

STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS  
(Borrello, P.J. and Jansen and Bandstra, J.J.)

Arthur Whitmore and  
Elaine Whitmore,  
Plaintiffs-Appellees,

v

Charlevoix County Road Commission,  
Defendant-Appellant.

Supreme Court No. 142106

Court of Appeals No.291421

Charlevoix Circuit Court No.

08-014922-NO

Hon. Richard M. Pajtas

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142106  
Amicus by MAJ

BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION FOR JUSTICE

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Submitted by:

Victor S. Valenti (P36347)

For Amicus Curiae

Michigan Association for Justice

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## TABLE OF CONTENTS

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	PAGE
TABLE OF CONTENTS.....	ii
INDEX OF AUTHORITIES.....	iii
STATEMENT OF INTEREST.....	iv
STATEMENT OF QUESTION PRESENTED.....	v
INTRODUCTION.....	2
LAW AND ARGUMENT.....	3
I. IN THE CONTEXT OF THE MCR 2.116 (C)(7) MOTION THAT WAS BEFORE THE LOWER COURTS, PLAINTIFFS’ COMPLAINT SUFFICIENTLY ALLEGED THE MCL 691.1403 NOTICE REQUIREMENT THAT THE ROAD COMMISSION “KNEW OR IN THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE EXISTENCE OF THE DEFECT” THAT PLAINTIFFS ASSERT RENDERED THE ROAD “NOT REASONABLY SAFE AND CONVENIENT FOR PUBLIC TRAVEL” CONTRARY TO THE MCL 691.1402 (1) HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY.....	3
A. Plaintiff’s Complaint satisfies the requirement to plead in avoidance of governmental immunity by pleading the Sec. 1402(1) highway exception and by asserting that the Road Commission had actual and constructive notice of the roadbed defect as required by Sec. 1403.....	3
B. In response to the Road Commission’s pre-formal discovery (C) (7) motion, only Plaintiffs came forward with a witness affidavit and documentary evidence regarding the road commission’s notice of the defect.....	13
C. This Court should adhere to stare decisis and decline Defendant’s invitation to cast aside its recent precedent in <i>Wilson v Alpena Cty Rd Comm</i> , 474 MICH 161; 713 NW 2d 717 2005).....	14
RELIEF REQUESTED.....	16

## INDEX OF AUTHORITIES

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### CASES

	PAGE
<i>Fane v Detroit Library Comm</i> , 465 Mich 68, 74; 631 NW 2d 678 (2008).....	3
<i>Hughes v Jackson Cty Rd Comm</i> , (on Redmand), COA No 256652 (unpubl rel'd 4/17/07).....	11, 12
<i>Kurzer v Oakland Cty Rd Comm</i> , COA No. 295412 (unpubl rel'd 2/8/11).....	10, 11
<i>Mack v City of Detroit</i> , 467 Mich 186; 649 NW2d 47 (2002).....	3, 4
<i>McCormick v Carrier</i> , 487 Mich 180; 795 NW2d 517 (2010).....	14
<i>Odom v Wayne Cty</i> , 482 Mich 459; 760 NW2d 217 (2008).....	13
<i>Pohutski v City of Allen Park</i> , 465 Mich 675; 641 NW2d 219 (2002).....	15
<i>Robinson v City of Detroit</i> , 462 Mich 439; 613 NW2d 307 (2000).....	14
<i>Rowland v Washtenaw Cty Rd Comm</i> , 477 Mich 197; 731 NW2d 41 (2007).....	15
<i>Tellin v Forsyth Twp</i> , __ MichApp __; __ NW2d __ l vden __ Mich (No 142714 6/28/11).....	12
<i>Wilson v Alpena Cty Rd Comm</i> , 474 Mich 161; 713 NW2d 717 (2006).....	passim

### STATUTES AND COURT RULES

MCL 691.1402(1).....	passim
MCL 691.1403.....	passim
MCL 691.1406.....	12
MCR 2.116 (C)(7).....	passim
MCR 2.116 (C)(8).....	passim
MCR 2.116 (C)(10).....	passim

## STATEMENT OF INTEREST

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Michigan Association for Justice (“MAJ”) is an organization comprised of more than 1600 Michigan attorneys engaged primarily in litigation, trial and appellate work. The MAJ recognizes an obligation to assist this Court on important issues of law that substantially affect the orderly administration of justice in the trial and appellate courts of this State. The Amicus MAJ believes that the issue presented in this case has a direct and substantial impact on the rights of Michigan citizens injured as the result of the failure of governmental agencies to comply with their statutory obligations.

