STATE OF MICHIGAN

IN THE SUPREME COURT

BEVERLY LUCKETT and WILLIAM LUCKETT,
as Next Friends of WILLIAM LUCKETT, IV, a minor,

Plaintiffs-Appellees,

v

RICK KITTELL,

Defendant-Appellant,

and

SOUTHEAST MACOMB SANITARY DISTRICT,
and PATRICK O'CONNELL,

Defendants.
_____/

Supreme Court
Case No. 149229

Court of Appeals
Case No. 313280

Macomb Circuit Court
Case No. 10-004265-NI

**BRIEF OF AMICI CURIAE
MICHIGAN MUNICIPAL LEAGUE,
MICHIGAN TOWNSHIPS ASSOCIATION, AND
THE PUBLIC CORPORATION LAW SECTION OF
THE STATE BAR OF MICHIGAN**

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## 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 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.

The Public Corporation Law Section of the State Bar of Michigan (PCLS) provides information, education, and analysis about issues of concern to the State Bar, through meetings, seminars, public service programs, and the like.[1] The Section Council of the State Bar of Michigan Public Corporation Law Section consists of 21 elected members, and the filing of an amicus brief in this case was approved on June 20, 2014, by a unanimous vote of the quorum of counsel members in attendance.

[1] The Public Corporation Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interests. The position expressed is that of the Public Corporation Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

## STATEMENT OF THE ISSUES

Amici Curiae, the Michigan Municipal League, Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan rely on the Statement of the Question Presented as set forth in the Application for Leave to Appeal filed on behalf of Defendant, Rick Kittell.

## STATEMENT OF FACTS

Amici Curiae, the Michigan Municipal League, Michigan Townships Association, and the Public Corporation Law Section of the State Bar of Michigan rely on the Statement of Facts as set forth in the Application for Leave to Appeal filed on behalf of Defendant, Rick Kittell.

## ARGUMENT

### THE HOLDING OF THE COURT OF APPEALS MUST BE REVERSED WHERE IT HAS CONFLATED THE QUESTIONS OF LIABILITY AND IMMUNITY, HAS EQUATED ALLEGATIONS OF NEGLIGENCE WITH EVIDENCE NECESSARY TO SUPPORT A FINDING OF GROSS NEGLIGENCE, HAS APPLIED A "BUT FOR" ANALYSIS TO THE LEGAL QUESTION OF PROXIMATE CAUSATION, AND HAS FAILED TO DISTINGUISH "PROXIMATE CAUSE" FROM THE MEANING OF "THE PROXIMATE CAUSE".

The undeniably tragic circumstances of this case are, unfortunately, analogous to other cases which assert claims against governmental defendants because of some alleged causal connection between the injury causing accident and some governmental action or inaction. In these cases, however, plaintiffs may not prevail merely by establishing the requisites for liability – duty, breach, proximate cause, damages. Rather, when confronted by a motion for summary disposition asserting governmental immunity, plaintiffs must also establish the existence of evidence sufficient to avoid the immunity that the Legislature has provided to governmental defendants. This immunity, which includes both immunity from suit and immunity from liability, is a threshold consideration. Accordingly, when considering the issue of immunity from the liability that might otherwise be imposed, the existence of some fault is necessarily assumed and the only relevant question is whether, notwithstanding the existence of duty, breach, proximate cause and damages, the plaintiffs' claims must be dismissed.

It is this question of immunity that is before this Court on the Application for Leave to Appeal filed by Defendant, Rick Kittell. One of the errors that is apparent in the

opinion of the Court of Appeals, and which requires the attention of this Court to correct, is the opinion's failure to appreciate the difference between facts that, if taken as true, might arguably be sufficient to support a finding of liability – negligence that is a proximate cause of the injury – with the more substantial facts that must be established to avoid the broad immunity that otherwise mandates dismissal of the complaint– "gross negligence" that is "the proximate cause" of the injury.[2] Even if one were to accept that the multiple inferences relied on by the Court of Appeals could, in the absence of evidence, support a finding of negligence, these inferences could not support a finding of gross negligence. Nor could a jury permissibly ignore the undisputed evidence of unsafe operation of a snowmobile, in the dark and at a high rate of speed, as the one most immediate, efficient and direct cause of the snowmobile crashing into the pier. The Court of Appeals' contrary conclusion substituted an inference of "but for" causation with evidence of the standard of causation necessary to avoid immunity. It also conflated the independent inquiries of "gross negligence" and "the proximate cause", essentially concluding that if gross negligence could reasonably be found, it would also be reasonable to find that this conduct constituted the proximate cause of the injury.

