Case No. 16-1346

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MALKORZATA KRAWCZYK, personal representative of Estate of Robert Klepacki,

Plaintiff-Appellee,

v.

TOWNSHIP OF HAGAR,

Defendant,

AND

IZZY DIMAGGIO, Hagar Township Supervisor; DEBORAH L. KELLEY, Hagar Township Clerk,

Defendants-Appellants.

On Appeal from the United States District Court
Western District of Michigan, Southern Division
Case No. 1:14-cv-00914

BRIEF OF MICHIGAN TOWNSHIPS ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL, AND THE PUBLIC CORPORATION LAW SECTION AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, Michigan Townships Association, Michigan Municipal League, Michigan Municipal League Liability & Property Pool, and the Public Corporation Law Section Council make the following disclosures:

1. *Is said party a subsidiary or affiliate of a publicly owned corporation?* No.

2. *Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome?* No.

DATED: July 1, 2016

/s/Mary Massaron
Mary Massaron

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Michigan Townships Association (hereinafter "MTA") is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan 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 of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships.

Amicus curiae Michigan Municipal League (hereinafter, "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 478 are also members of the Michigan Municipal League Legal Defense Fund (the

[1] Pursuant to Fed. R. App. P. 29, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, their members, or counsel, has made a monetary contribution to the preparation or submission of this brief.

"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 of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys.[2]

Amicus curiae Michigan Municipal League Liability & Property Pool (hereinafter "MMLLPP") 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 MMLLPP are to establish and to administer municipal risk management service, to reduce the incidents of property and casualty losses occurring in the operation of local government functions and to defend MMLLPP's members against liability losses.

Amicus curiae the Public Corporation Law Section of the State Bar of Michigan (hereafter "PCLS") is a voluntary membership section of the State

[2] Clyde J. Robinson, city attorney, Kalamazoo; John C. Schrier, city attorney, Muskegon; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; and William C. Mathewson, general counsel, Michigan Municipal League.

Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The PCLS provides education, information, and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The PCLS is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the PCLS participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous amicus curiae briefs in state and federal courts.

The Public Corporation Law Section Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this amicus curiae brief was authorized at the May 13, 2016 meeting of the Council. A quorum of the Council was present at the meeting (14 members), and the motion passed unanimously, 14-0. The position expressed in this amicus curiae brief is that of the PCLS only and is not the position of the State Bar of Michigan.

Amici have a strong interest in the correct and consistent interpretation of the Michigan Governmental Tort Liability Act ("GTLA"), M.C.L. § 691.1401 *et seq*., which is vitally important to Michigan's local governments. They have been involved in the legislative efforts to enact the GTLA and its amendments. They have also taken a keen interest in assuring its proper interpretation. Because of the critically important nature of governmental immunity to Michigan's public officials, these groups regularly file amicus briefs addressing the issues before state and federal courts. And these groups have great expertise regarding the correct understanding of the statute's provisions.

Because the decision in this case will bear on the protections available to public employees and officials under Michigan law, it is vital that the Court embrace a view that is consistent with that adhered to by the Michigan Supreme Court. The case presents issues involving how to evaluate whether an official is entitled to absolute immunity as the top executive. It also involves the issue of how to determine whether a government employee is "the proximate cause" of a plaintiff's injury; an analysis carefully refined by the Michigan Supreme Court over the last fifteen years since its decision in *Robinson v. Detroit*, 462 Mich. 439; 613 N.W.2d 307 (2000). The groups offering to serve as amici in this appeal have a strong interest in assuring that this Circuit's interpretation of Michigan's GTLA is both correct and consistent

with that of the Michigan Supreme Court, in order to provide the state's public officials the immunity to which they are entitled and to avoid forum shopping. Amici believe that the attached brief, which they proffer in support of Defendants-Appellants, Izzy DiMaggio and Deborah L. Kelley, will assist the Court in resolving the issues presented.

