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STATE OF MICHIGAN

IN THE SUPREME COURT

AFTER REMAND TO THE COURT OF APPEALS
(Beckering, PJ, and Borrello and M.J. Kelly, JJ)

HELEN YONO,

Plaintiff / Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant / Appellant.

Supreme Court No. 150364
Court of Appeals No. 308968
Court of Claims No. 11-000117-MD

AMICUS CURIAE BRIEF BY MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF MICHIGAN DEPARTMENT OF TRANSPORTATION'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Amicus curiae respectfully submit the inherent, preexisting immunity of the state has not been waived in the instant case.[1] Michigan adheres to the jurisdictional principle of sovereign immunity.[2] The state created the courts and so is not subject to their jurisdiction absent express legislative waiver.[3] A failure on the part of a claimant to plead and prove that the case falls within the Legislature's strict waiver of immunity deprives the judiciary of jurisdiction to consider the claim.[4] Subject-matter jurisdiction may be raised at any time, even after appeal.[5]

In the instant case, notwithstanding the conclusion of the Court of Appeals, Plaintiff's claim does not implicate the Legislature's waiver because Plaintiff has failed to both *plead* and

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[1] *Mack v City of Detroit*, 467 Mich 186, 190 and n 18 (2002) (holding that a claimant must plead *and* prove at the outset that a case will fit within the narrow exception to move beyond the summary disposition stage on a motion under 2.116(C)(7)).

[2] *Ross v Consumers Power Co*, 420 Mich 567, 596-97 (1984); *Ballard v Ypsilanti Twp*, 457 Mich 564, 567-69 and 573-76 (1998).

[3] *Ballard*, *supra*, at 568, citing *Ross*, *supra*, at 598. See also *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002) and *Sanilac County v Auditor General*, 68 Mich 659, 665 (1888) ("[t]he state is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure"). Accord *Mack*, *supra*, at 195 (stating "a governmental agency is immune *unless* the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government" and holding that a claimant must plead *and* prove at the outset that a case will fit within the narrow exception to move beyond the summary disposition stage on a motion under MCR 2.116(C)(7)) (emphasis added).

[4] *Atkins v SMART*, 492 Mich 707, 714-15 and n 11 (2012), quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-69 (1908) ("[I]t being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred any limitations it chose.").

[5] *Fox v Bd of Regents of Univ of Michigan*, 375 Mich 238, 242-43 (1965).

prove her claim falls within the "highway exception" to immunity.[6] Therefore, this Court does not have jurisdiction over Plaintiff's claim and it should be dismissed *sua sponte*.[7]

If the Court disagrees with this jurisdictional statement, then *amicus curiae* would submit the Court's jurisdiction is limited to considering whether Plaintiff has, as a matter of law, both pleaded and proved her case under MCL 691.1402, such that the additional elements of her claim against the state can proceed.[8] In the latter case, the Court has jurisdiction over this appeal pursuant to Mich Const 1963, art 6, § 4.[9]

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[6] *Mack*, *supra*, at 198-99, 202-03 and nn 14 and 15. See also *Pohutski*, *supra*, at 688 (2002); *Ballard*, *supra*, at 567-69 and 573-76 (explaining the history of common law immunity, the Legislature's statutorily created exceptions, and the fact that immunity must be expressly waived by statute because Michigan adheres to the jurisdictional view of governmental immunity); *Ross*, *supra*, at 596-97 (same); *Michigan State Bank v Hastings*, 1 Doug 225, 236 (1844) ("a state… cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction…and an act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary").

[7] "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox*, *supra*, at 242.

[8] Even if a claimant pleads and proves a sufficient claim *in avoidance of* the state's immunity, he or she must still proceed to prove the tort claim by demonstrating that the state breached its duty, the breach was the factual and legal (proximate) cause of the claimant's injuries, and that no mitigating defenses exist, e.g., the open and obvious doctrine. *Suttles v State Dep't of Transportation*, 457 Mich 635, 653 (1998).

[9] See also MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2), (7); and MCR 7.302(C)(2)(b).

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STATEMENT OF QUESTIONS PRESENTED

In addition to and supplementing the questions presented by MDOT for this Court's review from the opinion of the Court of Appeals, *amicus curiae* respectfully submit the following:

I. Whether the parallel parking space where plaintiff slipped and fell is a "highway" according to the plain language of MCL 691.1401(c) and MCL 691.1402, the "highway exception" to governmental immunity?

Amicus curiae answer: No.

II. Whether the standard of review applied to plaintiff's claim and to the state's governmental immunity under MCR 2.116(C)(7) was correct in light of this Court's requirement a claimant both *plead* and *prove* in avoidance of the preexisting and inherent immunity of the government?

Amicus curiae answer: No.

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STATEMENT OF INTEREST BY *AMICUS CURIAE*

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative efforts. Its membership is comprised of approximately 521 Michigan local governments, of which approximately 450 are also members of the Michigan Municipal League Legal Defense Fund. The MML operates the Legal Defense Fund through a board of directors. The purpose of the legal defense fund is to represent the interests of member local governments in litigation and appeals concerning issues of statewide significance for local governments.

Amicus curiae Michigan Townships Association (MTA) is a Michigan non-profit corporation consisting of more than 1,230 townships within the State of Michigan (including both general law and charter townships). The MTA provides 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.

The members of *amicus curiae* are largely self-insured and maintain retention amounts which provide primary coverage for claims paid pursuant to § 2 of the Governmental Tort Liability Act (hereafter referred to as the GTLA, unless otherwise stated), MCL 691.1402, the "highway exception" to governmental immunity. This Court's consideration of the issues raised by MDOT in this case is of significant importance to *amicus curiae*.[10]

[10] While *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 161-62 (2000) held that the fourth sentence of MCL 691.1402, by the statute's terms at the time of the Court's decision, only applied to state and county road commissions, the Legislature has since amended MCL 691.1402(1) by enacting 2012 PA 50. The limitations and duties found in the fourth sentence of MCL 691.1402(1) now apply to all "governmental agenc[ies,]" including members of *amicus curiae*.

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INTRODUCTION

Amicus curiae respectfully submit that the Court of Appeals was without authority to expand the definition of the term "highway" in the GTLA beyond that authorized by the Legislature. This Court in *Grimes v Michigan Dep't of Transp*,[11] adhered to its duty to faithfully interpret the GTLA in a manner that leaves any expansion of the waiver of the government's suit immunity to the sole discretion and power of the legislative branch. When there is a choice to interpret the term "highway" to either exclude or include an area not previously included, the judiciary is jurisdictionally incapable of expanding the definition to include such areas. Excluding the parallel parking area in the instant case from the definition of "highway" as a matter of law is the only conclusion that can be reached absent express legislative expansion of the "highway exception". In short, the Court of Appeals applied the wrong legal construct to interpret the exception. Moreover, the Court of Appeals applied the wrong legal standard of review to determine when a governmental entity can be haled into court to contest a claim in avoidance of immunity.

In support of MDOT's Application for Leave to Appeal *amicus curiae* focus on two aspects of the Court of Appeals opinion after remand from this Court's April 1, 2014 order. First, the Court of Appeals did not provide the proper answer to this Court's directive to consider "what standard a court should apply in determining as a matter of law whether a portion of the highway was 'designed for vehicular travel' as used in MCL 691.1402(1)".[12] *Amicus curiae* takes issue with the Court of Appeals answer to this Court's question.

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[11] 475 Mich 72 (2006).

[12] *Yono v Dep't of Transportation*, 495 Mich 982 (2014).

