

TABLE OF CONTENTS

1. Interpretation of the Government Tort Liability Act.....1

2. “The Proximate Cause” is Different than “Cause in Fact” or “
a Proximate Cause”3

 a. The Proximate Cause4

CONCLUSION13

INDEX OF AUTHORITIES

Beals v Michigan, 497 Mich 363; 871 NW2d 5 (2015)5,6,8

Carr v General Motors Corp, 425 Mich 313, 389 NW2d 686 (1986)2

Cooper v Washtenaw County, 270 Mich App 506, 715 NW2d 908 (2006)8

Detroit v Putnam, 45 Mich 263, 7 NW 815 (1881).....3

Detroit v Redford Twp, 253 Mich 453, 235 NW 217 (1931)2

Hohn v United States, 524 US 236, 118 S Ct 1969,
141 L Ed 2d 242 (1998)3

Johnson v Ontonagon Co Bd of Co Rd Comm'rs, 253 Mich 465,
235 NW 221 (1931).....3

Koontz v Ameritech Services, Inc, 466 Mich 304; 645 NW 2d 34 (2002)2

LaMeau v City of Royal Oak, 289 Mich App 153, 796 NW2d 106 (2010)
rev'd and remanded, 490 Mich 949, 805 NW2d 841 (2011)4,5

Malone v Vining, 313 Mich 315, 21 NW2d 144 (1946).....9

Paige v City of Sterling Heights, 476 Mich 495; 645 NW2d 34 (2006)2

Pearce v Rodell, 283 Mich 19, 276 NW 883 (1937).....9

Reaume v Jefferson Middle School, 2006 Mich App LEXIS 2517 (2006)
rev'd by Reaume v Jefferson Middle School, 477 Mich 1109;
729 NW2d 840 (2007)6,7,8

Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000)1,3,4,5,6

Univ of Mich Bd of Regents v Auditor General, 167 Mich 444,
132 NW 1037 (1911)2

Zeppa v Diebel, 57 Mich App 462, 226 NW2d 523 (1975)9

Statutes

MCL 691.14073,4,7,8

The Court requested supplemental briefing on the issue of whether

a reasonable jury could determine that the defendant's conduct was "the proximate cause" of Plaintiff Kersh Ray's injuries where the defendant's actions placed the plaintiff in the dangerous situation that resulted in the plaintiff's injuries.

The answer to the above question is "No."

As this Court has explained in numerous cases, "the proximate cause" of an injury must be "the one most immediate, efficient, and direct cause of the injury or damage" Stated differently, the language adopted by the legislature "contemplates **one cause**," only. *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307, 318 (2000). Because the Legislature provided that there can only be "one cause," a plaintiff's or third party's *intervening* negligence will be a *superseding* cause more temporally proximate to the injury.

In this case, Plaintiff crossed a street and was struck by a car that was plainly visible. He was, in fact, seen by the members of the team who looked both ways prior to individually deciding to cross the street. As the testimony reflects, Plaintiff's teammates independently verified that they could cross the street safely and then did so in advance of Plaintiff reaching the same intersection. If Plaintiff had not breached the standard of care he owed to himself—by failing to stop and look both ways—he would not have been injured. Likewise, if the driver of the vehicle had not been operating his vehicle in a negligent manner (as pled and admitted to by Plaintiff), Plaintiff would not have been injured. Both Plaintiff and

the driver of the vehicle are intervening (and superseding) proximate causes of injury and, as such, leave to appeal should be denied.

1. INTERPRETATION OF THE GOVERNMENT TORT LIABILITY ACT

The fundamental obligation when interpreting statutes is “to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.” *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. *Carr v General Motors Corp*, 425 Mich 313, 317, 389 NW2d 686 (1986). Each word of a statute is presumed to be used for a purpose and, as far as possible, effect must be given to every clause and sentence. *Univ of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450, 132 NW 1037 (1911). The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Detroit v Redford Twp*, 253 Mich 453, 456, 235 NW 217 (1931). And, where the language of the statute is clear and unambiguous, judicial construction is neither required nor permitted. In other words, “[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute.” *Koontz* at 312. (emphasis added); *see also Paige v City of Sterling Heights*, 476 Mich 495; 645 NW2d 34 (2006).

