

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Court of Appeals  
(Whitbeck, C.J., and Bandstra and Schuette, JJ.)

---

Estate of Chantell Buckner, by its  
Personal Representative, Richard Rashid,  
and Laquita Wright, by her Conservator,  
Macheal J. Panek,

Supreme Court No. 133772

Plaintiffs-Appellees

Court of Appeals No. 270455  
Ingham CC No. 05-001467-NI

v

City of Lansing,

Defendant-Appellant

and

Estate of Luther Wampler, by its Personal  
Representative, Pamela Wampler, Martha  
Wampler, and Morley S. Oates, Post 701  
Veterans of Foreign Wars of the United States,  
Jointly and Severally,

Defendants.

---

**AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION OF JUSTICE  
IN SUPPORT OF PLAINTIFFS-APPELLEES**

---

Liisa R. Speaker (P65728)  
Jodi M. Latuszek (P70547)  
SPEAKER LAW FIRM, PLLC  
Attorney for Amicus Curiae,  
Michigan Association of Justice  
230 N. Sycamore St., Suite D  
Lansing, MI 48933  
(517) 482-8933

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... iii

INTERESTS OF AMICUS CURIAE ..... 1

STATEMENT OF BASIS OF JURISDICTION ..... 1

STATEMENT OF RELIEF SOUGHT ..... 2

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW ..... 2

STANDARD OF REVIEW ..... 3

STATEMENT OF FACTS ..... 4

ARGUMENT ..... 6

    I. Introduction ..... 6

    II Under the Plain Language of Section 1402(1) of the Governmental  
Immunity Act, the Legislature Did Not Intend to Require Plaintiffs to Show  
That the City’s Failure to Maintain the Sidewalks Was the Sole Proximate  
Cause of Their Injuries ..... 7

    III. Plaintiffs Have Demonstrated a Fact Issue Exists as to Whether the City  
Proximately Caused Their Injuries under Common Law Theory of  
Negligence ..... 13

        A. It is within the jury’s province to decide whether the plaintiffs injuries  
were foreseeable to the City ..... 13

        B. In negligence cases, this Court looks to the starting point of the  
chain of events that lead to the ultimate injury ..... 13

        C. The Legislature intended for this Court’s question “whether the  
children’s decision to risk walking in the street prevents the plaintiffs  
from establishing proximate causation” to be decided according to  
the comparative fault statutory scheme ..... 16

CONCLUSION ..... 19

RELIEF REQUESTED ..... 20

PROOF OF SERVICE ..... 21

## INDEX OF AUTHORITIES

### Cases:

<i>Bonin v Gralewicz</i> , 378 Mich 521; 146 NW2d 647 (1966) . . . . .	14
<i>Brisboy v Fibreboard Corp</i> , 429 Mich 540; 418 NW2d 650 (1988) . . . . .	14
<i>Daniels v Dep't of Corrections</i> , 468 Mich 34; 658 NW2d 144 (2003) . . . . .	8, 9, 10
<i>Detroit v Putnam</i> , 45 Mich 263; 7 NW 815 (1881) . . . . .	8
<i>Detroit v Redford Twp</i> , 253 Mich 453; 235 NW 217 (1931) . . . . .	8
<i>Estate of Shinholster v Annapolis Hosp</i> , 471 Mich 540; 685 NW2d 275 (2004) . .	13, 16
<i>Felgner v Anderson</i> , 375 Mich 23; 133 NW2d 136 (1965) . . . . .	18
<i>Johnson v Bd of Co Comm'rs of Ontonagon Co</i> , 253 Mich 465; 235 NW 221 (1931) . . . . .	8
<i>Haliw v Sterling Heights</i> , 464 Mich 297; 627 NW2d 581 (2001) . . . . .	7
<i>Ignotov v Reiter</i> , 425 Mich 391; 390 NW2d 614 (1986) . . . . .	13
<i>Lamp v Reynolds</i> , 249 Mich App 591; 645 NW2d 311 (2002) . . . . .	18
<i>McMillian v Vliet</i> , 422 Mich 570; 374 NW2d 679 (1985) . . . . .	13, 14
<i>Moning v Alfonso</i> , 400 Mich 425; 254 NW2d 759 (1977) . . . . .	13
<i>Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc</i> , 461 Mich 316; 603 NW2d 257 (1999) . . . . .	8
<i>Orzel v Scott Drug Co</i> , 449 Mich 550; 537 NW2d 208 (1995) . . . . .	16, 17
<i>Paige v City of Sterling Heights</i> , 476 Mich 495; 720 NW2d 219 (2006) . . . . .	8, 10, 11
<i>Parks v Stark</i> , 342 Mich 443; 70 NW2d 805 (1955) . . . . .	14
<i>People v Schaefer</i> , 473 Mich 418; 703 NW2d 774 (2005) . . . . .	13
<i>Placek v Sterling Heights</i> , 405 Mich 638; 275 NW2d 511 (1979) . . . . .	18
<i>Reed v Yackell</i> , 473 Mich 520; 703 NW2d 1 (2005) . . . . .	3