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Contiguous, and other connected areas of pavement and surface areas adjacent to the improved portion of a highway designed for vehicular travel, including the limited-use, parallel parking area in the instant case *are not* included within the definition of "highway" as used in the GTLA, and as interpreted by this Court's jurisprudence. Such areas, when compared to the actual travel lanes designed for vehicular travel, can be quite extensive in terms of additional surface areas over which a governmental entity might have jurisdiction and control. Defects in and upon these areas, which are outside of the narrowly confined scope of "highway" as used and defined in the GTLA, and as that term has been interpreted and applied by this Court, are not "actionable defects" under the highway exception. According to the Court of Appeals such defects are now actionable.

Also, the legal standard enunciated by the Court of Appeals is contrary to the jurisdictional principle of governmental immunity because it judicially expands the government's potential liability beyond the Legislature's strict waiver of the state's inherent and preexisting immunity; it is contrary to the plain language used by the Legislature in carving out the "highway exception", it is contrary to the strict interpretive principles applied to the GTLA by this Court, and it is contrary to the public policy evinced by the GTLA's confinement of liability to only a small subset of cases.[13] Indeed, only the Legislature can *expand* the means by which the government can waive

[13] Highway "defects" exist in and upon Michigan's roads and bridges. No one disputes this. However, there is a difference between "defects" and "actionable defects". *Plunkett v Dep't of Transportation*, 286 Mich App 168, 179 (2009), accord *Hanson v Mecosta County Road Comm'n*, 465 Mich 492, 504 (2002). Only those defects falling in the latter category allow liability against the state to be imposed. Likewise, but no less important, there are many injuries arising from accidents involving both pedestrians and motorists in and upon Michigan's roads and bridges, and adjacent and contiguous surface areas attached thereto, that simply are not legally cognizable as a matter of the Legislature's restrictions, which must be adhered to. *Mason v Wayne County Board of Comm'rs*, 447 Mich 130, 138 (1994) (stating "legislative line drawing [in the highway exception] is also explicable on the ground that *expanding the right to sue* past a certain point does

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its suit immunity and expose itself to suit and liability.[14] Any judicial interpretations purporting to do this are void and of no effect.[15]

Regarding the second question posed by this Court in its remand order, to wit, "whether the plaintiff has pled sufficient facts to create a genuine issue of material fact under *this* standard" (emphasis added), the Court of Appeals improperly merged the standards of review and consideration for a motion for summary disposition under MCR 2.116(C)(10) and a motion claiming governmental *immunity* from suit under MCR 2.116(C)(7). At least with respect to governmental *entities*,[16] this Court has consistently applied the jurisdictional principle applicable to governmental immunity law in Michigan.[17] This means absent an *express* legislative waiver of the government's inherent and preexisting immunity from suit, a governmental entity has not

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not prevent accidents, and amounts to nothing more than an expanded obligation to pay")(emphasis added).

[14] *Grimes v Michigan Dep't of Transp*, 475 Mich 72, 89-90 (2006) (rejecting judicial *broadening* of the Legislature's waiver of the state's immunity as expressly provided in the exceptions to immunity in the GTLA).

[15] *Id*. at 90. See also *Nawrocki*, *supra*, at 158-59 (stating "[t]here must be strict compliance with the *conditions* and *restrictions* of the [GTLA]").

[16] While much has been made of the difference between *sovereign* and *governmental* immunity, and a distinction may have been seen to exist between immunity of the state and the immunity conferred upon subordinate governmental entities, see *Williams v City of Detroit*, 364 Mich 231 (1961), limited by *McDowell v State Hwy Comm'r*, 365 Mich 268 (1961), superseded by statute as stated in *Mack v City of Detroit*, 467 Mich 186, 202 (2002), the Legislature abolished any such distinction by passage of the 1964 GTLA conferring the inherent and preexisting immunity of the government uniformly upon all governmental entities. *Mack*, *supra*, citing *Pohutski v City of Allen Park*, 465 Mich 675, 682 (2002). Thus, the immunity of the state and subordinate governmental entities is uniform. *Ross v Consumers Power Co*, 420 Mich 567, 614 (1984).

[17] *Ross*, *supra*, at 599, citing *People ex rel Ayres v Board of State Auditors*, 42 Mich 422, 427-28 (1880) ("No claim against the State could…be allowed except by the Legislature" and stating "[t]he State has never, before or since, allowed itself to be sued in its own courts" and "in providing for a different method of determining claims against the State, it was not deemed proper to include it within the judicial power.").

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submitted to the jurisdiction of the courts.[18] In such cases, jurisdiction over the governmental entity is lacking because the Legislature has not *waived* the state's immunity.[19]

In order for a court of law to exercise jurisdiction over the merits of a claim lodged against a governmental entity, it must be first be determined that the court has jurisdiction to consider the claim in the first place. Under MCR 2.116(C)(7), governmental immunity is generally presented in a motion for summary disposition by the government. According to this Court's jurisprudence, the trial court must then determine whether the plaintiff has both pled and proved his or her claim sufficiently to invoke the jurisdiction of the trial court before the case can even proceed.[20] This is because immunity is inherent in the operations and functioning of government.[21] If a claimant cannot meet this high standard of proof, the court lacks jurisdiction to further consider the claim.[22]

In the instant case, the Court of Appeals equated the government's burden when asserting immunity under MCR 2.116(C)(7) to an ordinary litigant's burden under MCR 2.116(C)(10).[23] Yet, under the latter rule, the party moving for summary disposition bears the initial burden to

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[18] As explained by this Court in *Mack*, *supra*, at 202 "a governmental agency *is* protected by immunity" and "[t]he presumption is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiff's case falls within a statutory exception." (emphasis in original).

[19] *Id*. at 202-03.

[20] *Id*. See also *Odom v Wayne County*, 482 Mich 459, 478-79 (2008).

[21] *Mack*, *supra* at 198-203.

[22] *Id*.

[23] *Yono v Dep't of Transportation (On Remand)*, 306 Mich App 671, ___ (2014), Slip Op at 4.

show that he or she is entitled to immunity as a matter of law.[24] Yet, this has never been the standard for assessing whether a claim has pierced the veil of the government's immunity.[25]

While this Court has stated, *in dicta*, that with respect to an individual governmental employee's claim of immunity, the burden *is* initially on the individual asserting immunity, i.e., it is an affirmative defense,[26] and has applied that standard to individual governmental employees in the past,[27] the preexisting, and inherent immunity of the governmental *entity* defendant is jurisdictional, which is why the assertion of immunity it *is not* an affirmative defense,[28] and which is why immunity cannot be *waived* by a failure to assert it.[29]

This burden of proof and pleading applied by the Court of Appeals is no small detail of insignificance. By incorporating the MCR 2.116(C)(10) standard and placing the burden on the government to prove it is *not* entitled to immunity, the Court of Appeals opinion requires the government to consent to the court's jurisdiction, and to then affirmatively prove it is entitled to immunity, the latter of which it is supposed to enjoy by virtue of the inherent characteristics of its

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[24] *Id*., citing *Kincaid v Cardwell*, 300 Mich App 513, 522 (2013) (a case in which a claim was said to be barred by a statute of limitations defense *not* a governmental immunity defense).

[25] *Mack*, *supra* at 195, 198-203 (discussing historical characteristics of the government's immunity from suit). See also *Lash v City of Traverse City*, 479 Mich 180, 194 (2007).

[26] *Odom v Wayne County*, 482 Mich 459, 479 (2008).

[27] See generally, *Maiden v Rozwood*, 461 Mich 109, 118-21 (1999).

[28] *Mack*, *supra*; *Odom*, *supra*.

[29] *Ballard*, *supra*, 457 Mich at 568 (stating "the state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment").

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functioning.[30] Immunity is immunity from *suit* not just liability.[31] When multiplied by the number of each governmental entity that must defend itself under the pleading standards espoused by the Court of Appeals in this case, the costs of just that portion of litigation that requires proof of immunity is of great concern to *amicus curiae*.[32]

The Legislature has provided a specific definition of highway in the GTLA. The judiciary must strictly construe that definition to remain faithful to its duty to narrowly construe the exceptions to the government's preexisting immunity in a given case.[33] The parallel parking area in this case is, by the plain language of the exception and this Court's interpretation, *without* the improved *portion* of the highway designed for vehicular travel. On this basis, the Plaintiff's case was not stated.