In addition to the above general canons of statutory interpretation, courts strictly construe statutes imposing liability on governmental parties in derogation of the common-law rule of sovereign immunity. *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307, 318 (2000) (citing *Johnson v Ontonagon Co Bd of Co Rd Comm'rs*, 253 Mich 465, 468, 235 NW 221 (1931); *Detroit v Putnam*, 45 Mich 263, 265, 7 NW 815 (1881)). Lastly, the application of stare decisis is “generally ‘the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’” *Robinson v Detroit*, 462 Mich 439, 463, 613 NW2d 307 (2000), quoting *Hohn v United States*, 524 US 236, 251, 118 S Ct 1969, 141 L Ed 2d 242 (1998).

2. “THE PROXIMATE CAUSE” IS DIFFERENT THAN “CAUSE IN FACT” OR “A PROXIMATE CAUSE”

In the Government Tort Liability Act, the Legislature consented to liability being imposed on governmental employees only if the employee’s conduct amounts to “gross negligence” that was “the proximate cause of injury or damage.” MCL 691.1407 (emphasis added.) The Legislature—specifically—did not impose liability if a governmental actor was a “cause in fact” or “a” proximate cause of injury. Likewise, the Legislature did not impose liability for being “the proximate cause” of a dangerous situation being created; rather, the Legislature specified that

liability would only attach if the gross negligence was “the” proximate of the “injury.”

a. The Proximate Cause

This Court explained the proper interpretation of the term “the proximate cause” for purposes of MCL 691.1407(2)(c) in *Robinson v Detroit*, holding that in order for a governmental employee’s grossly negligent conduct to be considered the proximate cause of an injury, that conduct must be “the one most immediate, efficient, and direct cause of the injury or damage” This Court explained that because “‘the’ is a definite article, and ‘cause’ is a singular noun, it is clear that the phrase ‘the proximate cause’ contemplates one cause.” (emphasis added.)

The Legislature chose its language with purpose, consenting to impose liability on governmental employees only if the employee was “the proximate cause” of injury, which contemplates *only* “one cause.” The Legislature could have imposed liability for creating a dangerous situation that ultimately resulted in injury, but the legislature did not do so. If liability could be imposed for creating a “dangerous situation,” *Robinson* and its progeny would be effectively overruled and the plain language of MCL 691.1407 would be rewritten.

In *LaMeau v City of Royal Oak*, 289 Mich App 153, 796 NW2d 106 (2010), *rev’d and remanded*, 490 Mich 949, 805 NW2d 841 (2011), this Court explained that an individual defendant was not “the” proximate cause of injury even though

he “contributed to, and initiated, a chain of events that led to the decedent's injury.” *Id* at 194 (emphasis added). In that case, the estate of a deceased operator of a motor scooter brought a wrongful death action against the city and city employees to recover after the operator sustained fatal head and neck injuries when he drove his motor scooter into guy-wire that crossed sidewalk. The plaintiff argued that the city employees were grossly negligent in constructing a sidewalk—against advice—to bisect a utility line. In reversing the Court of Appeals and dismissing the action, this Court held that “the decedent's own behavior” was “the” proximate cause of injury when he rode his scooter into the guy-wire.

In addition to *LaMeau*, every case this Court has decided from *Robinson* onward would have a different result if the governmental employee could be found liable for simply creating a “dangerous situation” that contributed to an injury. For example, the *Beals* case involved the drowning death of a special education student at school. *Beals v Michigan*, 497 Mich 363; 871 NW2d 5 (2015). At the time of the drowning, the defendant lifeguard was inattentive, “talking to girls,” “playing with a football,” and “did not once sit in the lifeguard observation stand.” *Id* at 368. As a result of the dangerous condition created by the lifeguard—allowing disabled students to swim unsupervised in a pool as part of their education—the disabled plaintiff became submerged for more than eight minutes and died. Even though

the defendant in *Beals* created a “dangerous condition” that caused the plaintiff’s death, this Court still held that the lifeguard was not the proximate cause.