<i>Robinson v Detroit</i> , 462 Mich 439; 613 NW2d 307 (2000) . . . . .	8, 10, 11, 12
<i>Samson v Saginaw Professional Bldg, Inc</i> , 393 Mich 393; 224 NW2d 843 (1975) . . .	14
<i>Sweet v Ringwelski</i> , 362 Mich 138; 106 NW2d 742 (1961) . . . . .	13, 14

**Statutes:**

MCL 30.411 . . . . .	10
MCL 257.633 . . . . .	12
MCL 324.5527 . . . . .	12
MCL 324.5531 . . . . .	12
MCL 324.5534 . . . . .	12
MCL 330.1629 . . . . .	10
MCL 418.305 . . . . .	8
MCL 418.375 . . . . .	10
MCL 419.51 . . . . .	10
MCL 436.1801 . . . . .	10, 12
MCL 484.251 . . . . .	10
MCL 500.214 . . . . .	12
MCL 600.2947 . . . . .	12
MCL 600.2957 . . . . .	18, 19
MCL 600.2958 . . . . .	17
MCL 600.2959 . . . . .	18, 19
MCL 600.6304 . . . . .	12, 18, 19
MCL 600.6306 . . . . .	18

MCL 600.5839 .....	12
MCL 691.1401 .....	7
MCL 691.1402 .....	6, 7, 8
MCL 691.1407 .....	12
MCL 691.1665 .....	12
MCL 750.90e .....	12
MCL 750.145o .....	12

**Other Sources:**

Black's Law Dictionary (6th ed) .....	9
Restatement of Torts 2d, § 442 B .....	14

## **INTEREST OF AMICUS CURIAE**

The Michigan Association of Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association of Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents important issues of law regarding the standards for proximate causation under the Governmental Immunity Act and common law negligence, and which will have a direct and substantial impact on anyone who suffers bodily injury or property damage due to a governmental entity's failure to keep a highway in reasonable repair or in a condition reasonably safe for travel.

## **STATEMENT OF BASIS OF JURISDICTION**

Appellant City of Lansing ("City") timely filed its application for leave to appeal from the March 15, 2007 judgment of the Court of Appeals. In an order dated September 26, 2007, this Court (1) granted the City's application for leave to appeal, (2) directed the parties to include among their briefing three issues, and (3) invited the Michigan Association of Justice, Michigan Defense Trial Counsel, and Michigan Municipal League to file amicus curiae briefs.

The Michigan Association of Justice submits this amicus curiae brief in response to the Court's invitation.

## **STATEMENT OF RELIEF SOUGHT**

The Michigan Association of Justice asks this Court to affirm the Court of Appeals' judgment on the grounds that plaintiffs have properly stated a claim within the highway exception of the Governmental Immunity Act. Additionally, the Michigan Association of Justice requests this Court enter an order that leave was improvidently granted as to the issue of "whether the children's decision to risk walking in the street prevents the plaintiffs from establishing proximate causation."

## **STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

1. Does the plain language of Section 1402(1) of the Governmental Immunity Act support the Court of Appeals' and trial court's decisions that the plaintiffs' injuries arose "by reason of" the City's failure to maintain the highway in a condition reasonably safe and fit for public travel?

Michigan Association of Justice answers:        Yes.

2. Have the plaintiffs established a genuine issue of material fact under common law negligence as to whether the City proximately caused the children's injuries by failing to maintain the highways in reasonable repair or in a condition reasonably safe for public travel?

Michigan Association of Justice answers:        Yes.