The Court of Appeals incorrectly ruled the alleged defect in the parallel parking space was an "actionable defect" under the highway exception by concluding the parallel parking space was a "highway" within the meaning of the exception. The Court of Appeals also erred by concluding the burden was on the government to prove that the "highway exception" did not apply, and that it was therefore immune from suit. These were erroneous rulings that warrant this Court's full review and correction.

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[30] Mack, *supra*.

[31] "[T]he purpose of governmental immunity is to protect the governmental body, not only from liability, but from the trial itself." *Walsh v Taylor*, 263 Mich App 618, 624-25 (2004) (Talbot, J.), citing *Mitchell v Forsyth*, 472 US 511, 526 (1985).

[32] *Odom*, *supra*, at 478-79 (2008) (citing *Mack*, *supra*, at 203, n 18 and *Walsh*, *supra*, at 624 and stating "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial" and placing on the claimant the burden to both plead and prove his or her case "relieves the government of the expense of discovery and trial in many cases").

[33] *Hastings*, *supra*, 1 Doug at 236.

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Therefore, *amicus curiae* submit the decision by the Court of Appeals is contrary to the jurisdictional principle of governmental entity immunity, contrary to this Court's jurisprudence applying the proper standards when reviewing a claim against a governmental entity, and creates a pleading standard that facilitates rather than mitigates litigation against the government.

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ARGUMENTS

I. THE COURT OF APPEALS CONCLUSION THAT THE PARALLEL PARKING AREA WHERE THE DEFECT EXISTED WAS A "HIGHWAY" WITHIN THE MEANING OF THE HIGHWAY EXCEPTION IS WRONG AS A MATTER OF LAW

A. Standard of Review

A court's interpretation of the statutory terms in the GTLA is reviewed *de novo*.[34]

B. Applicable Law

Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, which limits imposition of tort liability upon a governmental agency.[35] Under the GTLA, governmental agencies are immune from tort liability when engaged in a governmental function.[36] Immunity from tort liability is expressed in the broadest possible language – immunity is extended to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function.[37]

1. Governmental Immunity is Jurisdictional

Michigan courts originally recognized that the state cannot be sued unless it consents to the jurisdiction of the courts.[38] An act of the Legislature conferring such jurisdiction is the only means by which the state agrees to submit itself to the judgment of the judicial branch.[39] Immunity

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[34] *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002).

[35] *Ross v Consumers Power Co*, 420 Mich 567, 621 (1984).

[36] MCL 691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 207 (2011).

[37] *Ross*, *supra*, at 618.

[38] *Hastings*, 1 Doug at 236.

[39] *Dermont v Mayor of Detroit*, 4 Mich 435, 442-43 (1857), accord *City of Detroit v Blackeby*, 21 Mich 84, 113, 117 (1870) (Campbell, J.) (stating "there is no common law liability against towns and counties and they cannot be sued except by statute"), overruled in part by *Williams v City of Detroit*, 364 Mich 231 (1961), which was later limited by this Court in *McDowell v State Hwy Comm'r*, 365 Mich 268 (1961), and then completely disavowed by the Legislature's enactment of

from suit is an inherent characteristic of government.[40] The GTLA preserved the doctrine as it existed at common law.[41] A necessary predicate of this retained immunity is the lack of a court's jurisdiction over claims not perfected in strict compliance with the Legislature's *express*, but *limited*, waiver.[42]

Therefore, the immunity that was retained by the GTLA is jurisdictional.[43] "[T]he state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment".[44] The Legislature, not the judiciary, is the body that expresses the will of the sovereign, i.e., the People, and must therefore be the means by which subject-matter jurisdiction is conferred.[45]

Therefore, the highway exception is to be strictly construed and narrowly applied because when implicated, it vests the courts with the People's jealously guarded waiver of immunity and

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the GTLA, which restored sovereign immunity uniformly to all governmental entities. See also the discussion in *Odom v Wayne County*, 482 Mich 459, 467-68 (2008).

[40] *Mack v City of Detroit*, 467 Mich 186, 203 (2002). See also *Ballard v Ypsilanti Township.*, 457 Mich 564, 567 (1998).

[41] *Id*. at 202, accord *Pohutski*, *supra*, at 705 (by enacting the GTLA the Legislature retained the sovereign immunity that existed at common law in Michigan and extended that immunity to all other governmental entities encompassed within the act).

[42] *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193, 194 (1978), accord *Hastings*, *supra*, at 236 (1844).

[43] *Ballard*, *supra* at 568, citing *Ross*, *supra* at 598.

[44] *Id*. (emphasis added).

[45] *Hastings*, *supra*; *Greenfield Constr Co.*, *supra*; *Pohutski*, *supra*; *Odom*, *supra*, at 477.

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acquiescence to suit.[46] "The terms of the [government's] consent [in the highway exception] to be sued in any court define that court's jurisdiction to entertain the suit".[47]

2. Interpretation of the GTLA

The Court of Appeals interpreted MCL 691.1401(c) and MCL 691.1402(1) of the GTLA, the "highway exception" to governmental immunity. More particularly, the court examined the meaning and scope of the definition of "highway" as used within that provision, and as further interpreted by this Court's jurisprudence. Because governmental immunity is jurisdictional, "[when] analyzing the highway exception, [this Court] must be governed by the statutory language."[48]

This Court's common-law jurisprudence has also developed special rules for interpreting provisions that waive the government's pre-existing suit immunity. With respect to the GTLA, [this Court's] duty is to interpret the statutory language in the manner intended by the Legislature which enacted [the GTLA]."[49] Thus, in construing the GTLA, "courts may not speculate about an unstated purpose," *e.g.*, the creation of a common-law exception or an overly broad application of a statutory exception, "where the unambiguous text plainly reflects the intent of the Legislature."[50]

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[46] *Nawrocki*, *supra*, at 158. See also *Atkins v SMART*, 492 Mich 707, 714-15 and n 11 (2012), quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-69 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred *any limitations it chose*") (emphasis added).

[47] *Braun v Wayne County*, 303 Mich 454, 458 (1942), citing *Manion v State Hwy Comm'r*, 303 Mich 1, 2 (1942), cert den'd *Manion v State of Michigan*, 317 US 677 (1942).

[48] *Grimes*, *supra*, at 85.

[49] *Reardon v Dep't of Mental Health*, 430 Mich 398, 408 (1988), citing *Hyde v Univ of Mich Bd of Regents*, 426 Mich. 223, 244 (1986).

[50] *Gladych v New Family Homes, Inc*, 468 Mich 594, 597 (2002), citing *Pohutski*, *supra*, at 683.

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Specific provisions in the GTLA prevail over general statements in other parts of the statute.[51] The GTLA provisions granting immunity are broadly construed and the exceptions thereto are narrowly drawn.[52] As a result, "[t]here must be strict compliance with the *conditions* and *restrictions* of the [GTLA]."[53] In 1986, "the Legislature put its imprimatur on this Court's giving the exceptions to governmental immunity a narrow reading."[54]

3. This Court's Stated Intent When Addressing Governmental Immunity

This Court has developed a theme in addressing governmental immunity. As such, this Court strives for the following: (1) to faithfully interpret and define the GTLA "to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability"; (2) to "formulate an approach which is faithful to the

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[51] *Jones v Enertel, Inc*, 467 Mich 266, 270 (2002).

[52] *Nawrocki*, *supra*, at 158.

[53] *Id*. at 158-59 (emphasis added). See also *Scheurman v Dep't of Transportation*, 434 Mich 619, 629-30 (1990).

