STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee,

v

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

Defendants,

WILLIAM J. HARMAN, Jointly and Severally,

Defendant-Appellant.

_____/

Supreme Court No. 149901

Court of Appeals No. 310231

Barry Cnty Circuit Crt No. 11-45-NO

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT WILLIAM J. HARMAN

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Mark E. Donnelly (P39281)
Assistant Attorney General
Attorneys for Appellant Harman
Public Employment, Elections & Tort Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

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LARRY S. ROYSTER
CLERK SUPREME COURT

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QUESTION PRESENTED

1. Whether defendant William J. Harman's alleged failure to act was *the* proximate cause of decedent's death.

INTRODUCTION

In ordinary terms, the proximate cause of an injury generally is the force that causes the harm, not the failure of a person to prevent that force from causing the injury in the first place. This is true whether it is the negligent conduct of a person, such as a fleeing motorist, that is the cause of the victim's harm, or whether it is a natural force, such as a fire, that causes the injury. This Court has made that clear in its decisions in *Robinson v City of Detroit,* 462 Mich 439; 613 NW2d 307 (1999) (fleeing motorist), and *Dean v Childs,* 474 Mich 914; 705 NW2d 344 (2005) (fire). The external force is the most immediate, efficient, and direct cause preceding the injury, not the would-be-rescuer's failure to act. In applying this principle, Harman's alleged failure to act was not *the* proximate cause of Beals' death. It was the fact that Beals swam to the deep end of the pool and drowned from water.

If this were not the rule, all first-responders, such as police officers, fire fighters, or as here a life guard, would have to be aware that their alleged failures may subject them to liability whether the cause of the injury is really a drunk driver or the fire that was started by an arsonist or a strike of lightning. But the law does not assign liability to those governmental officials asked to safeguard the community when they fail to rescue us from harm. Nor should it.

This Court should adopt the reasoning of Judge O'Connell's dissent, hold that Harman's failure to act was not the proximate cause of Beals' tragic death, and reverse the decision of the Court of Appeals.

ARGUMENT

I. Harman's alleged failure to act was not the proximate cause of William Beals' death.

William Beals drowned because he aspirated water, but no one knows what caused Beals to quietly slip underwater, never to resurface. But we do know that William Harman did nothing to cause Beals to enter the pool; to swim into the deep end; and to later disappear underwater. Beals argues that Harman is responsible for the death because, as a lifeguard, Harman had an affirmative duty to observe Beals underwater and to rescue him. But Harman never saw Beals underwater and so he did not rescue him. Whether Harman breached his duty is not an issue before this Court. The question posed by this Court is whether Harman's failure to act was the one most immediate, efficient, and direct cause of Beals' death. Perhaps the easiest way to answer that question is to state the obvious: Had Harman not been there, the outcome would have been the same.

Stated another way, it is simply not possible for Beals to have drowned without him going underwater. Yet it remains entirely possible for Beals to have drowned even had Harman been diligently performing his lifeguard duties. The video shows, and it is not disputed, that Beals submerged underwater without any signs of struggle or duress (See Video, Application Exhibit D; Report of Gerald Dworkin, Opposition, Ex. 10, p. 11). Unless Harman was looking directly at Beals and singularly following him as he swam underwater, it remains entirely speculative whether he would have noticed Beals in time to save him. It is worth noting that—in addition to Harman—not one of the 25 students swimming in the

pool noticed Beals underwater until it was too late. Beals was drowning when he went underwater and aspirated water—causal events that Harman had nothing to do with. Beals' argument is not that Harman *caused* Beals to drown, but rather that Harman *may* have had an opportunity to save Beals before his drowning resulted in death.

Traditionally in Michigan tort law, the term "proximate cause" incorporates both legal cause and cause in fact. This Court explained those concepts in detail in *Skinner v Square D Co,* 445 Mich 153, 163; 516 NW2d 475 (1994).