**STATEMENT OF QUESTION PRESENTED**

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DID THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY DENY DEFENDANT ROAD COMMISSION'S MCR 2.116(C)(7) SUMMARY DISPOSITION MOTION BECAUSE PLAINTIFFS SUFFICIENTLY ALLEGED THAT DEFENDANT HAD ACTUAL OR CONSTRUCTIVE NOTICE AS REQUIRED BY MCL 691.1403 TO JUSTIFY THE PRIMA FACIE APPLICATION OF THE MCL 691.1402(1) HIGHWAY DEFECT EXCEPTION TO GOVERNMENTAL IMMUNITY?

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Defendant-Appellant says "No"

Plaintiffs-Appellees say "Yes"

The Trial Court said "Yes"

The Court of Appeals said "Yes"

Amicus MAJ says "Yes"

## INTRODUCTION

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Plaintiffs do not need to do more than plead notice at the (C)(7) stage. As the lower courts recognized, the Complaint sufficiently pleads "notice". There is no "magic language" pleading requirement as Defendant asserts. Plaintiffs are not required to actually "prove" their case when pleading in avoidance of governmental immunity. That is a (C)(10) analysis which is made based on the facts adduced through discovery, not on the pleadings alone.

The trial court recognized that the Sec. 1403 pleading question raised the (C)(7) issue of avoiding governmental immunity, not a (C)(10) factual inquiry (Defendants leave application Exhibit 5: Tr 11/21/08, p 22). As the trial court stated, "it's clear the Road Commission understood that the road needed to be repaired...I think there's sufficient notice... that the Road Commission was on notice of the defect in the highway" (Tr 11/21/08 p 25). This Court should deny the leave application.

## LAW AND ARGUMENT

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IN THE CONTEXT OF THE MCR 2.116(C)(7) MOTION THAT WAS BEFORE THE LOWER COURTS, PLAINTIFFS' COMPLAINT SUFFICIENTLY ALLEGED THE MCL 691.1403 NOTICE REQUIREMENT THAT THE ROAD COMMISSION "KNEW OR IN THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE EXISTENCE OF THE DEFECT" THAT PLAINTIFFS ASSERT RENDERED THE ROAD "NOT REASONABLY SAFE AND CONVENIENT FOR PUBLIC TRAVEL" CONTRARY TO THE MCL 691.1402(1) HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY.

A. Plaintiffs' Complaint satisfies the requirement to plead in avoidance of immunity by pleading the Section 1402(1) highway exception and by asserting that the Road Commission had actual and constructive notice of the roadbed defect as required by Section 1403.

The Road Commission brought its summary disposition motion under MCR 2.116(C)(7), claim barred by governmental immunity, and (C)(8), failure to state a claim (Defendant's Exhibit 1 to leave application: 12/4/08 order denying summary disposition). The motion was not brought under (C)(10), no genuine issue of material fact, because no formal discovery had been done. To survive a (C)(7) motion based on governmental immunity, a "plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2008).

The Road Commission overreads this requirement when it quotes *Mack v*

*City of Detroit*, 467 Mich 186, 198, n15; 649 NW2d 47(2002) for the proposition that a plaintiff pleading in avoidance of governmental immunity “bears the burden of pleading facts in the complaint which show that the action is not barred” by governmental immunity. Without any support whatsoever, the Road Commission elevates the “pleading facts” requirement to require a level of specificity that no governmental immunity case has ever required at the pleadings stage.