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[2]As relevant to the issue before this Court in the case at bar, the statutory language set forth in MCL 691.1407(2) clearly sets forth the general rule that "without regard to the discretionary or ministerial nature of the conduct in question, each * * * employee * * * of a governmental agency * * * is immune from tort liability for an injury to a person * * * caused by the * * * employee * * * while in the course of employment" as long as the "employee's * * * conduct does not amount to gross negligence that is the proximate cause of the injury * * *" MCL 691.1407(8)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

The facts essential to a consideration of the immunity available to Richard Kittell, an employee of the Southeast Macomb Sanitary District, is either undisputed or taken in the light most favorable to the plaintiff. During the evening hours of March 12, 2008, fourteen-year old William Luckett, IV (Billy) was operating his snowmobile on the frozen waters of Lake St. Clair, near the Rio Vista Pier, with his father, William Luckett, III (Mr. Luckett), and his father's adult friend, Brian Chambers. The Lucketts lived nearby, on a canal that led to the Lake, and Billy was an experienced snowmobiler who was very familiar with the pier and the surrounding water/ice. While the two adults stopped and talked on the ice, Billy received permission to drive his father's snowmobile. After driving east and then north away from the talking men, and away from the pier, Billy turned and drove south towards the men standing in the area of the pier at a rate of speed that was estimated by Chambers to be 75 to 80 miles per hour, and estimated by Billy's father to be 45 to 50 miles per hour. Chambers testified that he noted that the headlight of the snowmobile was on. After the snowmobile had passed the men, Chambers, who was facing the pier, saw Billy's brake lights go on and, almost immediately thereafter, heard a crash as Billy's snowmobile hit the pier.

The lighting on the pier, when fully operational, consisted of 10 spaced lights, nine of which were orange capped and continuous, while the one at end of the pier flashed white. Plaintiff alleges that, at the time of Billy' accident, the light at the end of the pier was not operating, blaming Rick Kettell. On the day of the incident, Kittell was working from 3:00 p.m. to 11:00 p.m., and one of his duties was to periodically check on the status

of the pier lights. The Dock Light Log indicated that he did so at 8:11 p.m. and that all lights were on. No witness testified to the contrary. In other words, there is no testimony in the record from any witness that the light that was normally flashing at the end of the pier was out before the accident. Indeed, Brian Chambers, who had been facing the pier before the accident, could not so state, although he did sign an affidavit that he observed that light to be out some period of time *after* the accident. Similarly, Mr. Luckett testified that it was only after the accident, when he went back to view the area, that he noted the light to be out.

On these facts the Court of Appeals reasoned that a jury could make findings of fact that would lead to inferences that could support a finding that (1) Kittell had been grossly negligent, defined in MCL 691.1407(8)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results", and (2) that Kittell's gross negligence was "the proximate cause" of the injury, defined in *Robinson v City of Detroit*, 462 Mich 439, 445-446 (2000) as "the one most immediate, efficient, and direct cause of the injury or damage." The Court below reasoned that evidence which would support a finding that the light was observed to be out *after* the accident was sufficient to permit an inference that the light was also out *before* the accident. It then added this inference (as to which there was no evidence), to an inference that Kittell was aware of the group out on the lake (as to which there was no evidence), to support a conclusion that Kittell's conduct amounted to a wilful disregard of the danger posed by the absence of a light at the end of a pier to those who operated snowmobiles. He reached

this conclusion notwithstanding that the existence of the flashing light would have been known to exist by those regularly operating snowmobiles on the ice, and its absence could, accordingly, also have been noted by those who chose to operate their snowmobiles in the dark.

