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STATE OF MICHIGAN

IN THE SUPREME COURT

THERESA BEALS, as Personal Representative of the Estate of WILLIAM T. BEALS, Deceased,

Plaintiff-Appellee,

v

STATE OF MICHIGAN and WILLIAM J. HARMON, Jointly and Severally,

Defendants,

and

WILLIAM J. HARMON, Jointly and Severally,

Defendant-Appellant.

_______________________________________/

Supreme Court
Case No. 149901

Court of Appeals
Case No. 310231

Barry Circuit Court
Case No. 11-45-NO

BRIEF AMICI CURIAE ON BEHALF OF THE MICHIGAN MUNICIPAL LEAGUE, THE MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL, AND THE MICHIGAN TOWNSHIPS ASSOCIATION

PROOF OF SERVICE

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RECEIVED by MSC 2/24/2015 12:28:49 PM

TABLE OF CONTENTS

Page

Index of Authorities. ii

Statement of Interest. iv

Statement of the Issues.. vi

Statement of Facts. 1

Argument. 2

THE HOLDING OF THE COURT OF APPEALS MUST BE REVERSED WHERE IT RELIES ON SPECULATION RATHER THAN RECORD EVIDENCE OF CAUSATION, AND/OR WHERE THE ALLEGED FAILURE TO SAVE PLAINTIFF FROM DROWNING CANNOT LEGALLY CONSTITUTE THE PROXIMATE CAUSE OF THE INJURY.. 2

Relief Requested. 15

RECEIVED by MSC 2/24/2015 12:28:49 PM

INDEX OF AUTHORITIES

Page

Cases

Dean v Childs,
474 Mich 914; 705 NW2d 344 (2005). 3, 4, 7, 8

Garlick v Harless,
CA #317650 (11/20/2014), 2014 WL 6602705. 11

Helfer v Center Line Public Schools,
477 Mich 931; 723 NW2d 459 (2006). 3

Kaminski v Grand Trunk WR Co,
347 Mich 417; 79 NW2d 899 (1956). 6

LaMeau v City of Royal Oak,
490 Mich 949; 805 NW2d 841 (2011). 3

Love v City of Detroit,
270 Mich App 563; 716 NW2d 604 (2006). 7, 8

Moning v Alfono,
400 Mich 425; 254 NW2d 759 (1977). 12

Oliver v Smith,
290 Mich App 678; 810 NW2d 57 (2010). 11

Ortiz v Porter,
2001 WL 1545914, CA #226466 (11/30/2001),
lv den 467 Mich 869; 651 NW2d 918 (2002). 10

Paige v City of Sterling Heights,
476 Mich 495; 720 NW2d 219 (2006). 10, 11

Reaume v Jefferson Middle School,
477 Mich 1109; 729 NW2d 840 (2007). 3

Robinson v City of Detroit,
462 Mich 439; 613 NW2d 307 (2000). 2, 4, 9, 11

Skinner v Square D Co,
445 Mich 153; 516 NW2d 475 (1994). 6, 12

Tarlea v Crabtree,
263 Mich App 80; 687 NW2d 333 (2004),
lv denied 472 Mich 891; 695 NW2d 69 (2005). 10

Thompson v Rochester Community Schools,
CA #269738 (10/26/2006), 2006 WL 3040137;
lv denied 478 Mich 889; 731 NW2d 772 (2007). 7, 8

Statutes / Court Rules / Other Authorities

1982 PA 138. iv

MCL 418.375(2). 10

MCL 619.1401, *et seq*. 2

MCL 691.1407(2). 3, 9-11, 13

MCL 691.1407(2)(c). 3

MCL 691.1407(8)(a). 3

Prosser & Keeton, Torts (5th ed.), §42. 12

RECEIVED by MSC 2/24/2015 12:28:49 PM

RECEIVED by MSC 2/24/2015 12:28:49 PM

STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, the majority of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This brief amicus curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the President and Executive Director/CEO of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Lori Grigg Bluhm, city attorney, Troy, Chair; Clyde J. Robinson, city attorney, Kalamazoo, Vice Chair; Randall L. Brown, city attorney, Portage; James O. Branson, III, city attorney, Midland; Robert J. Jamo, city attorney, Menominee; Catherine M. Mish, city attorney, Grand Rapids; James J. Murray, city attorney, City of Boyne City and Petoskey; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; Eric D. Williams, city attorney, Big Rapids; and William C. Mathewson, general counsel, Michigan Municipal League, Fund Administrator.