The Michigan Association of Justice does not take a position with respect to any of the other questions presented by the parties or framed by this Court in its September 26,

2007 order, and will instead defer to plaintiffs' analysis of those issues.

### **STANDARD OF REVIEW**

Resolution of the issues in this case involve the interpretation of provisions of the Governmental Immunity Act. Statutory interpretation is a question of law that this Court reviews de novo. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005); *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006). This case also requires an application of the law to the facts, which this Court also reviews de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 n 38; 548 NW2d 210 (1996).

## STATEMENT OF FACTS

The facts and proceedings most pertinent to the legal issues presented in this amicus curiae brief are summarized as follows:

On January 29, 2005, three young girls were walking westbound along the sidewalk abutting the north side of Saginaw Highway in Lansing, Michigan in the early evening hours. (Court of Appeals Opinion at 2). These three girls—Chantell Buckner (age 7), LaQuata Wright (age 13), and Lanecia Wright (age 14), came upon an obstacle in the sidewalk because the City of Lansing had plowed Saginaw Highway leaving an unnatural accumulation of snow and ice on the sidewalk. (COA opinion at 2; Appendix 67B). Although that portion of the sidewalk fell under the jurisdiction of the City of Lansing, the City had failed to maintain the sidewalk by removing the unnatural accumulation of snow and ice. (COA Opinion at 2 & n1).

Facing this obstacle, the three young girls left the sidewalk that they were unable to traverse, and began to walk on the roadway next to the curb. (COA Opinion at 2). As the girls attempted to maneuver around the impassable portion of the sidewalk, they were struck by a drunk driver heading eastbound on Saginaw Highway. (COA Opinion at 2). Buckner died and Laquata Wright suffered substantial injuries from the accident. (COA Opinion at 2).

The record in this case reveals that the City had left this particular portion of the sidewalk in an unmaintained condition for several years after the City had previously failed to complete a construction project involving that sidewalk. (COA Opinion at 2). According to the record in this case, the City had not cleared the sidewalk of snow and ice for at least 30 days prior to the accident, even though the City of Lansing had experienced snow

accumulation of 26½ inches during the month of January 2005, and even though the City had plowed that portion of Saginaw Highway approximately 13 times between January 1, 2005, and January 29, 2005. (Appendix 167-168B, 79B No. 17).

This suit followed. The trial court denied the City's motion for summary disposition. The Court of Appeals affirmed, in part, holding that highway exception to governmental immunity could be applicable to this case. The Court of Appeals remanded to the trial court to determine whether, by creating the unnatural accumulation of snow and ice on the sidewalk, the City breached its duty under Section 1402(1) of the Governmental Immunity Act to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). (COA Opinion at 7). The Court of Appeals further inquired, for purposes of remand, whether having breached a duty, the City proximately caused the plaintiffs' damages, which would then make the City liable to the plaintiffs. (COA Opinion at 7). This Court granted the City's application for leave to appeal.

## ARGUMENT

### I. Introduction.

This Honorable Court granted leave to appeal on September 26, 2007. In its order, this Court advised the parties to address (1) whether the children's decision to risk walking in the street prevents the plaintiffs from establishing proximate causation; (2) whether the City of Lansing is entitled to governmental immunity because the injuries did not occur on the sidewalk that the City allegedly failed to maintain, i.e., the injuries were not the direct result of the allegedly unmaintained condition; and (3) whether the statutory duty to "maintain the highway in reasonable repair," MCL 691.1402(1), imposes obligations relating only to structural-type defects, or whether it includes a duty not to place temporary obstacles on a highway that render it impassable.

Amicus Curiae Michigan Association of Justice agrees with plaintiffs that their claim should not be barred by the doctrine of proximate causation under the plain language of the Governmental Immunity Act because the plaintiffs sustained injuries "by reason of" the City's failure to keep the sidewalk along Saginaw Highway in reasonable repair and in a condition reasonably safe and fit for travel by creating an unnatural accumulation of snow and ice that made the sidewalk impassable. Amicus Curiae Michigan Association of Justice also agrees with the plaintiffs that they have established that the City was the proximate cause of plaintiffs' injuries under common law tenets of negligence because it was foreseeable that persons traveling along the sidewalk could be injured when forced to walk on the highway as a result of the sidewalk's unmaintained condition resulting in a pedestrian-automobile accident.