SUMMARY OF THE ARGUMENT

The district court erred in denying summary judgment to Defendants-Appellants, Izzy DiMaggio, Hagar Township Supervisor, and Deborah L. Kelley. Hagar Township Clerk (collectively, "Defendants") on claims of gross negligence brought by Plaintiff, the Estate of Robert Klepacki, Deceased, by its Personal Representative, Malgorzata Krawczyk, because it failed to follow Michigan authority on governmental immunity as it is required to do under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Under Michigan's GTLA, when a defendant raises the affirmative defense of individual governmental immunity, as Defendants did here, the court must determine whether the individual is entitled to absolute immunity under M.C.L. § 691.1407(5). *Odom v. Wayne Cty.*, 482 Mich. 459, 479; 760 N.W.2d 217 (2008). That section provides that "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." When determining whether the government official in question is "the elective or highest appointive executive official" and whether he or she "acting within the scope" of his or her executive authority, Michigan courts do not require extensive proofs, but rather, they turn to controlling statutes that

authorize a public official's position and define his or her duties. *See e.g.*, *Petipren v. Jaskowski*, 494 Mich. 190, 194; 833 N.W.2d 247 (2013), *Armstrong v. Ypsilanti Charter Twp*, 248 Mich. App. 573, 588, 592; 640 N.W.2d 321 (2001).

It follows that the district court here needed only to reference the applicable statutes governing townships to determine that the supervisor and clerk are elected executive officials responsible for conducting township business and are therefore entitled to absolute immunity. *See* M.C.L. § 41.70, M.C.L. § 168.358(1). Indeed, Plaintiff's complaint acknowledges that Defendants had the authority to close the beach and issue warnings regarding rip currents. Thus, the district court erred in denying summary judgment to Defendants and its order must be reversed.

Even under the standard for lower level employees, Defendants are entitled to governmental immunity. M.C.L. § 691.1407(2)(c) provides in clear and unambiguous language that a governmental employee retains his individual immunity from tort liability unless his conduct amounts to gross negligence and that gross negligence is "the" proximate cause of the injury or damage. The Michigan Supreme Court has defined "the proximate cause" as "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson*, 462 Mich. at 458-462. Michigan courts – and this Court, when

applying Michigan law -- have routinely declined to find a defendant's conduct "the" proximate cause of the injury where the plaintiff's own conduct, or other factors, were more directly and casually related to the injury sustained. *See e.g*. *Kruger v. White Lake Twp*., 250 Mich. App. 622, 626-627; 648 N.W.2d 660 (2002); *Beals v. Michigan*, 497 Mich. 363; 871 N.W.2d 5, reh den sub nom. *Estate of Beals v. State*, 498 Mich. 877; 869 N.W.2d 273 (2015), *Jasinski v. Tyler*, 729 F.3d 531 (6th Cir. 2013). Even if Defendants breached a duty to close the beach or provide additional rip current warnings other than those already posted, they did not compel the decedent, Robert Klepacki, to enter the water. Once in the water, the rip current caused Klepacki's death. Therefore, as a matter of law, under controlling Michigan precedent, Defendants cannot be the proximate cause of Klepacki's death.

ARGUMENT

The District Court Erred In Denying Defendants' Motion For Summary Judgment Because Defendants Are Entitled To Absolute Immunity, And In Any Event, Their Conduct Was Not The One Most Immediate Efficient, And Direct Cause Of Klepacki's Death

If left to stand, the district court's decision denying Defendants governmental immunity on Plaintiff's gross negligence claims will undermine the very purpose of Michigan's GTLA, which is to protect the state not only from liability, but also from the great public expense of having to contest a trial. *Odom*, 482 Mich at 478. In denying Defendants absolute immunity as the highest elected executive officials under M.C.L. § 691.1407(5), and in further denying them immunity under the standard used for lower level governmental employees, M.C.L. § 691.1407(2), the district court ignored its mandate to apply state law in accordance with the controlling decisions of the state supreme court. *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys. In*c., 249 F.3d 450, 454 (6th Cir.2001); *Standard Fire Ins. Co. v. Ford Motor Co*., 723 F.3d 690, 692 (6th Cir.2013); *Erie*, 304 U.S. at 78.

"Faithful application of a state's law requires federal courts to anticipate how the relevant state's highest court would rule in the case . . . ." *Berrington v. Wal-Mart Stores, Inc*., 696 F.3d 604, 607-08 (6th Cir. 2012). "The purpose of the *Erie* doctrine is to have diversity cases decided under the same

substantive rules as state cases so as to eliminate forum shopping and inequitable administration of the law." *Blaha v. AH Robins & Co.*, 708 F.2d 238, 239-40 (6th Cir. 1983). But the district court here did not follow – indeed it did not even reference – controlling Michigan authority on governmental immunity.