The Michigan Municipal League Liability & Property Pool was established under 1982 PA 138 to develop and to administer a group program of liability and property self-

insurance for Michigan municipalities. The principal objectives of the Pool are to establish and to administer municipal risk management services, to reduce the incidents of property and casualty losses occurring in the operation of local government functions and to defend the Pool's members against liability losses.

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,230 townships within the State of Michigan (including both general law and charter townships), joined together for the purpose of providing 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. This brief amici curiae is authorized by the Board of Directors of the Michigan Townships Association.

RECEIVED by MSC 2/24/2015 12:28:49 PM

STATEMENT OF THE ISSUES

Amici Curiae, the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association, rely on the Statement of the Question Presented as set forth in the Application for Leave to Appeal filed on behalf of Defendant, William J. Harman.

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STATEMENT OF FACTS

Amici Curiae, the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association, rely on the Statement of Facts as set forth in the Application for Leave to Appeal filed on behalf of Defendant, William J. Harman.

RECEIVED by MSC 2/24/2015 12:28:49 PM

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ARGUMENT

THE HOLDING OF THE COURT OF APPEALS MUST BE REVERSED WHERE IT RELIES ON SPECULATION RATHER THAN RECORD EVIDENCE OF CAUSATION, AND/OR WHERE THE ALLEGED FAILURE TO SAVE PLAINTIFF FROM DROWNING CANNOT LEGALLY CONSTITUTE THE PROXIMATE CAUSE OF THE INJURY.

As evident in the jurisprudence of this State, issues concerning the scope of the immunity set forth in the Governmental Tort Liability Act, MCL 619.1401, *et seq*, frequently arise in cases involving undeniably tragic circumstances where an allegation is made of a causal relationship between the asserted injuries and some governmental action or inaction. Plaintiffs in these cases cannot prevail, or avoid summary disposition, merely by establishing the usual requisites for liability – duty, breach, proximate cause, damages. Rather, they must also avoid the broad immunity set forth in the GTLA. Yet, in the case at bar, the majority opinion erroneously relied on its finding of a breach of duty as evidence supporting a denial of immunity.

Moreover, neither the tragic nature of the loss sustained, nor the absence of another viable party from whom recovery can be secured, effects the implementation of the policy choices made by the legislature when it provided broad immunity from liability which might otherwise be imposed, even where the result of these choices is to deny recovery. That is the nature of immunity, effectively ignored by the Court of Appeals, and this Court should take this opportunity to grant leave to appeal and reverse the Court of Appeals, thereby reconfirming its interpretation and application of the GTLA as expressed in its opinion and orders in *Robinson v City of Detroit*, 462 Mich 439 (2000),

RECEIVED by MSC 2/24/2015 12:28:49 PM

Dean v Childs, 474 Mich 914 (2005), *Helfer v Center Line Public Schools*, 477 Mich 931 (2006), *Reaume v Jefferson Middle School*, 477 Mich 1109 (2007), and *LaMeau v City of Royal Oak*, 490 Mich 949 (2011) each of which reflect adherence to the legislative policy choices embodied in MCL 691.1407(2).