In *Robinson*, this Court considered “whether the city of Detroit or individual police officers face civil liability for injuries sustained by passengers in vehicles fleeing from the police when the fleeing car caused an accident.” *Robinson v City of Detroit*, 462 Mich 439, 444; 613 NW2d 307, 318 (2000). In that case, it could certainly be argued that the officers created a “dangerous situation” by instituting and continuing a high-speed chase, which is something many communities prohibit because the risk of harm is so foreseeable. Despite this fact, this Court held that liability could only be imposed if the officer “hit the fleeing car or physically cause[d] another vehicle or object to hit the vehicle that was being chased or physically force[d] the vehicle off the road or into another vehicle or object. . . .” *Id* at 445.

In *Reaume*, the plaintiff, a middle school student, went to wrestling practice. *Reaume v Jefferson Middle School*, 2006 Mich App LEXIS 2517 (2006), rev’d by *Reaume v Jefferson Middle School*, 477 Mich 1109; 729 NW2d 840 (2007). As Reaume waited in the gym for the rest of the team and the coaches to arrive, he talked to his friends with his back to the entrance. *Id* at * 2-3. Nadeau, an assistant wrestling coach who weighed twice as much as Reaume, entered the gym, came up behind Reaume and, without alerting or informing Reaume, wrapped his arms

around Reaume's chest and threw Reaume to the ground. *Id.* Once on the ground, Nadeau performed a wrestling roll. As the roll ended, Reaume posted his arm on the floor to right himself; however, Nadeau performed a second roll. *Id.* During the second roll, Reaume's elbow was fractured and required surgery to repair it. This Court held that, even if the coach's surprise takedown was "grossly negligent," it was not "the" proximate cause of injury. Rather, the injury occurred when Plaintiff tried to escape from the wrestling hold by posting his arm. The plaintiff testified that after a completed body roll, he did what he had been taught to do - brace his arm to attempt an escape - and only then did the injury occur. *Id.* The plaintiff in *Reaume* followed his coach's direction and an injury occurred, but this was not sufficient to be "the" proximate cause. There can be no serious dispute that the coach in *Reaume* initiated a chain of events, which lasted only seconds, ultimately resulting in injury. Initiating the chain of events, or stated differently—placing the plaintiff in a dangerous position—was not "the" proximate cause of injury.

Plaintiff may try to argue that his action of crossing the street was "foreseeable" and, as such, was not "the proximate cause" of his injury. However, this Court's decisions addressing the issue of proximate cause under MCL 691.1407(2) in circumstances where there were multiple causes of the harm have never discussed the concepts of intervening and superseding causation and do not

indicate that foreseeability of an intervening cause is relevant to whether it may be deemed “the proximate cause” under the statute. *Cooper v Washtenaw County*, 270 Mich App 506, 715 NW2d 908 (2006). “There is no ... indication that the cause that is the most immediate, efficient, and direct cause preceding an injury may not be deemed ‘the proximate cause’ for purposes of MCL 691.1407(2) if it was foreseeable to the governmental actors.” 270 Mich App at 510. In fact, the cases discussed above illustrate that the foreseeability of the intervening cause is not dispositive. For example, in *Reaume*, the student did exactly as he was taught when he posted his arm. Posting his arm was a foreseeable event in the chain of causation. In *Lamue*, it was foreseeable that a bicyclist or runner would use the sidewalk and strike the guy-wire across the sidewalk. In *Beals*, the lifeguard could have foreseen that he would not have been able to render lifesaving aid if he was distracted and not watching the pool. And, in fact, his sole purpose was to be watching the pool because drowning in a pool is foreseeable—especially for disabled students.