[54] *Nawrocki*, *supra*, at n 16. The principle of statutory construction requiring strict or narrow interpretation of exceptions to governmental immunity has a distinguished pedigree. 3 Sands, Sutherland Statutory Construction (4th ed), § 62.01, p 113 (stating that "the rule has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit" and "the standard of liability is strictly construed even under statutes which expressly impose liability"). The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign. *Manion v State Hwy Comm'r*, 303 Mich 1 (1942), cert den'd *Manion v State of Michigan*, 317 US 677 (1942). See also *United States v Sherwood*, 312 US 584, 590 (1941) (the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted); *Shillinger v United States*, 155 US 163, 166, 167-68 (1894) ("the congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted"; "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government"; this is "a policy imposed by necessity").

statutory language and legislative intent"; and (3) develop a consensus of "what the Legislature intended the law to be.[55]

4. The Highway Exception to Governmental Immunity

Applying these principles, this Court has developed a well-established jurisprudence concerning interpretation and application of MCL 691.1402. The construction and maintenance of highways is the discharge of a governmental function, for the improper discharge of which there is no liability, except as created by statute.[56] Interpreting and applying the highway exception requires a court to parse each sentence of the statute to ascertain the scope of the exception, as determined by the stated policy considerations of the Legislature.[57]

The GTLA additionally defines the term "highway" as follows:

> "Highway" means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.[58]

In addition, MCL 691.1402 provides, in pertinent part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission

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[55] *Nawrocki*, *supra*, at 148-49.

[56] *Braun*, *supra*, at 457-58 (1942) (addressing CL 1929, § 3996, a predecessor to MCL 691.1402). See also *Thomas v Dep't of State Highways*, 398 Mich 1 (1976).

[57] *Nawrocki*, *supra*, at 159-160.

[58] MCL 691.1401(c).

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> shall be as provided in…MCL 224.21. [T]he duty of a governmental agency to repair and maintain highways, and the liability for that duty, *extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel*….[59]

MCL 691.1401(c) and MCL 691.1402 are to be read together as a single, comprehensive law.[60] When construing the terms of these provisions together, as required, the Court must give effect to *all* terms and phrases used in the exception.[61]

In determining whether there is an "actionable defect", this Court has stated it is "cognizant of the challenges presented by the drafting of the highway exception and mindful that [it is] 'constrained to apply the statutory language as best as possible as written….'"[62] In this latter regard, *Nawrocki* cautioned that an impermissibly "broad, rather than a narrow, reading of the highway exception is required in order to conclude that it is applicable to anything *but the highway* itself" and that such interpretations that did not "'limit[] governmental responsibility" in this way would be a "complete abrogation of this Court's duty to *narrowly* construe exceptions to the broad grant of immunity."[63]

Therefore, within the parameters of the foregoing framework, it is no surprise this Court's interpretation of the term "highway" has been restricted to only those lanes or thoroughfares of a

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[59] MCL 691.1402(1) (emphasis added).

[60] *Robinson v City of Lansing*, 486 Mich 1, 8, n 4 (2010).

[61] *Duffy*, 490 Mich at 213 and n 5, citing *People v Jackson*, 487 Mich 783, 791 (2010); *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999).

[62] *Duffy*, *supra*, at 206, quoting *Nawrocki*, *supra*, at 171.

[63] *Nawrocki*, *supra*, at 175.

highway actually *designed* and *used* for ordinary vehicular travel.[64] The Legislature "did not intend to extend the highway exception indiscriminately to *every* 'improved portion of the highway'".[65] Thus, according to this construct, not "every 'improved portion of the highway' is also 'designed for vehicular travel.'"[66] Further, even if an improved portion of the highway is "designed for vehicular travel", it also does not follow that the area is necessarily a "travel lane" within the meaning of the term "highway" as used and applied in the GTLA.

Actionable defects are only those that exist within the physical confines of this narrowest definition of "highway". This is a conclusion dictated by policy and the Legislature's narrowly confined waiver of immunity. The plain language of the statute, as well as this Court's jurisprudence fully supports this conclusion

"The highway exception…is limited exclusively to dangerous or defective conditions within the improved portion of the highway designed for vehicular travel; that is, the actual roadbed, paved or unpaved, designed for vehicular travel."[67] In keeping with his or her burden to plead and prove facts in avoidance of immunity,[68] a plaintiff pursuing a cause of action under the highway exception must demonstrate the existence of an actionable defect, and that the government's failure to fulfill its duty with respect to that defect was *the* proximate cause of the

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[64] *Id*. See also *Mason v Wayne County Board of Comm'rs*, 447 Mich 130, 138 (1994) (stating "legislative line drawing [in the highway exception] is also explicable on the ground that *expanding the right to sue* past a certain point does not prevent accidents, and amounts to nothing more than an expanded obligation to pay")(emphasis added).

[65] *Grimes*, *supra*, 475 Mich at 89 (emphasis added).

[66] *Id*. at 90.

[67] *Nawrocki*, *supra*, at 151-152 (emphasis added).

[68] *Mack*, *supra*, at 195.

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injury complained of.[69] A defect is not actionable, even if it is a defect, if it does not exist within the improved portion of the highway actually designed and used for regular and ordinary vehicular traffic.[70]

C. Analysis

Parallel parking areas, even those that might be used from time to time as a travel lane, must be excluded unless and until the Legislature provides otherwise. If an interpretation of the highway exception reveals the particular area under consideration should be excluded, the judiciary cannot broaden the exception to include such an area, and a claimant will have failed to carry her burden to prove her prima facie case.[71] This circumstance implicates the jurisdictional principle of governmental immunity. A failure to prove the prima facie case would necessarily mean that a trial court has no subject matter jurisdiction, i.e., a condition precedent to the government's suit immunity will not have been fulfilled.[72] *Amicus curiae* respectfully submit that Plaintiff cannot sustain her burden in this case.

1. The Plain Language of the Statute Excludes Parallel Parking Areas

"[T]he highway exception applies when a claimant's injury is proximately caused by a dangerous or defective condition of the improved portion of the highway designed for vehicular travel".[73] The first sentence and second sentence of MCL 691.1402(1) must be read and applied

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[69] *Nawrocki*, *supra*.

[70] *Braun*, *supra*, 303 Mich at 457.

[71] *Mack*, *supra*.

[72] *Atkins*, 492 Mich at 714-715 and n 11; *Braun*, *supra*, at 458 (1942), citing *Manion*, *supra*, 303 Mich at 2.

[73] *Nawrocki*, *supra*, at 151.

together such that the government's duty, as expressed in the first sentence, must be shown to have been breached, and the breach must be shown to have been the direct cause of the defect that was then the direct and only cause of the accident.[74] If a particular "defect" is not in a "highway" as defined and applied, it is not an "actionable" defect.[75]

Applying the rules of statutory interpretation and the special rules developed for statutory exceptions to immunity, the "defect" in the instant case was not an "actionable defect". Construing MCL 691.1401(c) and MCL 691.1402(1) together, as the Court must do,[76] reveals that the duty "to repair and maintain, and resulting liability for a breach of that duty, extends only to the improved *portion* of the highway designed for vehicular travel *and does not include* sidewalks, trailways, crosswalks, or *any other installation* outside the improved portion of the highway so designed.[77]

The statute therefore limits the location of an actionable defect and the concomitant duty to only a "portion" of the highway – the "improved portion" that is designed for vehicular travel. The provision then excludes sidewalks, trailways, crosswalks, or *any other installation* that is not *part of* this "portion" of the highway.[78]

Strictly construing the language of this provision, two conclusions can be drawn. First, if a defect is not located within the improved portion of a highway designed for vehicular travel, then it is not actionable, because it is not located in the "highway" as that term is defined and applied

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[74] *Id*. at 160-161.