> The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred. 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. [Internal citations omitted.]

Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296, 309 (2004). Layered onto these traditional, generic tort concepts of "proximate cause" is the statutory language contained in the Governmental Tort Liability Act immunizing lower level public employees from tort liability unless their gross negligence was *the* proximate cause. And in *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000), this Court made clear that "[t]he phrase 'the proximate cause' is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury."

Applying these concepts here, Beals could have drowned and may still have drowned even if Harman was attentive to his duties. While it is also possible that

he might have been able to save Beals had he noticed him underwater sooner, that outcome remains speculative. It cannot be said without speculating that but for Harman's inattentiveness Beals could not have drowned. But it can be said that but for Beals going underwater and encountering some physical distress he could not have drowned. So it was the water that Beals aspirated after slipping underwater and experiencing distress that was the one most immediate, efficient, and direct cause of his death. Harman did nothing to cause the chain of events that led to this unfortunate tragedy. And because Harman's inattentiveness to his duties was not the proximate cause of Beals' death, he is entitled to immunity.

Some will undoubtedly argue that such a result is unfair. But Michigan has adopted a public policy of broad immunity in part to protect the public fisc. In *Robinson*, this Court reinforced the principles that "Michigan strictly construes statutes imposing liability on the state in derogation of the common-law rule of sovereign immunity" and "[t]his Court has repeatedly acknowledged that governmental immunity legislation 'evidences a clear legislative judgment that public and private tortfeasors should be treated differently.'" *Robinson,* at 459 (internal citations omitted). And as part of its rationale for not expanding the public duty doctrine to all public employees, this Court explained in *Beaudrie v Henderson*, 465 Mich 124, 142; 631 NW2d 308 (2001), that "the comprehensive protections from liability provided to government employees by the governmental immunity statute" made it unnecessary.

Here, Beals agrees that government employees are not liable where the employee's action or inaction was not the one most immediate, efficient, and direct cause of the plaintiff's injury or damage (Opp'n, p 10). Since *Robinson*, this Court has not further defined or clarified the meaning of "the proximate cause". Twice, however, in lieu of granting leave to appeal, it has reversed the Court of Appeals in cases denying public employee immunity on the issue of "the proximate cause." In *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), rev'd in part, 474 Mich 914; 705 NW2d 344 (2005), the majority in the Court of Appeals relied on the affidavit of an expert firefighter who opined that the firefighters could have rescued the occupants had they properly performed their job—not unlike Beals' expert's affidavit in this case. But this Court rejected that logic, reversed, and adopted the dissent of Court of Appeals Judge Griffin holding that the most direct cause of the deaths of four children in a fire was "the fire itself, not [the firefighter] defendant's alleged gross negligence in fighting it." 262 Mich App 48, 61; 684 NW2d 894 (2004) (Griffin, J, dissenting). The same is true here. The water caused Beals to drown, not Harman's alleged gross negligence in failing to rescue him.

And in *LaMeau v City of Royal Oak*, 490 Mich 949; 805 NW2d 841 (2011) *rev'g* 289 Mich App 153; 796 NW2d 106 (2010), plaintiff's decedent died when he rode his motor scooter into a guy wire that was installed across a sidewalk. Plaintiff alleged that the defendants had been grossly negligent in planning and constructing the sidewalk at issue and that their gross negligence caused the death. The Court of Appeals held there was a question of fact whether the decedent's or the

defendants' conduct was the proximate cause. This Court reversed and adopted the dissent of Court of Appeals Judge Talbot who held that "the decedent's own behavior, combined with that of DTE, comprised a more "direct" and "immediate" cause of the injuries incurred than the actions attributed to [defendants]. Consequently, any negligence on the part of [defendants] was simply too remote to overcome the grant of immunity." 289 Mich App 153; 796 NW2d 106 (2010) (Talbot, J, dissenting).