Having thus found the possible existence of gross negligence, the Court of Appeals held that this conduct could also be found by a jury to constitute the one most immediate, efficient and direct cause of the accident based, again, on an inference that the light was out before the accident, and adding that inference to speculation that Billy Luckett had been trying to avoid the pier and would not have hit it had the flashing light been operating. The Court of Appeals also recognized that a jury could find to the contrary – that the one most immediate, efficient and direct cause of the accident was Billy Luckett's conduct in driving the snowmobile at a high rate of speed, at night, with the reduced ability to see obstructions.

The immunity question presented, however, is not whether the light was out, and not whether Kittell should have noted that it was out and thereby breached a duty owed to Plaintiff when, shortly before the accident, he failed to take steps intended to remedy the outage. Moreover, the question is not whether there was a causal connection between the outage and the accident. These are liability considerations, and a strong line of Michigan case precedent supports the position that neither a mere breach of duty, added to "but for" or even "proximate" causation, will avoid the immunity provided by MCL 691.1407(2). The Court of Appeals opinion is contrary to this clear line of authority and, if allowed to

stand, would permit claims to be brought and continued as to which immunity exists, thereby abrogating immunity from suit and jeopardizing immunity from liability. As accurately stated in *Tarlea v Crabtree*, 263 Mich App 80, 88 (2004):

> * * * The GTLA "takes great pains to protect government[al] employees to enable them to enjoy a certain degree of security as they go about performing their jobs." "The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law." Accordingly, when no reasonable person could find that a government[al employee's conduct was grossly negligent, our policy favors a court's timely grant of summary disposition to afford that employee the fullest protection of the GTLA immunity provision by sparing the employee the expense of an unnecessary trial. * * * [citations omitted]

### *A. The holding of the Court of Appeals which would allow a jury to find that Rick Kittell has engaged in grossly negligent conduct is contrary to the record evidence and equates allegations necessary to support a finding of negligence with evidence necessary to establish gross negligence.*

In *Maiden v Rozwood*, 461 Mich 109 (1999), this Court not only articulated the modern standards for evaluating motions for summary disposition, but it applied those standards in cases involving assertions of statutory governmental immunity and, notably, the existence of evidence sufficient to raise a genuine issue of material fact that a defendant's conduct constituted "gross negligence." As an initial matter, *Maiden* observed that "consistent with the statutory definition of gross negligence, [] evidence of ordinary negligence does not create a material question of fact concerning gross negligence" and that "a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" (461 Mich,

122-123) As the opinion notes, "[t]o hold otherwise would create a jury question premised on something less than the statutory standard." *Id*. Applying this standard to the record created in the *Maiden* case, the Court considered the uncontroverted evidence, as well as the inference that Plaintiff wished to draw from the fact that death had resulted from the governmental action, and concluded that the plaintiffs' proofs were insufficient to defeat the motion. In words equally applicable to the record in the case at bar, it explained that the plaintiff was essentially employing the doctrine of *res ipsa loquitur*, but that this argument could not create a question of fact as to gross negligence:

> Plaintiff essentially argues that because Maiden died of compressional asphyxia after being restrained, gross negligence is presumed. Plaintiff thus employs the doctrine of res ipsa loquitur to establish the existence of gross negligence. [note 10] "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). While the doctrine of res ipsa loquitur may assist in establishing ordinary negligence, the doctrine is not available where the requisite standard of conduct is gross negligence or wilful and wanton misconduct. * * *
>
> ---
>
> [note 10] The dissent raises a similar argument, stating that a jury could reasonably conclude that the cause of death supported the assertion that "defendants suffocated Mr. Maiden in a manner that evidenced a substantial lack of concern for whether they injured him." Op. at 833. The dissent's argument is essentially a classic case of the tail wagging the dog. To establish gross negligence as statutorily defined, the plaintiff must focus on the actions of the governmental employee, not on the result of those actions. That death resulted from the restraint does not support the conclusion that defendant's actions were so reckless "as to demonstrate a substantial lack of concern for whether an injury results."
>
> (461 Mich, 127)