According to the Michigan Supreme Court, absolute immunity is necessary for unfettered governmental decision making and is intended to protect select public employees who are delegated policy-making powers. *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567, 632-633; 363 N.W.2d 641 (1984). When a defendant raises the affirmative defense of individual governmental immunity, the court must determine whether the individual is entitled to absolute immunity under M.C.L. § 691.1407(5). *Odom,* 482 Mich. at 479.

M.C.L. § 691.1407(5) provides that "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." As illustrated by the controlling case law, *see e.g*. *Armstrong*, 248 Mich. App at 588, *Petipren*, 494 Mich. at 194, a court should make this determination by examining the relevant statutes from which the public

official derives his or her authority. Here, the district court did not even attempt such an analysis and instead ruled that Defendants' proofs were insufficient. This error requires reversal.

The district court's decision regarding immunity under M.C.L. § 691.1407(2) is similarly lacking in a discussion of, or adherence to, controlling Michigan authority. M.C.L. § 691.1407(2)(c) provides in clear and unambiguous language that a governmental employee retains his individual immunity from tort liability unless his conduct amounts to gross negligence and that gross negligence is "the" proximate cause of the injury or damage. The Michigan Supreme Court has defined "the" proximate cause as "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson*, 462 Mich. at 458-462. Although the district court's opinion references Defendants' reliance on *Robinson*, it engaged in no analysis under that decision and instead summarily concluded "Plaintiff's First Amended Complaint sufficiently pleads a claim in avoidance of governmental immunity based on gross negligence." R.E. 27, Opinion, Pg ID# 157-158. The district court's order must be reversed because any alleged failure by Defendants to provide a warning about rip currents to Klepacki is not the one most immediate, efficient, and direct cause of his death, but rather, it was the rip current that occurred while Klepacki was swimming.

A. Defendants are entitled to absolute immunity because they are the highest elected executive officials who acted within the scope of their authority.

Under Michigan's GTLA, when a defendant raises the affirmative defense of individual governmental immunity, the court must determine whether the individual is entitled to absolute immunity under M.C.L. § 691.1407(5). *Odom,* 482 Mich. at 479. That statute provides: "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."

1. Hagar Township is a level of government.

Accordingly, when a defendant claims absolute immunity, a court must first decide whether a governmental entity is a level of government. *Grahovac v. Munising Twp*., 263 Mich. App. 589, 593; 689 N.W.2d 498 (2004). It is undisputed that a township, such as Hagar Township, is a level of government. *See id*. at 594; *Nalepa v. Plymouth-Canton Cmty. Sch. Dist*., 207 Mich. App. 580,

587; 525 N.W.2d 897 (1994), aff'd on other grounds sub nom. *Nalepa v. Encyclopedia Britannica Educ. Corp.*, 450 Mich. 934; 548 N.W.2d 625 (1995).[3]

2. DiMaggio, as supervisor, and Kelley, as clerk are the highest elected executive officials.

The next consideration is whether the government official in question is "the elective or highest appointive executive official."[4] To make this determination, the courts do not require extensive proofs, but rather, they turn to controlling statutes. For example, in *Nalepa*, the Court of Appeals determined that a school district was a level of government, and then turned to whether the superintendent and school board members were entitled to absolute governmental immunity. Citing the relevant statute, the Court first determined that "the school board members are the elective executive officials of their level of government." *Nalepa*, 207 Mich. App. at 587-88, citing M.C.L. § 380.1101. With respect to the superintendent, the court again

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[3] The decisions of an intermediate state appellate court are persuasive in this Court's interpretation of that state's law. *CFE Racing Products, Inc. v BMF Wheels, Inc.*, 793 F.3d 571, 597 (6th Cir. 2015).

[4] The district court did not appear to rule on this point, but it did note Plaintiff's argument that both the supervisor and the clerk could not be entitled to absolute immunity. However, the Michigan Court of Appeals has observed that the proposition "that only a single official is entitled to immunity under M.C.L. § 691.1407(5) is contrary to binding precedent." *Martin v. Niles Hous. Comm'n*, No. 299983, 2012 WL 385603, at *2 (Mich. Ct. App. Feb. 7, 2012) (unpublished), citing *Armstrong*, 248 Mich. App. at 592-596 and *Nalepa*, 207 Mich. App. at 587-588.

referenced the then-controlling statutory provisions, which established that the superintendent (1) is appointed by the board, M.C.L. § 380.247; (2) is an executive official who executes the dictates of the school board, M.C.L. § 380.248(h), and is responsible for the day-to-day operation of the school, M.C.L. § 380.248(c) and (h); and (3) is the highest appointive executive of the school district because he is employed by, and answers only to, the school board, which is the elective body of the district, M.C.L. § 380.247. *Id*. at 589.