When an "officer, employee, member, or volunteer of a governmental agency" is acting or reasonably believes that he is acting within the scope of his authority, and in the absence of an intentional tort, the statutorily granted immunity is avoided only when the governmental individual's conduct "amount[s] to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). This immunity, which includes both immunity from suit and immunity from liability, is a threshold consideration. Accordingly, when considering the issue of immunity from liability that might otherwise be imposed, the existence of some fault on the part of the defendant is necessarily assumed and the only relevant question is whether, notwithstanding the existence of duty, breach, proximate cause and damages, the plaintiff's claim must be dismissed. As presented to this Court in this case, the parties have also assumed that the conduct at issue – inattention and inaction regarding efforts to save William Beals from drowning – constituted "gross negligence," statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a).

But the assumed fact of gross negligence that could otherwise support the imposition of liability, does not affect the *independent inquiry* which this Court has been

asked to resolve in this case – whether that grossly negligent conduct could reasonably be found to constitute "the proximate cause" of plaintiff's injuries. The existence of conduct that was so reckless as to demonstrate a substantial lack of concern for whether an injury results does not suffice to resolve the immunity inquiry, regardless of how blameworthy that conduct may seem. Rather, a plaintiff must establish that this conduct was also "the proximate cause" of the injury, defined in *Robinson v City of Detroit, supra*, 462 Mich, 445-446, as "the one most immediate, efficient, and direct cause of the injury or damage." Consistent with this authority, this Court has previously reversed appellate court decisions on the basis that the reckless conduct was not the proximate cause of the injury, and immunity applied to bar suit. Consider, for example:

- *Dean v Childs*, 474 Mich 914 (2005), reversing *Dean v Childs*, 262 Mich App 48 (2004) [allegedly grossly negligent firefighting did not constitute the proximate cause of injuries sustained by children caught in the burning home];
- *Helfer v Center Line Public Schools*, 477 Mich 931 (2006), reversing *Helfer v Center Line Schools*, 2006 WL 1693948, CA #265757 (6/20/2006) [alleged gross negligence of school bus driver who ordered child to get off of bus and to go home was not the proximate cause of child's injuries, sustained when she crossed the street and was hit by a car];
- *Reaume v Jefferson Middle School*, 477 Mich 1109 (2007), reversing *Reaume v Jefferson Middle School*, 2006 WL 2355497, CA #268071 (8/15/2006) [alleged gross negligence of school wrestling coach by initiating moves without warning

RECEIVED by MSC 2/24/2015 12:28:49 PM

was not the proximate cause of injuries received while engaged in the wrestling activity], and

- *Lameau v City of Royal Oak*, 490 Mich 949 (2011), reversing *Lameau v City of Royal Oak*, 289 Mich App 153 (2010) and adopting the dissenting opinion therein [alleged negligence in designing and constructing sidewalk with guy wire that crossed the sidewalk, fatally injuring the operator of a motor scooter, may have "contributed to, and initiated, a chain of events that led to the decedent's injury," but did not constitute the proximate cause where the decedent was traveling at night, without lights or a helmet at a potentially unsafe speed while intoxicated].

Each of these cases not only reflect legislative policy choices, but support the grant of summary disposition to the defendant in the case at bar. The majority opinion of the Court of Appeals in the case at bar is contrary to this precedent and inappropriately relied on its belief that the record supported a finding of gross negligence when it considered the only issue actually before it and concluded that this conduct was the proximate cause of plaintiff's injury. While there may have been evidence which could support a finding of gross negligence, there was no *evidence* supporting plaintiff's causation theory, and it was speculative to conclude that this gross negligence was the proximate cause of the plaintiff's injury. Acknowledging that "no explanation has been presented by the parties to explain precisely why Beals failed to reemerge under his own power," the majority opinion substituted its assumption that "[h]is distress was apparently not of [plaintiff's] own making, nor that of any other identifiable cause," for the requisite evidence. In the

RECEIVED by MSC 2/24/2015 12:28:49 PM

absence of evidence as to the cause of the distress, which was undeniably not attributable to Harman, the majority's conclusion was erroneously premised on the alleged subsequent gross negligence of Harman in failing to notice or respond appropriately to that distress. Relying on expert testimony as "evidence to indicate that proper intervention and rescue *could have prevented Beals's death*" (emphasis added), the majority opinion concluded as follows:

> * * * As a lifeguard, Harmon had an obligation to provide that intervention and rescue. Given the evidence presented, reasonable minds could conclude that Harmon's failure to intervene constituted the one most immediate, efficient, and direct cause of Beals's death. * * *. [Slip Opinion, pp 3-4)

In other words, since it was *possible* that proper intervention *could have* prevented the death, the majority determined that a jury would be allowed to speculate that it *would have* prevented the death. Not only is such speculation insufficient to support a finding that defendant's conduct was *the* proximate cause of the death, it was insufficient to support a finding that it was either a cause in fact, or a proximate cause of the death. There is no dispute that something other than Harman's conduct caused Beals to slip underwater and fail to reemerge, and the fact that the actual cause is unknown does not permit it to be ignored. Ignoring that unknown cause, and relying on the mere possibility that Beals might have been saved, is nothing more than speculation. As explained in *Skinner v Square D Co*, 445 Mich 153, 164 (1994), quoting from *Kaminski v Grand Trunk WR Co*, 347 Mich 417, 422 (1956):

> [A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There

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> may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

In *Love v City of Detroit*, 270 Mich App 563, 566 (2006), citing this Court's order in *Dean v Childs, supra*, the Court refused to allow such speculation to substitute for evidence, rejecting an argument, similar to that made by plaintiff in the case at bar, that a failure to rescue could constitute the proximate cause of deaths sustained as a result of a fire:

> * * * Similarly, in this case, decedents died from the fire that engulfed the second and third floors of their home. The fire was advanced by the time the firefighters arrived at the home. Witnesses indicated that the victims could be heard screaming for help after the firefighters arrived; however, no evidence established that the firefighters could have reached the victims or that, if fire fighters had acted more aggressively, the victims would have been rescued. The firefighters' actions did not constitute the proximate cause of decedents' deaths. * * *

Plaintiff's citation to *Thompson v Rochester Community Schools*, CA #269738 (10/26/2006), 2006 WL 3040137, does not support a contrary conclusion, but serves instead to highlight the insufficiency of the evidence in the case at bar, including the expert opinion that suggested the possibility that greater diligence by Harman could have saved Beals from the drowning that began when he went beneath the water and did not come up. Distinguishing both *Dean, supra*, and *Love, supra*, the *Thompson* court noted evidence to the effect that "timely use of the AED would have restored Cady's normal heart rhythm." It also explained that it was not clear how Cady had actually died, further

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noting that in both *Dean* and *Love* it had been clear that the plaintiffs had died as a result of fire, *14 - *15:

> The nature of the documentary evidence presented here distinguishes the present case from *Dean* and *Love*. Irrespective of the defendants' conduct in *Dean* and *Love*, the fires were "but for" causes of the decedents' deaths in those two cases. Accordingly, the plaintiffs in those cases were to a certain extent limited in their attempts to characterize the defendants' actions as the proximate cause of their decedents' deaths.
>
> In the present case, however, there was admissible expert testimony indicating that a condition such as that suffered by Cady Elkins would not typically result in death in the absence of improper care and treatment. * * *

The case at bar, however, is analogous to *Dean* and *Love*, and distinguishable from *Thompson*. It is known that William Beals died from drowning in a pool in which he had been swimming, going under water for no cause attributable to defendant. That drowning was a "but for" cause of his death. And there was no expert testimony that he would have been saved if proper treatment had been available.

Equivocal expert testimony is not a substitute for evidence, and the record of this case was insufficient to permit a finding of the requisite causal relationship between the alleged gross negligence and the injury sustained.