Amicus Curiae Michigan Association of Justice submits this brief for the purpose of

bringing this Honorable Court's attention to alternative grounds which mandate the same outcome as that proposed by plaintiffs and also warrant this Court to determine that it improvidently granted leave to appeal on the proximate causation issue.

II. **Under the Plain Language of Section 1402(1) of the Governmental Immunity Act, the Legislature did not Intend to Require Plaintiffs to Show that the City's Failure to Maintain the Sidewalks was the Sole Proximate Cause of their Injuries.**

The highway exception represents one of the few areas in which the government has waived its immunity from liability if the governmental agency fails to keep the highway in "reasonable repair" or "in a condition reasonably safe for travel," and when that condition results in bodily injury or property damage to a person traversing the highway. MCL 691.1402(1). A city's maintenance of sidewalks abutting a highway is part of the highway exception to governmental immunity. (COA Opinion at 3). MCL 691.1401(e) (defining "highway" to include sidewalks); *Haliw v Sterling Heights*, 464 Mich 297, 303; 627 NW2d 581 (2001). Specifically, the highway exception provides, in relevant part, that:

[E]ach 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.

MCL 691.1402(1) (emphasis added).

The Legislature employed specific proximate cause language in its enactment of the highway exception to the Governmental Immunity Act. That language requires the plaintiff show that the plaintiff suffered injuries "by reason of" the City's "failure to keep a highway

in reasonable repair and in a condition reasonably safe for public travel.” MCL 691.1402(1) (emphasis added). The Legislature’s chosen phraseology in the highway exception statute is legally significant.

It has been well-established by this Court that statutes should be interpreted consistent with their plain and unambiguous meaning. *Paige v City Sterling Heights*, 467 Mich 495, 510; 720 NW2d 219 (2006); *Northern Concrete Pipe, Inc v Sinacola Cos-Midwest, Inc*, 461 Mich 316, 320-321; 603 NW2d 257 (1999). Keeping with this rule of statutory construction, this Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. *Robinson v City of Detroit*, 462 Mich 439, 459; 612 NW2d 307 (2000); *Detroit v Redford Twp*, 253 Mich 453, 456; 235 NW 217 (1931). This Court clearly defined how to construct the Governmental Immunity Act in *Robinson, supra* at 459-460. This Court explained that,

These rules of statutory construction are especially germane in the cases now before us because Michigan strictly construes statutes imposing liability on the state in derogation of the common-law rule of sovereign immunity. *Johnson v Bd of Co Comm'rs of Ontonagon Co*, 253 Mich 465, 468; 235 NW 221 (1931); *Detroit v Putnam*, 45 Mich 263, 265; 7 NW 815 (1881).

*Robinson, supra* at 459-460.

This Court has previously interpreted the Legislature’s use of the phrase “by reason of” in *Daniels v Department of Corrections*, 468 Mich 34; 658 NW2d 144 (2003), as the Legislature used that term in the Worker’s Disability Compensation Act. That act provides that “[i]f the employee is injured **by reason of** his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act.” MCL 418.305 (emphasis added). In *Daniels*, a probation officer was disciplined by the Department of Corrections for sexually harassing female attorneys. After the probation officer returned from a ten-day

suspension without pay, he sought compensation under the Worker's Disability Compensation Act, alleging that he suffered depression because his supervisors and female attorneys were harassing him.

In determining that probation officer's misconduct proximately caused his injuries, this Court quoted the dissenting opinion from the Court of Appeals decision in that case, which reasoned that

It cannot be disputed that **[the probation officer's] misconduct was the starting point** for the resultant disciplinary proceedings that ultimately caused his injury. Had [the probation officer] not engaged in sexual harassment, he would not have been subjected to the disciplinary proceedings, and he would not have been suspended from his job.... [T]he disciplinary proceedings, from which plaintiff's mental disability arose, **flowed directly and predictably from [the probation officer]'s misconduct as surely as night follows day.**

*Daniels, supra* at 43-44 (emphasis added) (quoting 248 Mich App 95, 115-116; 638 NW2d 175 (2001) (dissenting opinion)).