Likewise, Michigan case law recognizing that police chiefs are the highest executive officials in their departments simply refer to statutes or previous case law to make this determination and do not require extraordinary proofs from the defendant asserting absolute immunity. For example, in *Payton v. Detroit*, 211 Mich. App. 375, 394; 536 N.W.2d 233 (1995), the Court of Appeals observed: "As this Court held in *Meadows v. Detroit*, 164 Mich. App. 418, 426-427; 418 N.W.2d 100 (1987), when acting in his executive authority, the police chief of the City of Detroit is absolutely immune from tort liability. Accordingly, we agree . . . that the trial court erred in denying [the defendant's] motion for summary disposition regarding the tort claims . . . ." In *Meadows*, the Court merely observed "[t]he [Detroit] city charter, article 7, ch. 11, § 7–1106, describes the chief of police as the chief executive officer of the police department . . . ." who was therefore entitled to

absolute immunity. 16 Mich. App. at 426-27. See also *Washington v. Starke*, 173 Mich. App. 230, 240-241; 433 N.W.2d 834 (1988) (holding that the highest executive in Benton Harbor's police department was entitled to absolute immunity).

It follows that the district court should have referenced the applicable statutes governing townships, M.C.L. § 41 *et seq*., to determine that the supervisor and clerk are elected executive officials entitled to absolute immunity. M.C.L. § 41.70 provides that "the supervisor, 2 trustees, the township treasurer, and the township clerk constitute the township board, and any 3 of them constitute a quorum for the transaction of business at a meeting of the township board." Likewise, under M.C.L. §168.358(1), the township supervisor and clerk are elected officials. Thus, DiMaggio, as supervisor, and Kelley, as clerk, along with others on the board are the elected executive officials responsible for executing all business of the township and are entitled to absolute immunity. See *Armstrong*, 248 Mich. App. at 588 (noting that, under M.C.L. § 42.5, a charter township board consists of members with equal voting power, and therefore finding that M.C.L. § 691.1407(5) was applicable to individual board members where the board members acted within the scope of their legislative authority); *Schulze v. Claybanks Twp*., 2009 WL 349757, at *5 (Mich. Ct. App. No. 282428, Feb. 12,

2009) (unpublished) (Relying on M.C.L. § 41.70; M.C.L. § 125.1502a(i); M.C.L. § 125.2652(i); M.C.L. § 259.109(k); M.C.L. § 400.1103(2), the court determined that the township supervisor was absolutely immune from tort liability as the highest executive official at the township level.).

3. Defendants acted within the scope of their authority.

The Michigan Supreme Court recently explained that "executive authority," as used in M.C.L. § 691.1407(5), "encompasses all authority vested in the highest executive official by virtue of his or her role in the executive branch, including the authority to engage in tasks that might also be performed by lower-level employees." *Petipren*, 494 Mich. at 194. Accordingly, "the highest executive official is entitled to absolute immunity under M.C.L. § 691.1407(5) even when performing acts that might otherwise be performed by a lower-level employee if those actions fall within the authority vested in the official by virtue of his or her role as an executive official." *Id.*

Generally, "[t]he determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of

government." *Am. Transmissions, Inc. v. Attorney Gen*., 454 Mich. 135, 141; 560 N.W.2d 50 (1997), quoting *Marrocco v. Randlett*, 431 Mich. 700, 711; 433 N.W.2d 68 (1988). The official's motive is irrelevant; the court must limit its consideration to whether the official was acting in the scope of his or her authority. *Id*. at 143-44.

The district court appears to have made its decision based on a perceived lack of evidence regarding the scope of Defendants' authority. The court relied on a footnote in an unpublished opinion of the Michigan Court of Appeals to deny defendants absolute immunity instead of following published Michigan case law which looks to relevant statutes to determine whether Defendants were acting within the scope of their executive authority when they allegedly failed to close the beach or issue a rip current warning. The district court cited *Rankin v. City of Highland Park*, 2015 WL 773734, at *8 n.4 (Mich. Ct. App. No. 318385, Feb. 24, 2015), and observed that the Michigan Court of Appeals denied absolute immunity under M.C.L. § 691.1407(5) because "the defendants had not provided a discussion of the executive authority possessed by each official as demonstrated by local law defining the officials' powers." R.E. 27, Opinion, Pg ID 156-57.[5] The district court thus

[5] Notably, however, in *Rankin*, the Court of Appeals affirmed the grant of governmental immunity under M.C.L. § 691.1407(2). 2015 WL 773734, at *7.

concluded that, in this case as well, Defendants did not establish that they are entitled to absolute immunity. Again, however, the controlling Michigan case law demonstrates that the court should rely on the relevant statutes, not detailed proofs from the defendant, regarding the scope of authority.