Indeed, even were it assumed that the expert testimony was sufficient to support a finding of "cause in fact," it was still insufficient to support the distinctly different question of whether the gross negligence was "the proximate cause." As a matter of law, Harman's conduct in failing to save Beals from drowning cannot constitute the proximate cause of that drowning. As quoted above, the majority opinion in the case at bar prefaced its conclusion on the observation that "[a]s a lifeguard, Harmon had an obligation to

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provide that intervention and rescue." But the immunity question presented in this case is not whether Harman should have noted that Beals had slipped under the water and thereby breached a duty owed to him when he failed to take timely steps to save him. Nor is the question whether there was a possible causal connection between his failure to intervene and Beals' death. These are liability considerations, and neither a mere breach of duty, added to "but for" or even "proximate" causation, will avoid the immunity provided by MCL 691.1407(2).

In *Robinson v City of Detroit*, 462 Mich 439, 445-446 (2000), this Court considered the statutory phrase "the proximate cause" and concluded that its use in MCL 691.1407(2) demonstrated the legislative intent to provide "tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." In *Robinson*, the injuries occurred as a result of the reckless driving of a third party who was fleeing from the police and the plaintiff sought to impose liability on the defendant police officers, arguing that their conduct had placed the motoring public in danger from the reckless driver. The Court disagreed. So, too, in the case at bar it is logically and legally impossible to conclude that the alleged gross negligence of the lifeguard was the one most immediate, efficient and direct cause of the drowning when that cause was, necessarily, whatever caused Beals to slip underwater and fail to come back up. That this cause is not known does not obviate its existence. What is known is that the cause was not attributable to Harman.

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Opinions of the Court of Appeals which have properly considered circumstances somewhat analogous to the case at bar, where governmental conduct is alleged to have constituted the proximate cause of the plaintiff's injuries, include *Ortiz v Porter*, 2001 WL 1545914, CA #226466 (11/30/2001), *lv den* 467 Mich 869 (2002) [Where the plaintiff's decedent died in a house fire and plaintiff sought to impose liability on the defendant fire inspector for his alleged gross negligence in failing to ensure that a smoke detector was placed in the home, as he had allegedly promised to do, and where the Court held that "[w]hatever the cause of the fire, the fire itself plainly constituted the one most immediate and direct cause of plaintiff's injuries, and defendant indisputably had no involvement with the fire's commencement."], and *Tarlea v Crabtree*, 263 Mich App 80 (2004), *lv denied* 472 Mich 891 (2005) [Where the alleged gross negligence of the coach could not have been the proximate cause of the injuries sustained during team exercises when the players had had a choice as to whether or not to participate and could have stopped at any time.]. The reasoning employed by the Court of Appeals in the case at bar is inconsistent with this authority and significantly departs from established precedent which should be reconfirmed by this Court in this case. The pertinent question is not "fault," or whose fault was greater.

Moreover, and significantly, in *Paige v City of Sterling Heights*, 476 Mich 495 (2006), this Court considered the meaning of the phrase "the proximate cause" as used in MCL 418.375(2), concluding that its meaning in that statute was identical to its meaning as used in MCL 691.1407(2). In so doing, and to the extent that there may have been any

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doubt about its meaning as discussed in *Robinson, supra,* the *Paige* Court effectively clarified that "the proximate cause" means "the sole cause":

> In this case involving the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*, the first issue is whether the phrase "the proximate cause" in MCL 418.375(2) means the sole proximate cause, i.e., "the one most immediate, efficient, and direct cause of the injury or damage." We conclude that it does, as we did in construing the identical phrase in the governmental tort liability act (GTLA), MCL 691.1401 *et seq*, in *Robinson v Detroit*, * * *.
>
> (476 Mich, 498-499)

Pursuant to *Paige, supra*, the immunity afforded by MCL 691.1407(2) cannot be avoided unless it is established that the conduct of the governmental employee constituted the "sole cause" of the injury. Certainly Harman's conduct could not be found to be the only cause of plaintiff's injury as he had nothing to do with whatever event caused Beals to slip under water and fail to reemerge. See, *e.g.*, *Oliver v Smith*, 290 Mich App 678, 686 (2010) ["Taking the evidence in the light most favorable to plaintiff, there was simply no evidence establishing that it was defendant's acts alone that were 'the one most immediate, efficient, and direct cause preceding (plaintiff's) injury."], and *Garlick v Harless*, CA #317650 (11/20/2014), 2014 WL 6602705 ["Therefore, plaintiff's conduct was a contributing cause and defendant's conduct could not be *the* proximate cause of injury."]