In the case at bar the opinion of the Court of Appeals would allow a finding of gross negligence premised on nothing more than an alleged failure to begin to take steps to remedy an outage shortly before a snowmobile ran into the pier. Gross negligence is not established by an allegation that the actor could have done something more than he did, but is, rather, conduct from which an objective observer would reasonably conclude "that the actor simply did not care about the safety or welfare of those in his charge." *Tarlea, supra*, 263 Mich App, 90. The Court of Appeals in the case at bar wished to fill the evidentiary void by suggesting that it would be permissible for a jury to find that Rick Kittell knew that the light was out, knew that there was snowmobiling going on in the area of the pier, understood that the outage presented a substantial risk of harm, and elected to do nothing. There is not a scintilla of evidence to support such a conclusion.

That the opinion of the Court of Appeals in the case at bar must be reversed lest it begin a new line of authority that is contrary to precedent, and contrary to legislative intent, is also apparent from the recent unpublished opinion of that Court in *Kott-Millard v City of Traverse City*, CA #314971 (6/5/2014), attached hereto as Exhibit A, wherein plaintiffs sought to impose liability on a governmental employee when a teenager drowned after jumping off a dock into water that was electrified, claiming that the defendant knew of this danger and did nothing about it:

> Even when viewed in the light most favorable to plaintiffs, there is no record evidence that reasonably leads to the conclusion that Smith engaged in "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." To so conclude would require the jury to find that Smith knew that there was a danger and decided not to do anything about it. This is not a case where there is conflicting testimony about what

> Smith knew – no witness testified that he or she told Smith directly about a danger of electrocution. The argument is that Smith "must have known" based on the surrounding circumstances. Witt and Waltz testified that they saw arcing but did not report what they saw. They assumed someone would see it. Plaintiffs' argument asks the jury to assume that not only did someone at the marina see the arcing, but that they reported it to Smith. The jury could assume that the person who shouted at the Mackeys to get out of the water was Smith, but there is no evidence that it was. Thus, to conclude that Smith knew that the water was electrified and did not care if anyone were electrocuted, the jury would be required to speculate. Accordingly, we reverse the trial court's determination that a genuine issue of material fact exists whether Smith was grossly negligent.
>
> (Slip Opinion, pp 6-7)

It is only similar speculation, premised on no testimony, that would allow the jury to infer that Kittell knew of the danger presented to the Plaintiff and did nothing about it. There is no evidence that he was either aware that the light was out, or that he knew that anyone was out on the ice. Without knowledge of both of these circumstances, no even arguable basis for a finding of gross negligence is possible. If he should have known that the light was out, but did not, it is merely a basis for a claim of negligence. And there was no duty to keep track of who was on the ice at any given hour of the day or night.

### *B. There is no record support for a finding that Rick Kittell's conduct constituted the proximate cause of Plaintiff's injuries and the contrary holding of the Michigan Court of Appeals is inconsistent with legislative intent and prevailing case precedent.*

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 negligence of Rick Kittell was the one most immediate, efficient and direct cause of the accident when that cause was the driving of a snowmobile, at a high rate of speed in the dark, in the vicinity of a known hazard.

This Court has previously considered the application of its definition of "the proximate cause," as articulated in *Robinson,* in several cases involving claims of governmental immunity and reversing, where necessary, the appellate court's deviation from the standard's proper application. 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 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 reflect adherence to the legislative policy choices embodied in MCL 691.1407(2) and support the grant of summary disposition to Rick Kittell in the case at bar. Moreover, 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. 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."

- *Kruger v White Lake Township*, 250 Mich App 622 (2002), where the alleged gross negligence of the police officers who had allowed the plaintiff's decedent to escape from custody could not have been the direct cause, the proximate cause, of her death when she was hit by a car during her flight.
- *Misko v Grosse Ile Township*, 2002 WL 31934120, CA #229505 (11/19/2002), where the alleged negligence of the governmental employees could not be the proximate cause of injuries sustained when a snowmobile hit pilings that had been difficult to see.
- *Hutchinson v Township of Portage*, 2003 WL 21958278, CA #240136 (8/14/2003), *lv denied* 470 Mich 876 (2004), where family members drowned as a result of alleged overdredging of a lake which, even if considered to be gross negligence, and even if the dredging or failure to post warning signs was a cause in fact of the injuries, could not reasonably be found to constitute the proximate cause of the accident "where a far more immediate, efficient, and direct cause of the drowning deaths was that the girls, who it was undisputed had little or no swimming ability, were allowed to swim without being accompanied by a

sufficient number of people with good swimming ability in close proximity to them."