In *Petipren,* the Supreme Court considered whether the police chief's executive authority included the ability to conduct an arrest. The Court noted that "[b]y statute, village police officers are vested 'with authority necessary for the preservation of quiet and good order in the village.' " *Petipren*, 494 Mich. at 213, citing M.C.L. § 70.14. "They are similarly vested 'within the village ... with all the powers conferred upon sheriffs for the preservation of quiet and good order....' " *Id*. at n. 53, quoting M.C.L. § 70.16. The Court further observed that, "[a]s officers charged with the preservation of public peace, village police officers possess statutory authority to conduct an arrest." *Id*. at 213, citing M.C.L. § 70.14 (authorizing village police to "suppress ... disturbances, and breaches of the peace," and to "apprehend upon view any person found violating a state law or village ordinance in a manner involving a breach of the peace"); M.C.L. § 764.15(1) (describing the circumstances in which a "peace officer" may conduct an arrest without a warrant). Additionally, a police chief is "charged with the duty to 'see that all the ordinances and regulations of the council, made for the preservation of quiet,

and good order, and the protection of persons and property, are promptly enforced.'" *Id*., quoting M.C.L. § 70.15. Thus, although the Court also considered the police chief's written job description and his affidavit, it relied primarily on the statutory authority to conclude that "[w]here, as here, the highest appointive executive official acts within the authority vested in the official by virtue of his or her executive position and there are no questions of material fact, that official is entitled to absolute immunity as a matter of law." *Id*. at 215.

In *Armstrong*, the Court held that governmental immunity protected township board members from liability for several claims brought by the plaintiff, a former administrative assistant, stemming from the township board's vote to eliminate his position. The Court observed that under M.C.L. § 42.9 "the township board has the authority to create positions within the township government. The statute is merely silent with respect to abolishing administrative positions. However, the fact that M.C.L. § 42.9 specifically denies a township board the authority to abolish the offices of township clerk and township treasurer indicates that other offices can be abolished." *Id*. at 589-90.

In this case, which was a motion on the pleadings, Plaintiff's complaint acknowledges that Defendants had the authority to close the beach and issue

warnings regarding rip currents – indeed, the entire basis of Plaintiff's claim is that Defendants failed to act in accordance with this authority. R.E. 15, First Amended Complaint ¶¶ 26, 42, 52-56, 59, 71-73, 80-81, 87-88, Pg ID # 51-55, 58-62. And again, as noted, M.C.L. § 41.70 provides that Defendants are responsible for transacting all township business. Thus, any act or failure to act in closing the beach or posting rip current warnings is within the scope of Defendants' authority, and therefore, as the elected executive officials, they are entitled to absolute immunity. The district court erred in concluding otherwise and its decision must be reversed.

B. Defendants are entitled to governmental immunity because any failure to close the beach or issue a rip current warning was not the proximate cause of Klepacki's death.

1. Michigan law is clear that, to be liable for gross negligence, a government employee's conduct must be the one most immediate, efficient, and direct cause of the injury or damage.

Michigan's GTLA "takes great pains to protect governmental employees to enable them to enjoy a certain degree of security as they go about performing their jobs." *Gracey v. Wayne County Clerk*, 213 Mich. App. 412, 418; 540 N.W.2d 710 (1995), overruled on other gds *Am Transmissions, Inc. v. Att'y General*, 454 Mich. 135 (1997). Under the GTLA, when a plaintiff pleads a

negligent tort and the defendant is a lower ranking governmental employee[6] who raises the affirmative defense of individual government immunity, a court should follow M.C.L. § 691.1407(2) and determine if the individual caused an injury or damage while acting in the course of employment or service or on behalf of his governmental employer and whether:

> (a) the individual was acting or reasonably believed that he was acting within the scope of his authority,
>
> (b) the governmental agency was engaged in the exercise or discharge of a governmental function, and
>
> (c) the individual's conduct amounted to gross negligence that was the proximate cause of the injury or damage.