[75] *Id*. See also *Plunkett v Dep't of Transportation*, 286 Mich App 168, 179 (2009).

[76] *Id*.

[77] MCL 691.1402(1) (emphasis added).

[78] *Id*. (emphasis added).

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under MCL 691.1401(c) and MCL 691.1402(1). That the statute restricts the location of actionable defects to only a "portion" of the highway is a logical consequence of the statute's plain language. Second, the strict interpretation of the exception required by this Court's jurisprudence reveals that the "portion" must also be the *narrowest* portion of a roadway or thoroughfare designed for vehicular travel.[79] It follows that *all areas* outside of this *portion* of the highway must be excluded.[80]

The statute *excludes* adjacent and contiguous surface areas, which would necessarily include parallel parking spaces.[81] Under the exclusion, an area, location, or installation could be adjacent to and contiguous with that "portion" of the highway where actionable defects can be located. Such locations could also be those that are not physically or spatially separated from that portion of the highway, i.e., adjacent to and contiguous with. Indeed, applying the strictest interpretation of the term "highway", and, in light of the plain language of the exclusion, such areas would not even necessarily have to be visibly separate (i.e., by painted lane lines, boundaries, curbs, and the like) from the improved *portion* of the highway.

Moreover, the generalized phrase "any other installation outside of the improved *portion* of the highway designed for vehicular travel" would properly *include* parallel parking spaces (whether or not delineated by painted lane lines on the surface; or whether or not physically

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[79] *Mason*, 477 Mich at 137-138.

[80] *Mason*, *supra*, at 137 (explaining that the reason the narrowest portion of travel lanes are included, and other contiguous and indeed integrated areas such as crosswalks, sidewalks, *other installations*, etc. are *excluded* is because the expectation is that only those areas constantly used by drivers for vehicular travel should be the limited area defining the term "highway"; all other excluded areas, while posing a risk to others, are not deemed to be areas with respect to which the governmental entity has a duty to keep free from actionable defects).

[81] MCL 691.1402(1).

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separated by some other more substantial delineation or barrier).[82] First, those other enumerated items "sidewalks, crosswalks, trailways, etc., are excluded *even though* they are also *on the highway*, and *even if* such other installations may or may not be physically separated. A sidewalk, for example may be both adjacent to and contiguous with (in terms of linear level and plane – as in "two dimensional") the improved portion of a highway designed for vehicular travel, but cannot be a "highway" where an actionable defect may exist. This same conclusion would obtain with respect to a "trailway".[83] And, certainly, a "crosswalk" which normally would actually traverse the improved portion of a highway and would normally only be delineated by paint or other non-three-dimensional indicators, still is not part of that narrow portion of the highway upon which an actionable defect may exist.[84]

Finally, although not defined in the GTLA, "installation" would certainly include areas or things similar in kind and scope to sidewalks and crosswalks. Indeed, "installation" is defined as "something installed, as…apparatus *placed in position* or *connected* for use."[85] A parallel parking space, specifically delineated and identified, or not, but contiguous with and adjacent to a highway would certainly fall within the exclusion as "any other installation outside of the improved portion

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[82] This Court has never limited the phrase "or any other installation" such that it would not include installations such as a parallel parking space that is obviously used by both pedestrians and motorists while embarking and disembarking from their vehicles, respectively. See *Suttles v State Dep't of Transp*, 475 Mich 635, 652-53 (1998). It would seem under the principles of construction applicable to the GTLA and the rule followed by this Court not to *expand* but rather *restrict* or *confine* those areas of a "highway" where an actionable defect might exist, that the "any other installation" category would apply here to exclude parallel parking spaces unless and until the legislature says otherwise.

[83] See *Duffy*, 490 Mich. at 222-24.

[84] *Id*. See also *Mason*, *supra*, at 137-138.

[85] Random House Dictionary of the English Language (2nd ed) (unabridged), p. 988.

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of the highway designed for vehicular travel."[86] It is both placed in position and connected with the highway for use.

A parallel parking space would even fall within those similar aspects of a highway's adjacent features such as sidewalks and crosswalks under the restrictive rule of statutory interpretation known as *ejusdem generis*;[87] although that rule would not necessarily pertain to a provision the construction of which is to be as narrow as possible in favor of the government's *broadly retained* immunity.[88]

In fact, the oft-confusing grammar of this particular provision does not pose a problem in this instance.[89] A parallel parking space, even if technically and physically "on" a highway, falls outside the narrow travel lanes of the improved portion of the highway actually designed for vehicular travel.[90] As a strict construction of this provision is required and immunity broadly conferred on the state, any other reading including that of the Court of Appeals here is unwarranted.

2. This Court's Jurisprudence Indicates Parallel Parking Areas are not "Highways"

"Highway" within the meaning of the highway exception to governmental immunity is a legal term of art. This particular term as defined by MCL 691.1401(c) and as applied in MCL 691.1402(1) has acquired a unique legal meaning in this Court's jurisprudence addressing the

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[86] MCL 691.1402(1).

[87] Where general words follow the specific enumeration of things, the general words are to be construed as applying only to the same kinds of things previously enumerated. *Southeastern Oakland Incinerator Authority v Dep't of Natural Resources*, 176 Mich App 434, 441 (1989).

[88] *Stanton v. City of Battle Creek*, 466 Mich. 611, 618 (2002).

[89] See, e.g., *Duffy*, *supra*, at 206, citing *Nawrocki*, *supra*, at 167, n 24 and stating "the Court has recognized that the language of the highway exception is not altogether clear".

[90] See, e.g., *Grimes*, *supra*, 475 Mich. at 90.

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exception. Where a term or phrase has acquired specific meaning through its usage in jurisprudence developed over time with respect to a particular and unique subject matter, the term or phrase is regarded as having acquired a particular legal meaning when discussed or considered in a similar case.[91]

In *Grimes*, this Court ruled that even momentary vehicular travel on areas of the highway outside the improved portion, as, for example, on parallel parking spaces, is not sufficient to bring the area within the narrow confines of the limited portion of the highway designed for vehicular travel.[92] This Court has otherwise rejected attempts to expand the meaning of the term "highway" to encompass areas outside the regularly traveled portion of the highway actually designed for vehicular travel.[93] If such expansion is to occur, it must be by legislative act.[94]

Indeed, as explained by this Court in *Ross*,[95] and, more recently in *Nawrocki*,[96] there is a distinct difference between those areas of a highway with respect to which a governmental entity may have a *duty* to maintain and repair, and those areas of a highway with respect to which a governmental entity may have an *actionable duty* in this regard; or, put another way, those areas with respect to which a failure of the government's duty to maintain and repair may give rise to liability (assuming, of course, all remaining elements of the tort necessary to prove the case can

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[91] See MCL 8.3a ("technical words and phrases, and such as may have acquired a peculiar meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"); *People v Thompson*, 477 Mich 146, 152 (2007).

[92] *Grimes*, *supra*, at 90.

[93] *Mason v Wayne County Bd of Comm'rs*, 447 Mich 130, 137-138 (1994).

[94] *Id*.

[95] 420 Mich. at 618-619.

[96] 463 Mich. at 157.

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be established).[97] Thus, it makes perfect sense, when viewed from the proper orientation of the retained-unless-surrendered nature of the government's preexisting immunity, and the strict confines required by the Legislature of the government's waiver thereof, to restrict the definition of highway to such a degree.