In fact, the *Mack*\* Court itself went on to explain that quite simply, “a plaintiff pleads in avoidance of immunity by stating a claim that fits within a statutory exception...” *Id* at 202. Plaintiffs’ Complaint in this case easily satisfied that pleading requirement by setting forth the essentials of the highway exception [1402(1)] and the basics of both actual and constructive notice [1403].

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\* *Mack*, by contrast, was not a governmental immunity exception case at all, because, as this Court recognized, “[n]one of the exceptions where a suit is allowed can be read to allow suit for sexual orientation discrimination.” *Id* at 196.

Here, as to notice, the Complaint states:

**7. That beginning in at least the year 2005, Defendant, Charlevoix County Road Commission, did publicly recognize and acknowledge the need to perform various acts of maintenance and repair over portions of the traveled portion of the roadway and roadbed of Advance Road in the Township of Evaline, County of Charlevoix, State of Michigan, including but not limited to the need for wedging, overlay, pavement repair, repaving, and resurfacing of portions of Advance Road near its intersection with Cummings Road in the County of Charlevoix, State of Michigan.**

**8. That the traveled portion of the roadbed and roadway to be wedged, overlaid, repaired, repaved and/or repaired included that portion of Advance Road where the defect which is the subject of this action, i.e., a large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road, existed and was known to exist by the Defendant, Charlevoix County Road Commission. Further, that said portion of the roadbed and roadway was otherwise within the operational jurisdiction and maintenance jurisdiction of Defendant, Charlevoix County Road Commission.**

**9. That in the days and weeks preceding the May 28, 2006, motor vehicle accident involving Plaintiffs herein, Defendant, Charlevoix County Road Commission, did again publicly acknowledge the deteriorated physical structure of and the need for significant maintenance to the roadbed surface designed for vehicular travel on Advance Road, including but not limited to that portion of Advance Road where the defect giving rise to this cause of action existed and was known to exist by the Defendant, Charlevoix County Road Commission.**

**10. That in the days and weeks preceding the May 28, 2006, motor vehicle accident involving Plaintiffs herein, Defendant, Charlevoix County Road Commission, did again publicly act in a manner to facilitate the commencement of a significant road repair project for Advance Road**

**including that portion of Advance Road where the defect giving rise to this cause of action existed and was known to exist by the Defendant, Charlevoix County Road Commission, and in so doing, did otherwise fail to act to temporarily patch, remedy and/or repair the dangerous and defective conditions known by it to already exist within the traveled portion of the roadway, including but [sic(not)] necessarily limited to the northbound lane of a section of Advance Road at or near its intersection with Cummings Road.**

(second) **11. That Defendant, Charlevoix County Road Commission, did, on or before May 28, 2006, knowingly leave a portion of the subject roadway at or near its intersection with Cummings Road in the Township of Evaline, County of Charlevoix, State of Michigan, in a dangerous and defective condition; to wit, by leaving a large, long-existing pothole of significant depth and width dimensions which it had previously failed to successfully repair on a number of occasions within the improved portion of the roadway designed for vehicular traffic for northbound traffic without appropriate safety markings or precautions, construction zone signage and/or other markings which would have timely revealed to the traveling public, including but not limited to Plaintiffs herein, the presence of a defective and dangerous condition which existed within the improved portion of the roadway.**

**12. That, upon information and belief, Defendant, Charlevoix County Road Commission, had not yet commenced its wedging, overlay, pavement repair, repaving and resurfacing work upon the roadway by May 28, 2006, even though it was long aware of the continuing need to do so.**

\*\*\*

**20. That Defendant, Charlevoix County Road Commission, by virtue of both its prior failed attempts to repair the dangerous and defective condition upon the subject roadway as well as its solicitation of assistance to perform the repairs upon this and other portions of Advance Road did have actual notice of the presence of said highway defect. Moreover, Defendant Charlevoix County Road Commission had constructive notice of the presence and gravity of the defect present in the improved portion of the roadbed inasmuch as said defect had continuously existed for a period exceeding thirty(30) days in duration prior to May 28, 2006.**

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29. That Defendant, Charlevoix County Road Commission, had reasonable and actual notice of the dangerous conditions present upon the roadway in question and, in spite of its statutory and common law duties to otherwise abrogate, repair and cure said defect and/or otherwise act to ensure the safety and prompt notification of the presence of said defect to vehicular travel, did fail to so act.