Odom, 482 Mich. at 479-480, quoting M.C.L. § 691.1407(2). Here, the element in dispute is whether Defendants' conduct was the proximate cause of Klepacki's drowning.

M.C.L. § 691.1407(2)(c) provides in clear and unambiguous language that a governmental employee retains his individual immunity from tort liability unless his conduct amounts to gross negligence and that gross negligence is "the" proximate cause of the injury or damage. Thus, even if an individual's actions rise to the level of gross negligence, immunity still applies

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[6] As discussed above, the district court erred in not determining that Defendants were the highest ranking elected officials entitled to absolute immunity.

if the plaintiff fails to plead and prove that the individual's actions do not constitute "the" proximate cause. *Miller v. Lord*, 262 Mich. App. 640, 644; 686 N.W.2d 800 (2004). The Michigan Supreme Court has defined "the proximate cause" as "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson*, 462 Mich. at 458-462. The Court noted the difference between "a proximate cause" and "the proximate cause" and observed that "the Legislature has shown an awareness that it actually knows that the two phrases are different. It has done this by utilizing the phrase 'a proximate cause' in at least five statutes' and has used the phrase 'the proximate cause' in at least thirteen other statutes." *Id*. at 460. In short, "[t]o be held liable under the GTLA, a defendant's gross negligence must be *the* most immediate cause of a plaintiff's injuries—it is not enough that the defendant's actions simply be 'a' proximate cause." *Tarlea v. Crabtree*, 263 Mich. App. 80, 92; 687 N.W.2d 333 (2004) (emphasis in original).

The Michigan Supreme Court reaffirmed this reasoning in later cases. In *Paige v. City of Sterling Heights*, 476 Mich. 495; 720 N.W.2d 219 (2006), the Supreme Court was asked to determine the proper meaning of the phrase "the proximate cause," as contrasted with "a proximate cause," the former being found in the Worker's Disability Compensation Act, M.C.L. § 418.101 *et seq*. In

so ruling that "the proximate cause" contemplated but one sole proximate cause, the Court again noted the significant difference between "a" and "the":

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

Id. at 507-508, quoting *Hagerman v. Gencorp Automotive*, 457 Mich. 720, 753-54, 579 N.W.2d 347 (1998) (dissenting opinion).

Adopting this analysis, the Court determined that the phrase "the proximate cause," as used in M.C.L. § 418.375(2) of the Worker's Disability Compensation Act referred to the sole proximate cause. *Paige*, 476 Mich. at 508-512. In so doing, the Court noted that, in *Robinson*, it addressed the identical phrase as found in the GTLA. *Id*. at 499. In both cases, the Court read the statutory language to mean "sole" proximate cause.

This Court has also recognized the importance of *Robinson* as it applies to the proximate cause analysis when addressing governmental immunity under Michigan law. "The Michigan Supreme Court has held that an

employee's conduct is 'the proximate cause' of an injury only when it is 'the one most immediate, efficient, and direct cause preceding an injury.'" *Grabow v. Co of Macomb*, 580 F.App'x 300, 312 (6th Cir. 2014), quoting *Robinson*, 462 Mich. 439. "*Robinson* clearly explains that the proximate-cause inquiry under the GTLA is different from proximate-cause analysis in other contexts because of the use of the definite article 'the' in the GTLA." *Jasinski*, 729 F.3d at 544. Thus, "[e]stablishing proximate cause is a high bar." *Walker v. Detroit Pub. Sch. Dist.*, 535 F.App'x 461, 463 (6th Cir. 2013). Plaintiff failed to clear the bar here and the district court erred in concluding otherwise.

2. The district court's opinion disregarded controlling precedent.

In its opinion, the district court did not even attempt to determine how the Michigan Supreme Court – or even this Court – would rule on what constitutes "the" proximate cause in this case. In fact, the court seemed to have misunderstood Defendants' argument that the sole proximate cause of Klepacki's drowning, as set forth in the complaint, was the rip current. R.E. 24, Defendants' Motion for Summary Judgment, Pg ID# 95. The district court disagreed with Defendants' contention that the allegations in the complaint implicated the rip current as "the" proximate cause. The district court implies that Defendants mischaracterized Plaintiff's argument because, in the district

court's view, "Plaintiff argues that the question of proximate cause always depends in part on foreseeability, and '[p]roximate cause is that which bridges to produce the particular consequences without the intervention of any independent, unforeseen cause, without which the injury would not have occurred.'" R.E. 27, Opinion, Pg ID# 158. But the proper course for the district court is not to determine how Plaintiff would decide the issue of proximate cause, but instead, it must determine how the Michigan Supreme Court would do so. *Allstate Ins.*, 249 F.3d at 454.