Amicus curiae submit that even if the parallel parking space at issue in this case is "designed for vehicular travel", it does not follow that it falls within the "*traveled portion*" of that part of the highway designed for vehicular travel.[98] "Traveled portion" pertains directly, and solely to the constant and voluminous vehicular travel where actionable defects are most likely to cause the most damage.[99] Indeed, such a limitation was evident in this Court's opinion in *Grimes*, and would apply equally to "parallel parking spaces", even ones that are sometimes used as turning lanes.[100]

In essence, to faithfully adhere to the plain language of the statute, and strictly construe the Legislature's waiver, as this Court must, to be a "highway" within the meaning of the highway exception, the particular "portion" of the highway at issue must be both within the improved portion of the highway *and* designed for vehicular travel.[101] In *Grimes*, this Court concluded that the shoulder of the highway at issue was not "designed for vehicular travel", and it was not a "travel lane". "A shoulder may be capable of supporting some form of vehicular traffic, but it is not a travel lane and it is not 'designed for vehicular travel.'" A "parallel parking space", even

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[97] *Id*. at 157.

[98] *Grimes*, *supra*.

[99] *Id*. at 91.

[100] *Id*.

[101] *Id*. at 88.

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one that doubles as a convenient turn lane, is not necessarily a "travel lane" even if it is "designed for [some] vehicular travel".[102]

It is beyond this Court's authority to expand or draw lines not clearly delineated as acceptable by the Legislature's waiver of the state's immunity through the GTLA.[103] Such "line drawing" is reserved exclusively to the Legislature, and, as this Court has noted it "is explicable on the ground that expanding the right to sue past a certain point does not prevent accidents, and amounts to nothing more than an expanded obligation to pay."[104] In the instant case, this Court should adhere to this principle because the creation of an additional exception to immunity that does not clearly exist by virtue of the statutory language is beyond this Court's authority. Indeed, the creation of additional exceptions, whether from preexisting common-law constructs or expansive and new interpretations of the GTLA are prohibited as they cannot be "culled from the language of [the GTLA]."[105]

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[102] *Id*. at 90.

[103] *Mason*, *supra* at 138.

[104] *Id*.

[105] *Li v Feldt*, 434 Mich 584, 602 (1990) (Griffin, J, concurring in part and dissenting in part). Justice Griffin's view that the *only* exceptions to the government's immunity were those found in the GTLA and the immunity of the state was retained by the GTLA without common-law exceptions was eventually affirmed by this Court in *Pohutski v City of Allen Park*, 465 Mich 675, 688 (2002).

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II. THE COURT OF APPEALS APPLIED THE WRONG STANDARD IN REVIEWING PLAINTIFF'S CLAIM BY REQUIRING THE GOVERNMENT TO BEAR THE BURDEN OF PROVING IT IS NOT ENTITLED TO IMMUNITY

A. Standard of Review

Questions regarding whether a lower court applied the correct standard of review on a motion for summary disposition are reviewed *de novo*.[106]

B. Applicable Law

"From the time of Michigan's statehood, this Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents, and that any relinquishment of sovereign immunity must be strictly interpreted.[107] Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them or their jurisdiction without express legislative consent.[108] In keeping with this principle, "a 'central purpose' of governmental immunity is 'to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.'"[109] Thus, merely allowing governmental entities to assert immunity "while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare [a] defense, would render illusory the immunity afforded by the [GTLA]."[110] Therefore, it is essential that motions for

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[106] *Natural Resources Defense Council v Dep't of Envt'l Quality*, 300 Mich App 79, 87 (2013). See also *Maiden v Rozwood*, 451 Mich 109, 118 (1999).

[107] *Manion v State Hwy Comm'r*, 303 Mich 1, 19 (1942).

[108] *Ballard*, *supra*, 457 Mich at 568 citing *Ross*, *supra*, and *Pohutski*, *supra*, at 681-82.

[109] *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 410 (2006).

[110] *Id*.

summary disposition based on the government's claim of immunity from suit be carefully considered.

It follows that a plaintiff must "allege facts justifying the application of an exception to governmental immunity".[111] Further, if a plaintiff alleges that governmental immunity *does not apply*, the burden is on the plaintiff to proffer material facts to the contrary.[112] Indeed, the burden is on plaintiff at the outset to both *plead* and *prove* facts in avoidance of immunity.[113]

In *Mack*, this Court addressed the question of "whether government immunity is an affirmative defense or a characteristic of government so that a plaintiff must plead in avoidance of it."[114] This question was key, because if governmental immunity pled as a defense to a claim pursuant to MCR 2.116(C)(7) is merely an affirmative defense, then a failure to plead it in a first responsive pleading could be deemed a *waiver* of the defense of immunity. A *waiver* would effectively allow the court to exercise jurisdiction over the government and consider the merits of the claim against it. If, on the other hand, immunity is not an "affirmative defense" then the governmental entity does not waive the defense at the initial pleading stage and the court could not simply proceed to address the merits of the underlying claim.

In *Mack*, this Court reasoned governmental immunity was an inherent characteristic of government. Therefore, immunity from suit did not have to be asserted and plead as an affirmative defense. Key to this Court's holding in *Mack* was the understanding that "to plead a cause of action against the state or its agencies, the plaintiff must plead *and prove facts* in avoidance of

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[111] *Fane v. Detroit Library Comm'n*, 465 Mich. 68, 74 (2001); *Mack*, *supra* at 203, 204.

[112] *Mack*, 467 Mich at 204, 205.

[113] *Id*. at 199.

[114] *Id*. at 193.

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immunity."[115] In order to determine whether one has both *pleaded* and *proven facts* in avoidance of immunity, it must be determined, in advance, whether the suit against the government can be prosecuted further. After all, governmental immunity provides immunity from suit, not just liability.[116] Immunity from suit is as important a defense as defending against liability judgments because defending a suit is as costly and potentially even more detrimental to the efficient operation and functioning of government.[117] To defend a suit against the government the governmental entity must divert costly resources to investigation of the claim and defense of its merits.[118]

Thus, the Court in *Mack* recognized the import of the GTLA's statement "except as otherwise provided *in this act*, a governmental agency is *immune from tort liability*…."[119] This language confirms the Court's holding: governmental immunity preexists, is inherent, and applies where the governmental entity is involved in the discharge of a governmental function.[120]

Therefore, the failure to raise the defense under MCR 2.116(C)(7) or in general terms in the statement of affirmative defenses is immaterial because the government is already immune from suit.[121] Which is why it is not enough to simply allege facts sufficient to implicate an

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[115] *Id*. at 199, quoting *McCann v State of Michigan, Dep't of Mental Health*, 398 Mich 65, 77, n 1 (1976)(emphasis added).

[116] *Costa*, *supra*, at 409-10, citing *Robinson v City of Detroit*, 462 Mich 439, 459 (2000) and *Mack*, *supra*, at 203, n 18.

[117] *Mack*, *supra*.

[118] *Id*. at 195, 198-203.

[119] *Id.*

[120] *Id*.

[121] *Id*.

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exception in pleading a cause of action in avoidance of the government's inherent immunity from suit. If this were the case, the whole point of immunity, which includes immunity from suit, not just liability, would be lost.[122] "[R]equiring the plaintiff to bear the burden of pleading in avoidance of governmental immunity is also consistent with a central purpose of governmental immunity, that is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity."[123]

C. Analysis

In its opinion after remand from this Court the Court of Appeals stated:

> [I]t is unclear what our Supreme Court meant when it ordered us to consider whether [Plaintiff] "has pled sufficient facts to create a genuine issue of material fact…." It may have meant for this Court to consider solely what evidence is necessary to establish whether "the improved portion of the highway" at issue was "designed for vehicular travel," MCL 691.1402(1), or it may have meant that this Court should examine the standard applicable to pleading in avoidance of governmental immunity under MCL 691.1402(1). Therefore, in order to ensure that we have considered everything that our Supreme Court has asked of us, we first consider whether Yono properly pleaded in avoidance of governmental immunity. We then examine the evidence that is sufficient to establish that the condition at issue was in the "improved portion of the highway designed for vehicular travel." MCL 691.1402(1).[124]

The Court continued:

> A trial court properly dismisses a claim under MCR 2.116(C)(7) when, in relevant part, the claim is barred by "immunity granted by law." The party moving for summary disposition under MCR 2.116(C)(7) may show that he or she is entitled to immunity granted by law in two distinct ways. First, the moving party may show that he or she has immunity on the face of the plaintiff's pleadings. See

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[122] *Id*. at 203, n 18.