30. That notwithstanding said duties, Defendant Charlevoix County Road Commission, did breach same in one or more of the following particulars:

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b. in failing to warn motorists of the existence of a significant, large, and long-existing pothole of significant depth and width dimensions present in the northbound lane of travel of Advance Road near its intersection with Cummings Road, within the traveled and improved portion of the roadway open to public travel and vehicular traffic, which Defendant knew to exist via actual or constructive knowledge on its part;

c. In failing to take reasonable and necessary measures to correct defects within the traveled and improved portion of the roadway in the northbound lane of travel of Advance Road near its intersection with Cummings Road known by it to then exist;

\*\*\*

j. In failing to inspect the work performed by its employees when Defendant Charlevoix County Road Commission, knew or in the exercise of reasonable care should have known that its employees and/or contractors failed to successfully repair some or all of the dangerous and defective conditions known to be present in the roadway, including but not limited to the existence of a significant, large, and long-existing pothole of significant depth and width dimensions present in the northbound lane of travel of Advance Road near its intersection with Cummings Road; ( Complaint: Exhibit 3 to Plaintiff Supplemental Brief emphasis added)

\*\*\*

The quoted breach of duty allegations in paragraph 30 with respect to Plaintiff

Arthur Whitmore are also repeated verbatim in paragraph 44 with respect to Plaintiff Elaine Whitmore. Surely, these allegations in the Complaint satisfy the requirement for Plaintiffs to plead in avoidance of governmental immunity.

As the Court of Appeals panel recognized, the basis on which Defendant sought, and the trial court denied, summary disposition was MCR 2.116(C)(7), claim barred based on governmental immunity. The Court of Appeals, relying upon *Wilson v Alpena County Road Comm*, 474 Mich 161; 713 NW2d 717(2006), rejected Defendant's argument that Plaintiff failed to satisfy the MCL 691.1403 notice provision because they failed to allege that the Road Commission had "notice of a single specific pothole that caused the accident" (Court of Appeals Slip opinion p2). The Court examined the Complaint, and concluded that Plaintiffs "properly alleged that [D]efendant had actual and constructive knowledge of the pothole" (Slip opinion p2). The Court pointed to the Plaintiffs' Complaint description of the pothole as "'a large, long-existing pothole of significant depth and width dimensions present in the northbound lane of Advance Road near its intersection with Cummings Road,'" and to the Complaint allegation that Defendant had "'previously failed to successfully repair'" it (Slip Opinion p2, quoting Complaint paragraphs 8,9, 11; Exhibit 3 to Plaintiffs' supplemental brief)

The Road Commission relies upon *Wilson*, but either misses or ignores a critical distinction in that precedent. *Wilson* is distinguishable from this (C)(7) only case because there defendant sought summary disposition under (C)(10) as well as (C)(7) and (8). *Wilson*, 474 Mich at 164. In its opinion, this Court first affirmed the denial of summary disposition on (C)(7) agreeing plaintiff “successfully pleaded in avoidance of immunity” by alleging that the Alpena County Road Commission “had actual or constructive notice of the defect in the roadbed that, because of the agency’s failure to reasonably maintain or repair resulted in the road being not reasonably safe and convenient for public travel.” 474 Mich at 163. As to the denial of the (C)(10) motion in *Wilson* however, because neither party provided evidence that there was no question of fact regarding the Road Commission’s statutorily required unsafe condition, the Court held that defendant was “free to bring a second motion making the proper argument and submitting the proper supporting evidence” which plaintiff may “attempt to defeat by pointing to competent evidence in the record that the road was not reasonably safe.” 474 Mich at 170-171.