The district court did not engage in any discussion of Michigan law, rather, it simply concluded that "proximate cause is generally a fact question to be decided by the jury," and thus "Plaintiff's First Amended Complaint sufficiently pleads a claim in avoidance of governmental immunity based on gross negligence. The issue of proximate cause is not properly determined on the basis of the pleadings under the circumstances presented." *Id.*, Pg ID 157-158. To the contrary, the Michigan Supreme Court has plainly held that "[w]hen the material facts are not in dispute, this Court may decide whether a plaintiff's claim is barred by immunity as a matter of law." *Petipren*, 494 Mich. at 201.

The Michigan Supreme Court's controlling decisions, as set forth above, make clear that Defendants' alleged failure to close the beach or warn of rip

currents, even if grossly negligent, does not amount to the sole proximate cause of Klepacki's drowning. Michigan courts have routinely declined to find a defendant's conduct "the" proximate cause of the injury where the plaintiff's own conduct, or other factors, were more directly and casually related to the injury sustained. *See e.g*. *Kruger v. White Lake Twp.*, 250 Mich. App. 622, 626-627; 648 N.W.2d 660 (2002) ("The" proximate cause of plaintiff's decedent's death was not any gross negligence of police officers who had detained the decedent but rather her escape and flight from the police station, her running onto the highway and into traffic, and the unidentified driver hitting her); *Litzenberg v. Jeffrey*, 2001 WL 4375211 (Mich. App. No. 299217, September 20, 2011) (unpublished) (Coach not responsible when plaintiff, an athletic trainer, got hit in the head by a lacrosse ball while working on the sidelines during a game, despite fact that coach directed his players to practice along the sidelines after having been warned of the danger; the one most immediate and direct cause of the injury was the ball thrown by the lacrosse player.); *Willis v. Charter Township of Emmett*, 2012 WL 5193210 (Mich. App. No. 301324, October 18, 2012) (unpublished) (Plaintiff's decedent was erroneously pronounced dead at the scene of a multi-vehicle accident and later died; police officers, EMTs, the medical examiner, and others were not "the" proximate cause, but rather, "the most immediate, efficient and direct

cause of the decedent's injury was the vehicular accident."); *Parent v. Lapeer Community Schools*, 2011 WL 2555719 (Mich. App. No. 297656, June 28, 2011) (unpublished) (Mother of handicapped student sued school district, principal, and various school employees claiming her son was injured when they left him unsupervised; the Michigan court ruled that the one most immediate, efficient and direct cause of the injury was the fact that another student's sweatshirt accidentally caught on the controller of the handicapped child's wheelchair, which caused the chair to lurch forward into the computer table, it was not the absence of an adult in the room).

This Court has also recognized the limitations imposed by the Michigan Supreme Court's definition of "the" proximate cause. For example, in *Jasinski,* 729 F.3d at 533, the plaintiff sued officials and employees of Michigan Child Protective Services and its parent-agency, the Michigan Department of Human Services for gross negligence, among other causes of action, arising from the murder of her son, Nicholas Braman ("Nicholas"), by his father, Oliver Wayne Braman ("Oliver"). The complaint alleged that over the course of nine years, Child Protective Services received numerous complaints regarding Oliver's abuse and neglect of Nicholas and his siblings, which it investigated and substantiated. Yet Nicholas was not removed from the home. *Id*. at 534. Nevertheless, this Court, citing *Robinson*, held that "[w]ithout altogether

ignoring Oliver's role in causing Nicholas's death, CPS employees' conduct cannot be said to be the 'most immediate, efficient, and direct cause' of the injury." *Id*. at 545. See also *Walker*, 535 F.App'x at 467-68 (School officials' failure, when they broke up a fight, to take some additional disciplinary or preventative measure against one of the participants was not the proximate cause of the plaintiffs' injuries; the participant and others who perpetrated a shooting were the proximate cause of the plaintiffs' injuries.).