Looking at the "by reason of" language in the Worker's Disability Compensation Act, this Court noted that the phrase did not require that an injury arise contemporaneously with the misconduct. *Daniels, supra* at 44. Instead, this Court turned to Black's Law Dictionary, which defines "by reason of" as "[b]y means, acts, or instrumentality of." Black's Law Dictionary (6th ed). *Daniels, supra* at 43. Based on the plain language of the Worker's Disability Compensation Act, this Court "decline[d] to impose a more direct causation requirement than the statute plainly expressed." *Daniels, supra* at 43.

Although the Legislature has employed the "by reason of" language in several other statutory schemes, *Daniels* appears to be the only case that specifically interprets the Legislature's use of that language. See, eg, MCL 30.411(4) (Emergency Management Act

provides immunity to licensed physician who renders services during a state of disaster when person sustains injury “by reason of” those services, unless the physician was grossly negligent); MCL 330.1629(1), (2) (Mental Health Code provides immunity to a guardian for civil damages “by reason of” authorizing routine or emergency medical treatment); MCL 419.51 (statute creates liability of railroads to employees for injuries “by reason of” any defect or insufficiency due to the negligence of the railroad in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, coal docks, or other equipment); MCL 436.1801 (Liquor Control Code imposes liability on bar owner when an individual suffers damage “by reason of” the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death); MCL 484.251 (telephone companies are civilly liable to persons who suffer damages “by reason of” mistakes, errors or delays in the transmission or delivery, due to negligence of the telephone company).

This Court’s interpretation of the phrase “by reason of” in *Daniels* should direct this Court’s analysis of identical proximate cause language in the Governmental Immunity Act.<sup>1</sup> As instructed by this Court’s reasoning in *Daniels*, the phrase “by reason of” requires the Court to consider the starting point of the event. In this case, the starting point of the event is the City’s negligence in failing to maintain the sidewalk in a manner reasonably safe for travel. Had the City not filled the sidewalk with snow and ice, making the sidewalk

---

<sup>1</sup> On previous occasions this Court has applied an interpretation of a phrase from one statute to an identical phrase used in a different statutory scheme. For instance, this Court applied its interpretation of “the proximate cause” from *Robinson*—a case arising out of the Governmental Immunity Act—to the same language used by the Legislature in MCL 418.375(2) of the Worker’s Disability Compensation Act. *Paige, supra* at 509-510.

impassable, the girls would have been able to continue their journey on the sidewalk, the girls would not have walked into the roadway of Saginaw Highway, and the girls would not have been struck by the drunk driver or any other automobile traveling on Saginaw Highway.

The City argues in its Brief that the plaintiffs have failed to establish proximate causation because the direct and proximate cause of the plaintiffs' injuries was either the children's decision to walk on the street or Luther Wampler's careless and reckless driving of his vehicle while intoxicated. (Appellant's Brief at 33, 40, 42). In making this argument, the City essentially proposes that the Legislature intended to impose a higher burden on the plaintiffs than actually created by the plain language of the Governmental Immunity Act. Indeed, the City argues that the children's decision to walk in the roadway (or Wampler's intoxicated driving) was the sole proximate cause of their injuries, and that no liability should fall on the City because the City's failure to maintain the sidewalk was "too remote." The City's attempt to impose "the proximate cause" standard where the statute does not require a showing that the City was "the proximate cause" of the injuries contravenes the Legislature's intent in enacting the Governmental Immunity Act.

As this Court has stated, when the Legislature employs the phrase "the proximate cause," it refers to the sole proximate cause, which is "the one most immediate, efficient, and direct cause preceding an injury." *Paige, supra* at 509-510; *Robinson, supra* at 459. This Court has previously recognized that the Legislature actually knows that the phrase "the proximate cause" is different than the phrase "a proximate cause."<sup>2</sup> *Robinson, supra*

---

<sup>2</sup> This Court noted some of the statutes that employed these two phrases. *Robinson, supra* at 460. The Legislature has used the phrase "a proximate cause" in the

at 460. In *Robinson*, this Court held that the conduct of the individual police officers chasing after fleeing vehicles was not "the one most immediate, efficient, and direct cause" of the passengers' injuries; instead, the proximate cause of the injuries was the drivers of the fleeing vehicles. *Robinson, supra* at 462.

The fact that the Legislature did not use the term "the proximate cause" in Section 1402, but instead chose to employ the phrase "by reason of" changes the Court's analysis and also the causation burden posed on the plaintiffs. This Court should not pose a higher burden on plaintiffs than that envisioned by the plain language of the Governmental Immunity Act.