[123] *Id*.

[124] 306 Mich App 671, ___ (2014), Slip Op at 3.

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MCR 2.116(G)(2) (stating that the moving party may, but is not required, to support a motion under MCR 2.116[C][7] with affidavits, depositions, admissions, or other documentary evidence). In this sense, the motion is similar to one under MCR 2.116(C)(8). See *Patterson v Kleiman*, 447 Mich 429, 434 (1994) (noting that the distinction between a motion under MCR 2.116[C][7] and one under MCR 2.116[C][8] is that the movant under MCR 2.116[C][7] may support his or her motion with documentary evidence that contradicts the allegations in the plaintiff's complaint). In reviewing a motion under MCR 2.116(C)(7) that challenges whether the movant is entitled to immunity on the face of the plaintiff's pleadings, the trial court must accept all well-pleaded allegations as true. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Similarly, as with a motion under MCR 2.116(C)(8), the court must construe the allegations in the light most favorable to the nonmoving party. *Id.* If it is evident on the face of the allegations, even when considered in the light most favorable to the nonmoving party and accepting the allegations as true, that the movant is entitled to immunity as a matter of law, the trial court should grant the motion to dismiss under MCR 2.116(C)(7).

In contrast to a motion under MCR 2.116(C)(8), a party moving for summary disposition under MCR 2.116(C)(7) is not limited to challenging the facial validity of the pleadings. See MCR 2.116(G)(5) (providing that, in a motion under MCR 2.116[C][8], the trial court may only consider the pleadings); *Patterson*, 447 Mich at 434. Rather, the movant may establish that, given the undisputed facts of the case, he or she is entitled to immunity as a matter of law, notwithstanding the plaintiff's allegations. See MCR 2.116(G)(5); MCR 2.116(G)(6). Such a challenge is similar to one under MCR 2.116(C)(10). See *Dextrom v Wexford County*, 287 Mich App 406, 430-433 (2010). And, as with a motion under MCR 2.116(C)(10), the movant bears the initial burden to show that he or she is entitled to immunity as a matter of law. See *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant has immunity, the burden shifts to the nonmoving party to present evidence that establishes a question of fact as to whether the movant is entitled to immunity as a matter of law. *Id.* at 537, n 6. If the trial court determines that there is a question of fact as to whether the movant has immunity, the court must deny the motion. *Dextrom*, 287 Mich App at 431.[125]

[125] *Id*. at 3-4.

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The last three sentences create a pleading requirement contrary to this Court's decision in *Mack*.[126] And, because the Court of Appeals concluded the parallel parking area was a "highway" within the meaning of the highway exception, it declined to fully address this incorrectly stated standard.[127] This pronounced "standard" must be corrected.

If a claimant asserts a cause of action against the government, and pleads all the necessary facts to bring the claim within the exception, is it sufficient to survive a motion for summary disposition under MCR 2.116(C)(7)? In such a case, without more, the claimant has not both *plead* and *proved* the case against the government, as required by this Court's decision in *Mack*.[128] On the other hand, the government's motion does not offer anything other than its stated immunity from suit. Under the Court of Appeals standard, the movant, i.e., the government, "as with a motion under MCR 2.116(C)(10)…bears the *initial* burden to show that [it] is entitled to immunity as a matter of law."[129] If this is the standard applied, then the government will not have met its burden and the suit will be allowed to proceed. This is no small detail considering the volume of cases the government must defend.

The jurisdictional view of governmental immunity adhered to in Michigan requires that for a circuit court to even have jurisdiction over the government, the case itself (the underlying facts of the case) must *establish* that the claim against the government can go forward under one of the

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[126] *Mack*, *supra* at 193-203 and n 18 (2002).

[127] 306 Mich App 671, ___ (2014), Slip Op at 4-5 and n 2.

[128] *Mack*, *supra*.

[129] 306 Mich App 671, ___ (2014), Slip Op at 4, quoting *Kincaid v Caldwell*, 300 Mich App 513, 522 (2013).

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legislative exceptions to immunity in the GTLA.[130] As this Court has recognized: "the state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment".[131]

Such consent comes only in the form of the narrowly applied exceptions to that immunity in the GTLA. Only when the claimant pleads that the facts fall within an exception and proves those facts exist is there evidence of a *waiver* of the inherent and preexisting immunity granted by law.[132] And, later, this Court made clear that, at least with respect to actions against governmental entities, the burden to both *plead* and *prove* the case falls within an exception is on the claimant.[133]

Here, while recognizing the conflict of opinions in this area, the Court of Appeals conflated the MCR 2.116(C)(7) standard with the "genuine issue of material fact" standard of MCR 2.116(C)(10), as if there was no difference in application of these two court rules.[134] This conflation resulted in the conclusion that a pleaded, but not necessarily proved, claim against the government is sufficient to survive the summary disposition. This is error.

The Court of Appeals concluded:

> Because [MDOT] did not present any admissible evidence to rebut [Plaintiff's] allegations that the area of the highway at issue was part of the improved portion of the highway designed for vehicular travel, [MDOT] failed to establish that it was entitled to summary

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[130] *Greenfield Construction Co v State Highway Dep't*, 402 Mich 172, 194 (1978) (stating that "it is well settled that the circuit court is without jurisdiction to entertain an action against the State of Michigan unless that jurisdiction shall have been acquired by legislative consent). See also *Ross v Consumers Power Co*, 420 Mich 567 (1984) and *Manion v State Highway Comm'r*, 303 Mich 1 (1942).

[131] *Ballard*, 457 Mich at 568.

[132] *Mack*, *supra*, at 200-02.

[133] *Odom v Wayne* County, 482 Mich 459, 478-79 (2008).

[134] 306 Mich App 671, ___ (2014), Slip Op at 4 and n 2.

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> disposition under MCR 2.116(C)(7). Indeed, as we noted in our prior opinion, the only admissible evidence submitted by the parties actually supported an inference that the lanes at issue were in-fact designed for vehicular travel. See *Yono*, 299 Mich App at 114. Because [MDOT] failed to contradict [Plaintiff's] allegations by presenting evidence sufficient to establish that the area of M-22 at issue here fell outside of the improved portion of the highway designed for vehicular travel, the trial court did not err when it denied the Department's motion for summary disposition under MCR 2.116(C)(7).[135]

This turns the government's inherent immunity on its head. Now, rather than the government being immune from *suit*, the government is being required to prove it is *not immune*. If this is the standard, then any well-pled allegation in a complaint setting forth the parameters of a statutory exception to immunity and factual allegations that the exception is satisfied will survive a motion for summary disposition on grounds of "immunity granted by law" under MCR 2.116(C)(7). This does nothing to preserve the inherent characteristic of governmental immunity from suit.[136]

Consider *Ruff v Smart*,[137] where in a 2-1 opinion, the Court of Appeals addressed a case against a governmental entity (a transportation authority) under the "public building" exception.[138] The plaintiff was injured when he fell through a missing pane of safety glass on a public bus stop.[139] Plaintiff filed suit against the governmental entity claiming negligence. The plaintiff

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[135] The Court of Appeals provides a rather cryptic footnote here, stating: "Nothing in this opinion should be understood to preclude the Department from making a properly supported motion for summary disposition at some later point."

[136] *Mack*, *supra*.

[137] (**ATTACHMENT A**), Unpublished Opinion of the Michigan Court of Appeals, issued November 4, 2014 (Docket No. 317017).

[138] MCL 691.1406.