Despite the procedural difference between this case, were no formal discovery has taken place and where the Road Commission neither presented any deposition, affidavit or documentary evidence, nor even raised a (C) (10)

argument, and *Wilson*, Defendant asserts that Plaintiffs not only have to plead in avoidance of governmental immunity, but they must also conclusively prove their case to survive a (C)(7) summary disposition motion. However, Plaintiffs here did submit the affidavit of a disinterested witness and Road Commission documents procured through a FOIA request that they argued conclusively established Defendant's notice. The affidavit and the documents were not countered by Defendant at the summary disposition hearing and the Road Commission has conspicuously ignored them throughout its appeals.

The Road Commission directs the Court to the recent unpublished, per curiam Court of Appeals opinion in *Kurzer v Oakland County Road Comm*, No 295412 (unpublished 2/8/11) (Exhibit 2 to Defendant's Supplemental Brief). The essential distinction in *Kurzer* is that, like *Wilson*, but, unlike here, formal discovery had been done, and the Oakland County Road Commission sought summary disposition under both (C)(7) and (C)(10). The Court of Appeals, applying the (C)(10) standard, reversed the trial court's summary disposition denial.

The Court of Appeals panel remarked that the only independent witness to the accident had testified that he was an experienced motorcyclist and that he could have ridden through the area where Kurzer fell "without a problem."

Additionally, because Kurzer himself testified that he routinely traveled the subject stretch of roadway but never noticed any specific defect that he could connect with the accident, and after examining the post-accident photographs of the area, the panel found that Kurzer's general claim was that the road was bumpy, but "notice of a general bumpy condition is not the equivalent of notice of a specific pothole of such dimensions that would render the roadway unsafe or inconvenient for public travel" (Defendant's supplemental brief exh 2: *Kurzer Slip Opinion* p 3). In short, the Court of Appeals in *Kurzer* evaluated de novo a far weaker trial court factual record for plaintiff, and reversed the trial court based on the (C)(10) ruling, not the (C)(7) motion for failure to state a claim in avoidance of immunity. *Kurzer* is inopposite.

In *Hughes v Jackson County Road Commission, (On Remand)*, Court of Appeals No 256652 (unpublished 4/17/07), lv den \_\_\_Mich\_\_\_(No 134003 9/10/07), the Court of Appeals, following *Wilson*, reaffirmed the trial court's denial of summary disposition on (C)(7) grounds and remanded for further proceedings on the factual bona fides of whether defendant had notice that the road was not reasonably safe. This Court unanimously denied leave.

Factually in *Hughes*, the Court of Appeals quoted the trial court's

recognition that the record contained disputed testimony of constructive notice of a defect based on the fact that a Road Commission employee regularly used the road and that the Road Commission knew the road regularly needed regrading because of “washboarding” which Rush asserted was the defect. Thus, in *Hughes* the notice-related pleadings were sufficient for (C)(7) purposes to plead the highway exception, although there remained a factual question whether the Road Commission was aware that the road was not reasonably safe. So it is here.

Further, the Amicus MAJ suggests that this Court should recognize the similarity of the Court of Appeals’ recent public building exception notice opinion in *Tellin v Forsyth Twp*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (approved for publ 3/10/11) lv den \_\_\_ Mich \_\_\_ (No 142714 6/28/11). In *Tellin*, the Court of Appeals affirmed a (C)(7) denial of summary disposition under MCL 691.1406, the analogous language of which conclusively presumes notice of the dangerous condition by the governmental agency when such “defect existed as to be readily apparent to an ordinarily observant person for a period of 90 days or longer before the injury took place.” Based on the facts of *Tellin*, the Court of Appeals panel affirmed that the trial court properly denied summary disposition under MCR 2.116 (C)(7). (Slip Opinion pp 12-13) This Court unanimously denied defendants’ leave application.

B. In response to the Road Commission's pre-formal discovery (C)(7) motion, only the Plaintiffs came forth with affidavit and documentary evidence regarding the Road Commission's notice of the defect.