In this case, Plaintiff did not look to see what the rest of the team who looked could plainly see—a car with headlights approaching a quiet, rural intersection. Plaintiff’s intervening action of stepping in front of a moving vehicle was “the one most immediate cause of injury.” This action breached the standard of care Plaintiff owed to himself. In fact, as this Court has explained:

a pedestrian, before crossing a street or highway, must (1) make proper observation as to approaching traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observations while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily careful and prudent person would exercise under like circumstances.

Malone v Vining, 313 Mich 315, 321, 21 NW2d 144, 146-47 (1946)(citing *Pearce v Rodell*, 283 Mich 19, 37, 276 NW 883, 890 (1937)); see also *Zeppa v Diebel*, 57 Mich App 462, 467, 226 NW2d 523, 525 (1975). Plaintiff breached this duty he owed to himself. While Plaintiff wants to suggest he did the exact same thing as the coach and his teammates, such assertion is not supported by the record because the other students *did* look both ways, observed the car, decided they could individually cross safely, and proceeded safely across the street.

The accident occurred at an intersection in a rural area outside the village of Chelsea. At this early hour, there was virtually no traffic present. After stopping at a traffic light, multiple students and Coach Swager looked both ways, determined it was safe to cross, and proceeded safely across the intersection. Here, several individuals testified that they independently determined that it was safe to cross before actually doing so.

- **Student Charles Miller:** Student Miller testified that he looked both ways and determined that he had more than enough time to cross safely. (Exhibit 6: Miller's Dep at 15 & 26-27.) Student Miller testified that he observed the car prior to crossing. (*Id* at 24.)

- **Student Stuart Cook:** Student Cook testified that he “looked both ways before crossing” and the runners with him “decided it would be safe enough to cross the street.” (Exhibit 7: Cook’s Dep. at 14.) Specifically, Student Cook personally observed a car coming down the road at a fairly far distance, and decided it would be safe to cross the street at a casual jog. *Id.*
- **Student Miles Fischer:** Testified that he “looked both ways,” observed the car “way off in the distance,” and decided it was safe to cross. (Exhibit 11: Fischer’s Dep at 13.)
- **Student Mitchell Henschel:** Testified that he “look[ed] both ways” and determined it was safe to cross. (Exhibit 10: Henschel’s Dep at 12.)
- **Student Matt Proegler:** Testified that he determined that it was safe to cross *after* looking both ways *and* seeing the car. (Exhibit 9: Proegler’s Dep. at 8, 15 & 27.)
- **Student Adam Bowersox:** Testified that looked both ways, *saw the car*, determined it was safe to cross, and did, in fact, cross safely. (Exhibit 12: Bowersox’s Dep at 8-11.)
- **Student Jack Baylis:** Testified that he saw a car in the distance and believed he had time to cross safely and did so. (Exhibit 13: Baylis Dep. at 17.)
- **Student David Trimas:** Testified that he looked both ways, saw the car, believed it was safe to cross, and proceeded safely across the street. (Exhibit 14: Trimas’ Dep. at 8, 13 & 16.)
- **Coach Eric Swager:** Testified that he and “some runners . . . came up to the street . . . [t]here was no traffic, and we crossed because it was safe.” (Exhibit 5: Swager’s Dep at 51.)

After the lead runners safely crossed the street, additional students approached the intersection, including Adam Junkins and Plaintiff. Adam was in front of Plaintiff. Adam, who now lives in Connecticut, testified in this matter by way of affidavit.

Adam testified that Coach Swager never instructed him to cross the street.

(Exhibit 16: Affidavit at ¶ 6.) In fact, Adam testified that most of the team had already crossed the street when he reached the intersection. (*Id* at ¶ 7.) **Adam**

testified that he made the decision to cross the street on his own. (*Id* at ¶ 8.)

Adam confirmed that the next runner in front of him was about 30 yards ahead and had already crossed the street when he began to cross the street. (*Id* at ¶ 5.)