The Michigan Supreme Court recently reaffirmed *Robinson*'s concept of sole proximate cause in *Beals v. Michigan*, 497 Mich. 363, 871 N.W.2d 5, reh den sub nom. *Estate of Beals v. State*, 498 Mich. 877; 869 N.W.2d 273 (2015), which also involved a drowning. The deceased in that case, William Beals, was a 19-year-old diagnosed with a learning disability and autism. *Id*. at 366. He drowned while swimming in a pool with 24 other disabled students at the Michigan Career and Technical Institute, a state residential facility providing vocational and technical training to students with disabilities. *Id*. The only lifeguard on duty, defendant William Harman, was both an employee and student of MCTI; he reportedly suffered from attention deficit disorder. *Id*. at 367. The evidence suggested that Beals "waded into the shallow end of the pool where he 'surface dove' into the deep end and continued to swim underwater. He never resurfaced under his own power." *Id*. There was no

evidence that Beals visibly struggled in the water or that Harman or any of the other students in the pool area witnessed Beals in distress. *Id*.

The estate brought suit against Harman and the state of Michigan, claiming that Harman was grossly negligent because, among other reasons, he never once sat in the lifeguard observation stand and he was playing with a football and otherwise distracted. *Beals,* 497 Mich. at 368. The trial court denied Harman's motion for summary disposition on the basis of governmental immunity, rejecting the argument that Harman was not "the proximate cause" of Beals' death. *Id*. The Court of Appeals affirmed, concluding that reasonable minds could conclude that Harman's failure to intervene "constituted the one most immediate, efficient, and direct cause of Beals's death." *Id*.

The Supreme Court disagreed, explaining that, under *Robinson*, Harman's connection to the drowning was too tenuous to hold him liable:

> [D]efendant's failure to intervene in the deceased's drowning cannot logically constitute the "most immediate, efficient, and direct cause" of his death. The causal connection between defendant's failure to intervene and the deceased's drowning is simply too tenuous for it to constitute the proximate cause of his death. In our view, it is readily apparent that the far more "immediate, efficient, and direct cause" of the deceased's death was that which caused him to remain submerged in the deep end of the pool without resurfacing. That the reason for the deceased's prolonged submersion in the water is unknown does

> not make that unidentified reason any less the proximate cause of his death.

Beals, 497 Mich. at 366. The Court further noted that Harman did not take any affirmative action to cause the drowning; he did not "cause Beals to enter the pool and swim to the deep end, . . . nor did Harman cause Beals to remain submerged in the water, which was undeniably a more direct cause of Beals's death than any inaction on the part of Harman." *Id*. at 373-74.

Importantly, in explaining where the Court of Appeals had gone wrong, the Supreme Court observed that that court had conflated duty with proximate cause: "[T]he majority focused on Harman's obligation to rescue Beals and reasoned that Harman's grossly negligent conduct resulted in his failure to notice Beals's distress and respond appropriately. While the majority pointed to evidence alleging that proper intervention and rescue could have prevented Beals's death, this speculation does not establish a proximate relationship between Harman's breach and Beals's death." *Beals*, 497 Mich. at 374.

The same result must follow here. Even if Defendants breached a duty to close the beach or provide additional rip current warnings other than those already posted, they did not compel Klepacki to enter the water. Once he was in the water, the rip current caused Klepacki's death. Therefore, as a matter of

law, under controlling Michigan precedent, Defendants cannot be the proximate cause of Klepacki's death.

CONCLUSION

WHEREFORE, amici curiae, the Michigan Township Association, the Michigan Municipal League, the Michigan Municipal League Liability & Property Pool, and the Public Corporation Law Section of the State Bar of Michigan, respectfully request that this Court reverse the March 3, 2016 order of the district court denying summary judgment on the ground of governmental immunity to Defendants-Appellants, Izzy DiMaggio and Deborah L. Kelley.

Respectfully submitted,

PLUNKETT COONEY

By: /s/Mary Massaron Ross

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Dated: July 1, 2016

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is an attorney with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief on appeal;

2. The brief on appeal prepared by her office complies with the type-volume limitation, using Cambria size 14 font; and

3. The word processing system counts the number of words in the brief as 6,675.

/s/Mary Massaron
MARY MASSARON

CERTIFICATE OF SERVICE

MARY MASSARON, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 1st day of July, 2016, she caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States Court of Appeals for the Sixth Circuit, and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the US Mail.

PLUNKETT COONEY

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ADDENDUM – DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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