[139] Public bus stops are considered "public buildings" within the meaning of MCL 691.1406 of the Governmental Tort Liability Act (GTLA) (the "public building" exception). *Ali v. City of Detroit*, 218 Mich. App. 581, 585 (1996).

never pled allegations in avoidance of immunity, i.e., never pled that the facts established his case fit with one of the statutory exceptions to governmental immunity.[140] The governmental entity included "governmental immunity" in its affirmative defense.

The governmental entity then filed a motion for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10), contending the public building exception did not apply because the missing pane of glass did not constitute a "dangerous or defective condition".[141] The plaintiff argued there was a genuine issue of material fact concerning whether the missing pane of glass was a "dangerous or defective condition", and that this was a sufficient question to allow the action to proceed.[142] The trial court agreed and denied the bus authority's motion.[143]

The Court of Appeals reversed ordering judgment for the bus authority. The majority reasoned that, as a matter of law, the missing pane of glass was not a "dangerous or defective" condition within the meaning of the public building exception.[144] Even though the bus authority sought summary disposition under the standards applicable to such motions under all three court rules MCR 2.116(C)(7) ("immunity granted by law"); (C)(8) ("failure to plead or state a claim"); and (C)(10) ("no genuine issue of material fact"), the Court of Appeals majority properly oriented the motion as one falling under (C)(7). Thus, the Court reasoned, that summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by "immunity granted *by law*".[145] The

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[140] (**ATTACHMENT A**), Slip Op at 3.

[141] *Id*. at 2.

[142] *Id*.

[143] *Id*.

[144] *Id*. at 3.

[145] *Id*. at 2-3 (emphasis added), citing *Seldon v SMART*, 297 Mich App 427, 432 (2012).

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Court pointed out that the trial court is to resolve the governmental immunity issue at the summary disposition stage as "an issue of law…[i]f there are no material facts in dispute or if reasonable minds could not differ regarding the legal effect of the facts."[146]

The Court of Appeals in *Ruff*, correctly applied the proper reviewing standard. The trial court should decide the question of whether an exception to immunity applies "as a matter of law". If the trial court rules an exception does not apply, the Court of Appeals has *de novo* reviewing authority over the case to check the trial court's decision, thereby preserving the jurisdictional principle of governmental immunity from unnecessary erosion, and, at the same time, insulating, to the greatest extent possible, the government's immunity *from suit*, as well as from liability.[147] Otherwise, trial courts have the discretion to allow a case to proceed against the government. This is inconsistent with the jurisdictional view of governmental immunity and contrary to established case law, which preserves the government's preexisting and inherent immunity from suit and liability in all but a small number of cases.

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[146] *Id*., citing *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 578 (2011).

[147] MCR 7.202(6)(a)(v). See also *Walsh v Taylor*, 263 Mich App 618, 622-24 (2004) (stating if an appeal of right on the legal issue of whether an exception to immunity applies was not always available to the governmental entity "the claim of immunity could be 'effectively lost' when a plaintiff's allegations in avoidance of immunity were 'erroneously permitted to go to trial'"). This Court later affirmed this reasoning in *Watts v Nevils, et al*, 477 Mich 856, 856 (2006).

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CONCLUSION

This Court, and only this Court can expand the government's immunity from suit by interpreting and applying the GTLA. And, the Court's authority in this regard is limited by the jurisdictional principle of governmental immunity. Judicial constructs that broaden an exception to immunity are prohibited by the very nature of the preexisting and inherent immunity enjoyed by the state.[148]

This Court has stated many times that governmental immunity is broad and the exceptions thereto are to be narrowly drawn.[149] The Court has also stated the highway exception is "a narrowly drawn exception" and there must be "strict compliance with the conditions and restrictions of the statute" and therefore "[n]o action may be maintained under the highway exception unless it is *clearly within the scope and meaning of the statute*."[150]

While oft stated, the rationale for these judicial guideposts is the jurisdictional principle of governmental immunity. The government *is immune* from suit and liability, *unless* an exception applies. Thus, if an area does not fall "clearly within the scope and meaning of the statute" it cannot be included as a "highway" by this or another Court's interpretation.[151] To include the parallel parking area in this case would be a judicial *expansion* of the highway exception because the plain language of the statute, as well as this Court's jurisprudence *excludes* such areas.

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[148] *Grimes*, 475 Mich at 89-90.

[149] See *Gregg v State Highway Dep't*, 435 Mich 307, 318-319 (1990) (Griffin, J, dissenting and citing *Ross*, 420 Mich at 594, n 4). Of course, *Gregg* was overruled by this Court in *Grimes*, *supra*.

[150] *Scheurman v Dep't of Transp*, 434 Mich 619, 630 (1990) (Riley, J) (emphasis added).

[151] *Id*.

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The plain language of the highway exception, this Court's interpretive principles applied to statutes that waive governmental immunity, and the policy against broadening the exceptions to immunity all counsel against the conclusion of the Court of Appeals that the parallel parking area is a "highway" under the "highway exception". Given the narrow interpretation mandated for statutes waiving the government's suit immunity and the broad grant of immunity, and the fact that the definition of "highway" provided by the Legislature suffers from "no apparent ambiguity",[152] resort to speculation about what should or should not be included as "part" of a highway is prohibited. Indeed, engaging in such an exercise is nothing more than substituting one panel's policy choices for that of the Legislature – it is an expression of what the particular panel thinks should and should not be included as part of a highway.[153] Such policy choices (or speculating about what should or should not be included as waiving the government's inherent immunity) are best left to the Legislature.[154] This is especially true when addressing provisions that lift the broad veil of immunity and subject the government to suit in its own courts.[155]

Courts must jealously guard the Legislature's waiver of suit immunity because the presumption is the People *have not* waived immunity from suit and exposed the government to potential liability where such an expression is not plainly evident in the statutory exception – the only exceptions that can avail a claimant of access to courts of law in cases against the government. Thus, even if an interpretation of an exception to immunity *might* encompass a particular case or

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[152] *Grimes*, 475 Mich at 87.

[153] *People v McIntire*, 461 Mich 147, 152 (1999). See also *Grimes*, *supra*, at 85 and *Mason*, 447 Mich at 138.

[154] *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 214, n 10 (2007).

[155] *Mack*, *supra*.

circumstance, the default outcome *must be* that it does not so apply absent clear legislative expression. Interpretations of the highway exception must always abide by this principle. If unverified *allegations* of a defect were allowed to pierce the veil of immunity then the purpose of immunity to prevent not only judgments and liability, but the costs of defending suits will be lost.[156]

While it is the position of *amicus curiae* that the plain language of the relevant provisions construed together provide sufficient authority to *exclude* the particular parallel parking area at issue in the instant case, when immunity is broadly drawn and the exception itself is narrowly applied there is even more reason for such exclusion. Indeed, the judiciary is ill equipped to make *policy* choices (or choices of interpretations that reflect such choices) that cause a particular claim to fall within the Legislature's narrow exceptions to the government's jealously guarded immunity because it is itself a branch of government subservient to the collective will of the People's choice of when immunity can be waived and, therefore, when jurisdiction may be conferred in a given case so that the judiciary may decide the merits of a legitimate claim.[157] The default must always be that a particular claim *does not* satisfy the requirements to access the courts and lift the presumptive veil of immunity that is cast widely upon the government's activity.[158]

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[156] *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 409-410 (2006).

[157] *Atkins v SMART*, 492 Mich 707, 714-715 and n 11 (2012), quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-169 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred any limitations it chose"). As a matter of constitutional limitations imposed on the branches of government, the judiciary cannot expand such limitations.

[158] *Mack*, *supra*, at 198-203.

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RELIEF REQUESTED

Amicus curiae respectfully request this Court to grant MDOT's Application for Leave to Appeal, or to peremptorily reverse the Court of Appeals for the reasons stated in MDOT's application and in this brief in support thereof.

Respectfully submitted,

/s/ Carson J. Tucker

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