As the above testimony shows, multiple persons looked both ways, *saw the car that was plainly visible*, and independently determined it was safe to cross the street; in fact, **every runner with Coach Swager safely crossed the street and**

proceeded on their run without incident. (*Id* at 98.) Even if Coach Swager

decided to cross the street ahead of Plaintiff and against a red light, that action did not excuse Plaintiff's individual responsibility to stop, look, and listen when

Plaintiff reached the same intersection a considerable distance behind Coach Swager and his teammates. Traffic conditions are constantly changing. Had

Plaintiff acted reasonably like his peers, he would have looked and listened and seen what was clearly visible that quiet morning . . . headlights and the sight and

sound of a car approaching as it entered into the intersection through a yellow light. Plaintiff, through his own volition, stepped directly in front of a moving car

and this intervening action was "the" proximate cause.

In addition to Plaintiff being an intervening and superseding proximate cause, so was Driver Platt. In his Complaint, Plaintiff alleged that Defendant Scott Platt was negligent in the operation of his car and in striking Plaintiff with his car. In Plaintiff's Complaint, Plaintiff admitted that Driver Platt drove carelessly and heedlessly in willful disregard of the rights and safety of Plaintiff. Plaintiff also admitted that Driver Platt drove carelessly and recklessly at a speed that was greater than would permit him to bring a vehicle to a stop within an assured clear distance ahead where a pedestrian was in a crosswalk. Plaintiff also admitted that Plaintiff failed to yield to pedestrians already in a crosswalk. (Complaint at ¶¶ 41a-41g.) Plaintiff even admitted that Driver Platt was "the direct and proximate" of his injuries. (*Id* at ¶ 44)(emphasis added).

The record evidence supports the facts pled by Plaintiff in this regard. After the accident, Driver Platt told the officer that he was on his way to work, that he noticed that there were some people jogging in the area, that he noticed a group crossed the road, and then another jogger crossed the road that he was not able to avoid (Exhibit 18: Sumner's Dep at 15.) Despite knowing that students were running across the street, he did not slow down; rather, he accelerated. At deposition, Driver Platt testified that he entered the intersection on a yellow light. When asked why he told the police officer "he looked up" and then saw the students, Driver Platt testified that "when you drive a car, you pay attention to your light, do a lot of different

things.” (Exhibit 19: Platt’s Dep at 37.) Driver Platt also candidly admitted that he “sped up during a yellow light,” despite knowing that students were running in the area. (Exhibit 19: Platt’s Dep at 37.)

Student Adam Bowersox testified that he “found it hard to believe that the driver didn’t see the kids crossing until the time [he] heard the brakes.” (Exhibit 12: Bowersox Dep at 10.) Student Bram Parkinson testified that Driver Platt proceeded through a “yellow light.” (Exhibit 20: Parkinson’s Dep at 18.) Student Vermilye also testified that the traffic light was yellow when he was crossing. (Exhibit 21: Vermilye’s Dep at 20.) Another student, Matt Proegler, indicated that Driver Platt had to have been driving “very fast” to have struck Plaintiff. (Exhibit 9: Proegler’s Dep at 24.) The Driver’s operation of the vehicle in the manner admitted to by Plaintiff—and borne out by the record—constitutes an intervening and superseding cause of injury.

Based on the above, a jury could not reasonably determine that Coach Swager was “the” proximate cause of Plaintiff’s injury.

CONCLUSION

Leave to appeal should be denied. If this Court, however, is considering peremptory action, it should be noted that the Court of Appeals decided this case *solely* on the issue of “the” proximate cause. The Court of Appeals did not reach the issue of gross negligence. As such, if this Court were to take peremptory

action, it should be remanded to the Court of Appeals for a determination of gross negligence, which has not yet been decided—especially considering that the Coach *and multiple teenagers* looked both ways and believed that it was safe to cross the street.

/S/TIMOTHY J. MULLINS

GIARMARCO, MULLINS & HORTON, PC

Attorney for Defendant-Appellant

101 W. Big Beaver Rd, 10th Floor

Troy, MI 48084-5280

(248) 457-7020

tmullins@gmhlaw.com

P28021

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