This case, of course, is directly parallel to *Dean*: the most direct cause of Beals' death was the drowning itself, not the lifeguard's alleged gross negligence in failing to rescue Beals from the water. Analytically, there is no difference between a firefighter and a lifeguard—each has a duty to try to rescue someone from a hazard (fire and water). For Beals to be right, then, *Dean* must be wrongly decided.

Since *Robinson*, the Court of Appeals has issued numerous published opinions that have consistently applied *Robinson*'s construction of the phrase "the proximate cause" to hold that government employees are not liable where the employee's action/inaction was not the one most immediate, efficient, and direct cause of the injury or damage. Most recently in *Jones v Bitner*, 300 Mich App 65; 832 NW2d 426 (2013), the plaintiff's decedent, a two-year-old girl, died of morphine poisoning. Plaintiff alleged that the decedent's mother had been selling morphine from her home to an undercover officer and that the officer knew the young girl lived there. Plaintiff alleged that the police officer had a duty under the Child Protection Law, MCL 722.623(1)(a), to protect the girl from her mother by reporting

the mother to the Department of Human Services and that the failure to do so amounted to gross negligence. The Court of Appeals held that the "alleged failure to report could *not* have been the proximate cause of Ava's death and that plaintiff's claim is barred by immunity granted by law." *Jones*, 300 Mich App at 78.

The examples of this same analysis is legion in the Court of Appeals:

- *Kruger v White Lake*, 250 Mich App 622; 648 NW2d 660 (2002) (township not liable for individual killed by a vehicle while escaping custody);
- *Curtis v City of Flint*, 253 Mich App 555; 655 NW2d 791 (2002) (city not liable for vehicle collision caused by car attempting to allow paramedic unit cross against red traffic signal);
- *Miller v Lord*, 262 Mich App 640; 686 NW2d 800 (2004) (teacher not liable for sexual assault by another student);
- *Tarlea v Crabtree*, 263 Mich App 80; 687 NW2d 333 (2004) (coach not responsible for students injured during voluntary workout);
- *Harbour v Corr Med Servs*, 266 Mich App 452; 702 NW2d 671 (2005) (jailers not liable for intoxicated inmate's death);
- *Rakowski v Sarb*, 269 Mich App 619; 713 NW2d 787 (2006) (inspector not liable for improperly constructed handicap ramp railing);
- *Manuel v Gill*, 270 Mich App 355; 716 NW2d 291 (2006) (police not liable for peril of informant);
- *Cooper v Washtenaw County*, 270 Mich App 506; 715 NW2d 908 (2006) (jailers not liable for inmate suicide);
- *Love v City of Detroit*, 270 Mich App 563; 716 NW2d 604 (2006) (firefighters not liable for deaths caused by failure to properly fight fire);
- *Cummins v Robinson Twp*, 283 Mich App 677; 770 NW2d 421 (2009) (building officials' interpretation of building code not proximate cause of plaintiff's financial losses);
- *Oliver v Smith*, 290 Mich App 678; 810 NW2d 57 (2010) (police officers not liable for injuries to plaintiff who resisted arrest).

Particularly instructive are the *Harbour, Cooper,* and *Love* cases. In *Harbour v Corr Med Servs*, 266 Mich App 452; 702 NW2d 671 (2005), the decedent was arrested for drunk driving and taken to jail. The defendant nurse examined him and placed him on "sick call." Two hours later, the decedent collapsed in his cell and died from acute alcohol withdrawal. The plaintiff claimed that the defendant could have prevented the decedent's death had she taken appropriate medical action. The Court of Appeals disagreed and held that reasonable minds could not differ that the decedent was fifty percent or more responsible for his death. *Id.* at 463. "It is of no consequence that plaintiff argues that the decedent's death could have been prevented by nurse Froehlich, because the decedent's self-induced intoxication was fifty percent or more *the* cause of his death." *Id.*