**III. Plaintiffs have Demonstrated a Fact Issue Exists as to Whether the City Proximately Caused their Injuries under the Common Law Theory of Negligence.**

**A. *It is within the jury's province to decide whether the plaintiffs injuries were foreseeable to the City.***

In addition to establishing that plaintiffs are able to recover under the highway

---

Michigan Liquor Control Code, MCL 436.1801(3); in product liability claims where the seller fails to exercise reasonable care, MCL 600.2947(6)(a); comparative fault statute, MCL 600.6304(8); Equine Activity Liability Act, MCL 691.1665(a); and criminal statute regarding contributing to the delinquency of a minor, MCL 750.145o. See *Robinson, supra* at 460 n 16.

In contrast, the Legislature has employed the phrase "the proximate cause" in other statutory contexts, such as the motor vehicle statute governing speeding violations, MCL 257.633(2); the Natural Resources and Environmental Protection Act, MCL 324.5527, MCL 324.5531(11), and MCL 324.5534; the insurance commissioner's immunity from civil liability under the Insurance Code, MCL 500.214(6); the act governing statute of repose for actions against architects and engineers, MCL 600.5839(1); the exception to governmental immunity for certain governmental employees, MCL 691.1407(2)(c); and a criminal statute governing careless or reckless driving involving injury to a fetus, MCL 750.90e. See *Robinson, supra* at 460 n 17.

exception's proximate cause standard, the plaintiffs have also established a fact issue that the City was a proximate cause of their injuries under negligence law. To establish proximate causation for negligence, plaintiffs in this case must show that it was foreseeable that the City's actions would result in the plaintiffs' injuries. See *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004); *Moning v Alfonso*, 400 Mich 425, 439; 254 NW2d 759 (1977).

While an intervening cause could potentially break the chain of causation so as to constitute a superseding cause that relieves the original actor of liability, liability can still attach if the intervening act was reasonably foreseeable. *McMillan, supra* at 576; *People v Schaefer*, 473 Mich 418, 437-438; 703 NW2d 774 (2005). Proximate cause "operates to produce particular consequences without the intervention of **any independent, unforeseen cause**, without which the injuries would not have occurred." *Ignotov v Reiter*, 425 Mich 391, 400; 390 NW2d 614 (1986) (emphasis added); see also *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985) (decendent's action of whirling around and bumping the officer's arm which caused the officer's gun to discharge was not an intervening cause to break the chain of causation that began with the officer's negligent detention of decedent); *Sweet v Ringwelski*, 362 Mich 138, 145; 106 NW2d 742 (1961) (examining whether ten-year-old's decision to cross street without looking both ways was an intervening cause of accident when she crossed after an adult motioned that it was safe to cross).

It is also possible that more than one cause operates to produce an injury so that both constitute a direct and proximate cause of the resulting harm. *Brisbois v Fibreboard*

*Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988); *McMillian*, *supra* at 577. Thus, a defendant cannot escape liability for its negligent conduct merely because the negligence of others may also have contributed to the harm caused. *Brisboy*, *supra* at 547. Likewise, where the negligent conduct of an actor creates or increases risk of a particular harm and is a substantial factor in causing that harm, the fact that harm is brought about through the intervention of another force does not relieve the actor of liability. *Parks v Stark*, 342 Mich 443, 447; 70 NW2d 805 (1955) (citing Restatement of Torts 2d, § 442 B).

These inquiries surrounding proximate cause such as foreseeability and the character of an intervening cause are factual questions to be decided by the jury. *Sweet supra* at 145; *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 409; 224 NW2d 843 (1975); *Bonin v Gralewicz*, 378 Mich 521, 527; 146 NW2d 647 (1966).

Amicus Curiae Michigan Association of Justice defers to plaintiffs' briefing, which discusses why it was foreseeable to the City that pedestrians could be injured by the City's failure to maintain its sidewalk along Saginaw Highway. (Appellees' Brief at 40-45). Plaintiffs set forth in their brief a number of events that occurred within the halls of Lansing City Hall and other City departments the year prior to the accident. These events demonstrate that the City specifically was aware that high-traffic streets within the City, including Saginaw Highway, posed a danger to pedestrians. (Appellees' Brief at 41; Appendix at 169). The City Public Service Department also advised City Council that the failure to remove snow and ice along these high-traffic thoroughfares posed a great danger to pedestrians. (Appellees' Brief at 41-42; Appendix at 170-172B; 173-185B).

