandum opinion stated that the "final disposition of an application [for leave to appeal]" which "contains a concise statement of the applicable facts and the reason for the decision" is binding precedent under this constitutional provision. Indeed, the Court of Appeals has stated simply that "Supreme Court peremptory orders are binding precedent when they can be understood."[180] Inversely, where a Supreme Court order vacates a Court of Appeals opinion without "expression of approval or disapproval" of the panel's reasoning in the particular case, the order is not considered binding precedent.[181] As one jurist has noted, "Michigan Supreme Court precedent that is binding on [the Court of Appeals] does not permit an inferior court, appellate or trial, to overrule Supreme Court precedent; rather, such precedent places the prerogative of overruling Supreme Court decisions with the Supreme Court."[182]

C. Analysis

In reversing the decision of the Court of Appeals in *Paletta* by peremptory order, this Court held:

> "The accumulation of gravel on the paved roadway was not actionable under the highway exception to the governmental tort liability act (MCL 691.1402) because an accumulation of gravel,

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[179] 444 Mich. 463, 464, n. 8 (1993).

[180] *People v. Phillips (After Second Remand)*, 227 Mich. App. 28, 38, n. 11 (1997).

[181] *People v. Giovannini*, 271 Mich. App. 409, 414 (2006), citing *People v. Akins*, 259 Mich. App. 545, 550, n. 8 (2003) (Zahra, J.).

[182] *In re Nestorovski Estate*, 283 Mich. App. 177, 205 (2009) (Saad, J., dissenting).

> whether natural or otherwise, does not implicate the defendant's duty to maintain the highway in 'reasonable repair.'"[183]

The language of this order contains the requisite statement of fact and discernible legal rule from the highway exception. First, the order references the factual underpinnings of the plaintiff's theory of an actionable claim under the exception. The plaintiff alleged the accumulation of gravel and gravel debris deposited by employees of the defendant road commission due to "improperly scraping the gravel shoulders and failing to sweep the gravel debris from the roadway in accordance with industry standards" caused him to lose control of his motorcycle and injure himself. [184] The defendant argued that the "presence of gravel on a roadway is not a 'defect' and does not make a roadway *unreasonably safe* for public travel."

In the instant case, the Court of Appeals reasoned that *Paletta* did not fulfill the requirements necessary to discern precedential, and therefore binding effect because it did not contain "the requisite factual statement to be binding."[185] However, in the last sentence of this footnote, the panel goes on to state (apparently assuming *if Paletta* is binding): "Additionally, this case is distinguishable from *Paletta* as there was no accumulation of any substance on the roadbed."[186]

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[183] *Paletta v. Oakland County Road Commission*, 491 Mich. 897 (2011), citing MCL 691.1402(1); *Nawrocki v. Macomb County Road Commission*, 463 Mich. 143 (2000); *Estate of Buckner v. City of Lansing*, 480 Mich. 1243 (2008).

[184] *Paletta*, Unpublished Decision of the Michigan Court of Appeals, dated July 21, 2011 (Docket No. 298238), Slip Op. at 1.

[185] *Id.* at p. 6, n. 31, citing *Dykes*, *supra* at 483 (holding that a "final...disposition of an application...that contains a concise statement of the applicable facts and reasons for the decision is binding precedent").

[186] *Id.*

At once, the Court of Appeals asserts *Paletta* does not contain a concise statement of facts sufficient to discern this Court's holding applying the language of MCL 691.1402 to conclude, as it did, that gravel on the improved portion of the highway is not an actionable defect in the roadbed sufficient to invoke the highway exception to governmental immunity. Yet, in the very next sentence, the Court claims *Paletta* is distinguishable. Which really begs the question: If *Paletta* does not contain a concise statement of the applicable facts and the reasons for the Court's decisions, and is not binding precedent, then how can it be distinguishable?

Aside from recounting the factual allegations concerning the defect: "[t]he accumulation of gravel on the paved roadway"; this Court's order in *Paletta* applied a legal rule concerning the highway exception: "an accumulation of gravel, whether *natural or otherwise, does not implicate* the defendant's *duty* to maintain the highway in '*reasonable repair*'".[187]

The precision of this language should not be underestimated. The penultimate sentence contains three critical elements. First, the rule of law applies to accumulations whether natural or otherwise. In recognition of the *transient*, and therefore *non-permanent* or *non-persistent* nature of a condition such as loose gravel, sand, dust, debris, etc., the Court rules the allegations did not implicate the defendant's duty to maintain the highway, because no allegation of an actionable defect was lodged. Recall the discussion in Argument I, *supra*, that the government's *duty* to maintain the highway in reasonable repair is not implicated with respect to conditions of which it cannot be actually or constructively aware. Transient, non-permanent and non-persistent conditions, even if defects do not suffice.

Second, the Court's use of the phrase: "*does not implicate* the defendant's *duty* to maintain the highway in 'reasonable repair'", as also explained in Argument I, *supra*, references

[187] 491 Mich. 897 (2012).

the necessity of applying both sentence 1 and sentence 2 of MCL 691.1402(1) together.[188] Not only must there be a persistent defect in the roadbed at all times, but the governmental entity's failure to address *that* defect must be the cause of the damage complained of. There is no question the language of this Court's order in *Paletta* was sufficient to dispose of the instant case. As such, it is binding precedent that the Court of Appeals was bound to follow.

CONCLUSION AND RELIEF REQUESTED

Amicus curiae urges the Court to peremptorily reverse the Court of Appeals decision. In the alternative, the Court should grant the Board's Application for Leave to Appeal to fully address this case. *Amicus curiae* respectfully requests that in addition to those questions presented in the Board's Application for Leave to Appeal, the Court may have the parties brief the additional issues presented in this brief.

Respectfully submitted,

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[188] *Nawrocki, supra* at 160, citing *Pick, supra* at 635-637.