In *Cooper v Washtenaw County*, 270 Mich App 506; 715 NW2d 908 (2006), the Court of Appeals held that the defendants were not the proximate cause of the suicide of an inmate – notwithstanding allegations that the inmate was known to be mentally unstable and suicidal when he was placed into the defendants' custody and they did nothing to protect him. And here—unlike in *Harbour* and *Cooper*—Beals was not in the custody of Harman or the Michigan Career and Technical Institute when he drowned; nor was Harman aware of any disability creating a special danger that impacted Beals' ability to swim. Indeed, Beals was an accomplished swimmer. If the defendants in *Harbour* and *Cooper* who were responsible for the care and custody of an incapacitated defendant and a mentally

ill defendant, respectively, were not the proximate cause of their deaths, then Harman is not the proximate cause here.

In *Love v City of Detroit*, 270 Mich App 563; 716 NW2d 604 (2006), the decedents died in a home fire, and the plaintiff alleged that the firefighters failed to respond in a timely manner and failed to take effective steps to rescue the trapped individuals. Plaintiff argued that, had the firefighters not acted in a grossly negligent manner, the persons trapped in the house would have been rescued. *Id.* at 565. The Court of Appeals determined that the decedents died from the fire that engulfed their home. As a result, the firefighters were not ***the*** proximate cause. *Id.* *Love* relied on this Court's reversal of *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), rev'd in part, 474 Mich 914; 705 NW2d 344 (2005).

Beals rested his affirmative case entirely on three unpublished Court of Appeals decisions which were addressed by Harman in his reply brief (Reply, pp 2-3). Beals also tries to distinguish *Dean* and the "scattershot litany" of published Court of Appeals decisions relied on by Harman by arguing that either a third party or the plaintiff was at fault in those cases (Opp'n, pp 20-23). But whether there is a third party involved or the plaintiff was "at fault" is not the relevant inquiry. While it may sometimes be easier to analyze, or to find no liability, when someone other than the public employee has acted negligently, it does not necessarily follow that in the absence of some other tortfeasor, the public employee must be the proximate cause of an injury. A dangerous force, like fire or water, remains the proximate cause even if a third party *might* have been able to change its effect.

Here it is undisputed that the first link in the chain of events leading to Beals' death was his voluntary decision to go swimming. What caused him to go underwater and not resurface is unknown. Was it a heart attack? Was it a fainting spell? Was it a seizure? Was it an act of God? No one knows. But it was not anything Harman did or did not do. Harman did not "cause" the drowning. Harman failed to rescue Beals. But that failure to rescue was not the proximate cause of the death, because not only did Harman have nothing to do with the peril Beals was in, no one knows whether Harman could have saved Beals.

This Court should not modify *Robinson* to adopt a different analysis of "the proximate cause" in cases where it is alleged that a public employee failed to rescue someone. Beals argues he should be considered differently than other plaintiffs because neither he nor anyone else besides Harman did anything wrong. But injury can occur without "fault". And Beals' argument simply raises a distinction without a difference.

What about the baby abused by her parent? If a child protective services worker fails to remove the child after receiving a report of abuse and the baby is later killed, the courts would rule that the worker's failure to remove the child from danger (i.e. rescue) was not the proximate cause of the death. That child was unable to protect herself from the danger of an abusive parent. The danger existed before the CPS worker's involvement and the danger (abusive parent) ended up killing the child. Here too, Beals was in danger when he submerged underwater and the danger (i.e. the water combined with his physical condition) ended up

killing him. Why is the CPS worker immune and Harman not? Especially considering that the CPS worker was aware of the danger and Harman was not? In both cases the failure to rescue was not *the* proximate cause. The fact that the dangerous force was a natural one, as contrasted with a human negligent act, should make no difference. *Dean* requires that conclusion.