The history of these public discussions that occurred in the City of Lansing prior to

the accident in this case is further bolstered by statistics compiled by the Michigan State Police, which show that automobile accidents are foreseeable. According to traffic crash data compiled by the Michigan State Police ([www.michigantrafficcrashfacts.org](http://www.michigantrafficcrashfacts.org)), in Ingham County 2465 persons were injured and there were and 27 fatalities from automobile accidents in 2005, and in 2004 there were 2708 personal injuries and 24 fatalities. Among these Ingham County automobile accidents, nearly half of the fatalities resulted from accidents involving alcohol and drugs (11 fatalities resulted due to alcohol and drugs each in 2005 and 2004). Pedestrian/motor vehicle accidents regularly occur across the State of Michigan. For instance, in 2005, there were 2683 pedestrians involved in personal injury crashes and 137 in fatal crashes in the State, and in 2004 there were 2864 involved in personal injury crashes and 159 in fatal crashes.

Based on the record in this case, plaintiffs demonstrated a fact issue as to whether it was foreseeable to the City that pedestrians would be injured in the event they are forced to leave the impassable sidewalk along Saginaw Highway and whether the intervening cause of the children walking in the street and Wampler driving while intoxicated still did not break the chain of causation that directly linked the children's injuries to the City's failure to maintain the highway in a manner reasonably safe for public travel.

***B. In negligence cases, this Court looks to the starting point of the chain of events that lead to the ultimate injury.***

In addition to the facts in this case showing that the City's failure to maintain the highway would cause the plaintiffs' injuries, this Court has had many occasions to analyze proximate causation in negligence cases and to determine which cause started a chain of

events that led to a party's injuries. In doing so, this Court has looked to the beginning of the chain of events to establish that, but for the initial act of negligence, the party would not have eventually sustained injuries.

For example, this Court examined proximate cause in a medical malpractice action in *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 546; 685 NW2d 275 (2004). The Court held that reasonable minds could differ with regard to whether the physician's negligence in failing to recognize that the patient had been experiencing "mini strokes" that often precede a full-blown stroke or the patient's own pre-treatment negligence in failing to take her prescribed blood pressure medication constituted a foreseeable, natural, and probable cause of the plaintiff's fatal stroke. *Shinholster, supra* at 546.

Likewise, in *Orzel v Scott Drug Co*, 449 Mich 550, 566-568; 537 NW2d 208 (1995), the Court looked to the starting point of the series of events that led to the plaintiff's injuries in a suit against the pharmacist who filled the plaintiff's prescriptions. In that case, the plaintiff's own conduct of illegally using Desoxyn while he was sane served as the "direct, immediate, and necessarily proximate cause" of his addiction to Desoxyn, and the resulting hallucinations, amphetamine psychosis, and eventual legal insanity. *Orzel, supra* at 567. This Court rejected the plaintiff's argument that his use of Desoxyn while he was sane was too remote or incidental to be considered a proximate cause of his injuries. *Orzel, supra* 567-568. This Court held that the plaintiff's "use of Desoxyn while he was sane cannot be characterized as a separate transaction from his use while he was insane, because his initial consumption of the drug inevitably led to this subsequent use while he was insane. Consequently, any injuries that are a direct result of his use while he was insane are also

foreseeable consequences of his use while he was sane.” *Orzel, supra*, at 568.

Applying the law of foreseeability and proximate cause to this case, there is no question that the plaintiffs, at a minimum, created a fact issue for the jury.

**C. *The Legislature intended for this Court’s question “whether the children’s decision to risk walking in the street prevents the plaintiffs from establishing proximate causation” to be decided according to the comparative fault statutory scheme.***

The question posed by this Court in its order granting oral argument suggests that the plaintiffs in this case could be barred from recovering for their injuries because the children made the decision to leave the safety of the sidewalk and walk in the street where they were hit by a drunk driver. This suggested proposition contradicts the comparative negligence statutory scheme that the Legislature created when it abolished contributory negligence and assumption of the risk for tort cases.