When considering a (C)(7) motion, the contents of the complaint must be accepted as true unless defendant contradicts the complaint with affidavits, depositions, admissions or documentary evidence. *Odom v Wayne Cty*, 482 Mich 459,466; 760 NW2d 217 (2008) Here, only the Plaintiffs submitted such evidence in the form of the Karen Kopkau affidavit (Exhibit 3 to Plaintiffs' Supplemental Brief) and the Road Commission records produced in a FOIA request. (Exhibit 1 to Plaintiff's Supplemental Brief) These un rebutted materials clearly demonstrate that Defendant had notice of the defect for more than 30 days before Plaintiffs sustained their injuries. As Plaintiffs' counsel pointed out at the hearing, not only can advance notice of the defect be inferred from the Road Commission's ongoing planned rebuild project for 2006, but in fact in April 2006, just more than 30 days before Plaintiffs were injured, the Road Commission received a telephone complaint about the road's "terrible" shape which detailed 32 separate potholes in Advance Road at the point where Plaintiffs were later injured. (Exhibit 5 to Defendants leave application : Tr 11/21/08 p 15) Based on these materials, Plaintiff alleged that the defect existed for more than 30 days. (Tr 11/21/08 p23)

Plaintiffs' motion response asserted that the Road Commission was "very much aware" of the specific pothole problem that resulted in Plaintiffs' accident, yet Defendants never opposed the affidavit or the contents of the public meeting minutes that demonstrated the Road Commission's notice. On the unrebutted record presented, the lower courts did not err by denying the summary disposition motion.

C. This Court should adhere to stare decisis and decline Defendant's invitation to cast aside its recent decision in *Wilson v Alpena County Rd Comm*, 474 Mich 161; 713 NW2d 717 (2006).

Defendant's application surreptitiously asks the Court to disregard *Wilson*, a five-year-old precedent, the crux of which delineated the distinction between (C)(7) pleadings-based challenges to governmental immunity lawsuits and (C)(10) challenges where the factual bona fides of the notice claim is in dispute. This Court has repeatedly made it clear that "stare decisis is generally the preferred course," because "it promotes an evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" *Robinson v City of Detroit*, 462 Mich 439,463; 613 NW2d 307 (2000); Justice Markman, dissenting in *McCormick v Carrier*, 487 Mich 180;795 NW2d 517(2010)

[recognizing the interest served by stare decisis, “predictability, and certainty in the law, and the uniformity of its application”]; see also Justice Marilyn Kelly dissenting in *Pohutski v City of Allen Park*, 465 Mich 675,712; 641 NW2d 219(2002), warning that the frequent rejection of precedent will cause the law to “fluctuate from year to year, rendering our jurisprudence unstable” and Justice Cavanagh dissenting in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197,278; 731 NW2d 41 (2007) [“Under the doctrine of stare decisis, principles of law, deliberately examined and decided by a court of competent jurisdiction become precedent which should not be lightly departed”].

For the sake of predictability, certainty and uniformity as well, the Court should deny Defendant Charlevoix County Road Commission’s leave application.

## RELIEF REQUESTED

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For the foregoing reasons, Amicus MAJ requests that this Court deny Defendant Charlevoix County Road Commission's leave application and remand to the trial court for further proceedings. Plaintiffs clearly pleaded in avoidance of immunity that Defendant "knew or in the exercise of reasonable diligence should have known, of the existence of the defect" that rendered the roadway not "reasonably safe and convenient for public travel." Further, Plaintiffs submitted an un rebutted affidavit and documentary evidence demonstrating the factual requisites of their claim. Amicus MAJ asks the Court to follow its five-year-old decision in *Wilson v Alpena County Rd Comm* affirm the lower courts, and deny Defendant Charlevoix County Road Commission's application for leave to appeal.

September 16, 2011

Respectfully Submitted,



Victor S. Valenti (P36347)

For Amicus Curiae

Michigan Association for Justice