Even if "the proximate cause" is not construed to mean "the sole cause," it cannot be construed broadly enough to include the conduct of the lifeguard in this case, which conduct may arguably have been reckless, but was not malicious and did not result from a

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deliberate choice to harm Beals or ignore his plight. In *Moning v Alfono*, 400 Mich 425, 438 (1977), this Court noted that the question of proximate cause is a policy question, often indistinguishable from the question of duty, which asks whether the conduct at issue was "so significant and important a cause (of loss * * *) that the defendant should be legally responsible." In other words, the question remains whether the law *should* impose liability because of certain conduct, even if that conduct breached the relevant standard of care, and even if the conduct was a cause in fact of the injuries sustained. As explained in *Skinner v Square D*, 445 Mich 153, 162-163 (1994):

> * * * We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "proximate cause." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977).
>
> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Prosser & Keeton, Torts (5th ed.) §41, p 266. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.* * *

And as explained further in Prosser & Keeton, Torts (5th ed.), §42, pp 272-273:

> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injuries, there remains the question of whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the

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> conduct to the consequences which have in fact occurred. * * *
> [footnotes omitted]

When a governmental employee's conduct has been questioned, examination of the causative element requires that the conduct constitute "the proximate cause" before (as a matter of policy) liability may be imposed. As with the question of "proximate cause", the determination of "the proximate cause" involves the policy question of whether the governmental defendant *should* be legally responsible for the result to which his conduct allegedly contributed. However, unlike the considerations relevant to a determination of "proximate cause", the relevant policy decision in these cases was made by the legislature when it enacted MCL 691.1407(2). Consistent with its acknowledged intent of a broad grant of immunity, the legislature chose to significantly restrict the circumstances where suit would be permissible, even in the presence of gross negligence, and even if some causal relationship could be established.

In many, and perhaps most, circumstances there may be no one cause which constitutes "the proximate cause" of the plaintiff's injuries. Rather, there may be more than one proximate cause, each of which is sufficient to impose legal liability on each of the actors. Yet, pursuant to MCL 691.1407(2), legal liability may not be imposed on a governmental employee unless the grossly negligent conduct of that employee is so significant a cause as to be denominated "the" proximate cause. Even in circumstances where there may be no one cause that is the immediate cause, and the efficient cause, and the direct cause – in other words, if there is no one cause that may be deemed the "sole"

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legal cause – governmental immunity still precludes suit. It is only when the governmental conduct can be said to be the sole legal cause that immunity is avoided.

In the case at bar it suffices to support summary disposition that, as a matter of law, the defendant's conduct could not be found to constitute the one most immediate, efficient, and direct cause of the injury or damage to William Beals. Arguing otherwise, plaintiff has suggested that this case is different from others previously considered by this Court because there is no evidence that it was the fault of either plaintiff or anyone else that caused him to submerge and/or fail to reemerge. Focusing on fault, however, begs the question. Fault or otherwise, there was a "cause" for him to slip under the water. Although plaintiff does not know what that cause was, it was that cause that was "the proximate cause" of loss. It matters not whether it was a medical condition, or whether plaintiff tried to see how long he could hold his breath and aspirated water, or whether he was held down by another swimmer, or a myriad of other speculative explanations as for which there is no evidence. The legislature has determined that, even in the absence of such evidence, and even in the absence of the fault of another party, as long as the governmental conduct was not "the proximate cause" of the injury, immunity applies to bar suit.

This Court should grant leave to appeal and reverse the opinion of the Court of Appeals in this case.

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RELIEF REQUESTED

The Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Michigan Townships Association respectfully request that this Honorable Court grant the pending application for leave to appeal, reverse the Court of Appeals, and direct that judgment be entered in favor of William J. Harman.

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