- *Long v Baker*, 2003 WL 22850513, CA #241020 (12/2/2003), where the alleged failure to repair streetlights that were not operating was not the proximate cause of the motor vehicle accident.
- *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.
- *Holz v City of St. Ignace*, 2012 WL 5193204, CA #302647 (10/18/2012), where the alleged gross negligence of the defendant in failing to properly inspect tubes for defects could not have been the proximate cause of the injuries where the tubers had had opportunities themselves to avert the accident by their own actions.

The reasoning employed by the Court of Appeals in the case at bar is inconsistent with the authority above-cited and significantly departs from established precedent.

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 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)

As fully discussed in the pending Application for Leave to Appeal, these cases make clear that 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 the conduct of Rick Kittell could not be found to be the only cause of the injury. That argument will not be repeated herein, but amici do wish to articulate some additional thoughts on the possible meaning of "sole" cause and how it effectuates the policy choices made by the Legislature regarding broad governmental immunity.

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 is 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 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 which his conduct allegedly contributed to cause. 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 seriously restrict the circumstances where suit would be permissible, even in the presence of gross negligence, and even if some causal relationship could be established.

Indeed, the Legislature required that a very significant causal relationship be present – more than the relationship required for a finding of "proximate cause." Consistent with this Court's holdings in *Robinson, supra*, and *Paige, supra*, it required a causal relationship so significant that it nullified the effect of other "proximate causes." Or, as stated in *Paige*, it required that the conduct of the governmental employee constitute the sole proximate cause – the only legal cause.

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, and none of which is so significant as to nullify the causal effect of the others. 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 – if there is no one cause that may be deemed the "sole" 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 conduct of Rick Kittell could not be found to constitute the one most immediate, efficient, and direct cause of the injury or damage to Billy Luckett. Perhaps it was the conduct of Billy Luckett. Or perhaps there was no one cause that constituted "the proximate cause." In either event, the broad immunity provided by the Legislature prevents both suit and the imposition of liability against Rick Kittell.

This Court should reverse the opinion of the Court of Appeals in this case.

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Dated: June 25, 2014.
1165162.1

## EXHIBIT LIST

Exhibit A *Kott-Millard v City of Traverse City*, CA #314971 (6/5/2014)

STATE OF MICHIGAN

IN THE SUPREME COURT

BEVERLY LUCKETT and WILLIAM LUCKETT,
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and

Macomb Circuit Court
Case No. 10-004265-NI

SOUTHEAST MACOMB SANITARY DISTRICT,
and PATRICK O'CONNELL,

Defendants.
_____/

## PROOF OF SERVICE

**Proof of Service**: I certify that a copy of **BRIEF OF AMICI CURIAE ON BEHALF OF THE MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, AND THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN** and this **PROOF OF SERVICE** were served on the following as indicated below:

Date of Service: June 25, 2014

Signature: /s/ Enis J. Blizman
Enis J. Blizman

| **VIA FIRST CLASS MAIL** | **VIA FIRST CLASS MAIL** |
|---|---|
| Geoffrey N. Fieger (P30441)<br>Michael T. Ratton (P42399)<br>Matthew D. Klakulak (P60220)<br>Fieger, Fieger, Kenney,<br>Giroux & Harrington, P.C.<br>Attorneys for Plaintiffs-Appellees<br>19390 West Ten Mile Road<br>Southfield, MI 48075<br>Telephone: 248.355.5555 | Mary Massaron Ross (P43885)<br>Hilary A. Ballentine (P69979)<br>Peter W. Peacock (P37201)<br>Plunkett Cooney<br>Attorneys for Defendants-Appellees<br>38505 Woodward Avenue, Suite 2000<br>Bloomfield Hills, MI 48304<br>Telephone: 313.983.4801 |