Or what about the first responder to an automobile accident (caused by black ice) who fails to properly assess a passenger and mistakenly believes he is dead and takes no action to provide care, only to learn later that the victim was not dead but now it was too late to save him? Or the jail personnel housing a psychiatric prisoner that was known to be suicidal yet took no precautions and the prisoner hung himself? Or the electrical inspector who failed to do his job and the building burned down due to faulty wiring killing innocent people. In all of these examples, the victims are arguably blameless and the workers failed to save, protect or rescue. But in none of these examples were those "failures of duty" the proximate cause of the injuries.

That Beals' argument is premised on the notion that Harman should have rescued him impliedly concedes that Beals' distress was not caused by Harman. Beals must concede that Harman did not cause Beals to sink to the bottom of the pool. Beals swam to the deep end of the pool on his own volition and tragically did not re-surface. The fact that we do not know what caused Beals to sink does not mean that it—whatever it was—was not the proximate cause of his death. Again, compare this case with *Dean*: the fire itself prevented the children from escaping

the fire's risk, just as here the water itself prevented Beals from escaping the water's risk.

That Harman did not live up to the standards for lifeguarding is not relevant to this analysis; indeed, this analysis rests on the assumption that he was negligent. What is relevant is that no alleged gross negligence on the part of Harman could have been the one most immediate, efficient, and direct cause of Beals' death. The most immediate, direct cause of Beals' death was his drowning in the water, and not Harman's alleged gross negligence in failing to rescue Beals from the water. Harman's arguably negligent actions might have been *a* proximate cause of Beals death, but they were not *the* proximate cause, as *Robinson* requires.

Simply put, in the context of governmental immunity under MCL 691.1407(2), the failure to prevent injury not directly caused by the tortfeasor, or the failure to rescue someone in jeopardy by actions of someone other than the tortfeasor, cannot be the proximate cause of any subsequent injury.

CONCLUSION AND RELIEF REQUESTED

William Beals was an accomplished adult swimmer voluntarily participating in a recreational swim at his vocational school when he inexplicably and silently slipped underwater and drowned. His fellow student, William Harman, who was working as the lifeguard, never saw Beals in distress and was therefore unable to save him. Because Harman was not the one most immediate, efficient, and direct cause of Beals' drowning death, governmental immunity bars Plaintiff's claims against Harman.

Harman respectfully requests that this Court grant the application, reverse the July 1, 2014 decision of the Court of Appeals, and remand this case to the Barry County Circuit Court for entry of judgment in Harman's favor.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Mark E. Donnelly (P39281)
Assistant Attorney General
Attorneys for Appellant Harman
Public Employment, Elections & Tort Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

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Supreme Court No. 149901

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PROOF OF SERVICE

Wendy Todd certifies that on February 3, 2015, a copy of the following documents were served on the attorney of record:

Appellant William J. Harmon's Supplemental Brief

Matthew D. Klakulak
Fieger, Fieger, Kenney, Giroux & Harrington, P.C.
19390 W. 10 Mile Road
Southfield, MI 48075

via email at: m.klakulak@fiegerlaw.com, and first class mail by depositing same in a United States Post Office depository in Lansing, Michigan with first class postage fully paid.

Wendy Todd

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30736
Lansing, Michigan 48909-8236

BILL SCHUETTE
ATTORNEY GENERAL

February 3, 2015

VIA HAND DELIVERY
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 West Ottawa Street
Lansing, Michigan 48909

Re: *Theresa Beals, et al v William J. Harmon*
Michigan Supreme Court No. 149901
Michigan Court of Appeals No. 310231
Barry County Circuit Court No. 11-45-NO

Dear Clerk of the Court:

Please find enclosed for filing is an original and eight (8) copies of Appellant William J. Harmon's Supplemental Brief and Proof of Service.

Should you have any questions relative to the enclosure, please do not hesitate to contact me.

Sincerely,

Mark E. Donnelly
Assistant Attorney General

MED/wlt
Enclosures
cc: Matthew D. Klakulak

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CLERK SUPREME COURT