The Michigan Legislature has adopted the doctrine of pure comparative negligence and rejected the doctrine of contributory negligence. Specifically, MCL 600.2958 provides that “a plaintiff’s contributory fault does not bar that plaintiff’s recovery of damages.” MCL 600.2958. Instead, the comparative fault statutory scheme enacted by the Legislature distributes responsibility according to the proportionate fault of the parties, and accordingly requires that a plaintiff’s damages be reduced in the same proportion by which the plaintiff’s own conduct contributed to his or her injuries. MCL 600.2959; *Placek v Sterling Heights*, 405 Mich 638, 660-661, 681; 275 NW2d 511 (1979).

The Legislature also explicitly provided that the trier of fact is to allocate

comparative fault. MCL 600.2957(1); MCL 600.6304. The jury has to consider several factors in determining the comparative fault of the parties, including whether the plaintiff is a proximate cause of her damages (if the issue has been raised as a defense), the nature of the conduct of each person at fault, and the causal relationship between the conduct and the damages. MCL 600.6304(1)(b), (2); *see also Lamp v Reynolds*, 249 Mich App 591, 599; 645 NW2d 311 (2002). The trial court is then instructed to take the jury's verdict—which has already considered the comparative fault of the parties and non-parties—and reduce the total amount of damages pursuant to the comparative fault statute. MCL 600.6306(3); MCL 600.6304.

Like the contributory negligence scheme that preceded the Legislature's enactment of the comparative fault statutes, this Court has also abolished the doctrine of assumption of risk for ordinary negligence actions. *Felgner v Anderson*, 375 Mich 23, 56; 133 NW2d 136 (1965) (limiting doctrine of assumption of the risk to employment relationships and express contractual assumption of risk). This Court's rejection of the assumption of the risk dovetails into the comparative fault legislation discussed above, which does not eliminate a plaintiff's recovery for damages, even if the plaintiff is more than 51% at fault for her own injuries. MCL 600.2959. The Legislature explicitly provided a remedy where plaintiff is over 50% at fault by eliminating all noneconomic damages. MCL 600.2959.

To the extent that this Court's question in granting leave suggests that the children's decision to walk in the street would bar recovery for their damages, that question cannot be decided by this Court. The question, instead, is strictly governed by the comparative negligence statutes, where the Legislature granted the authority to the jury to decide to

what extent, if any, the children bear fault for their injuries when they made the decision to walk in the street. MCL 600.2957; MCL 600.6304.

## **CONCLUSION**

The Legislature clearly evinced its intent when it enacted the highway exception to governmental tort immunity because the Legislature merely required that the plaintiffs' injuries arise "by reason of" the governmental entity's failure to maintain the highway in a manner reasonably safe for public travel. The "by reason of" language requires a lesser showing than "the proximate cause" and instead directs this Court to look to the beginning of the chain of events that lead to the plaintiffs' injuries. Here, the City's failure to maintain its sidewalk along Saginaw Highway, and indeed the City's act of creating an unnatural accumulation of snow and ice making the sidewalk impassable was the starting point and the children's injuries when they were forced to abandon the impassable sidewalk and walk on Saginaw Highway and that their injuries "flowed directly and predictably" from the City's actions. But for the City's acts, the children would not have had any need to leave the safety of the sidewalk and they would not have been hit by a drunk driver or any other automobile.

Having demonstrated that governmental immunity should not apply in this case, the plaintiffs have established a genuine issue of material fact as to whether the City proximately caused their injuries for their negligence action. It was reasonably foreseeable that, when the City decided to cease maintaining its sidewalk and when it created an unnatural accumulation of snow and ice on that sidewalk, pedestrians traversing that

portion of the sidewalk of Saginaw Highway would have no choice but to abandon the sidewalk and temporarily walk on Saginaw Highway. The City knew that walking on the high-traffic thoroughfare of Saginaw Highway posed a danger to pedestrians. It was reasonably foreseeable that an automobile, here an automobile operated by an intoxicated individual, could endanger the lives and limbs of pedestrians who were forced to leave the safety of the City's sidewalks.

### **RELIEF REQUESTED**

Amicus Curiae Michigan Association of Justice respectfully requests that this Honorable Court affirm the decision of the Court of Appeals. In the alternative, Amicus Curiae Michigan Association of Justice requests this Court render a decision that leave was improvidently granted as to the proximate causation issue.

Respectfully submitted,

Dated: December 28, 2007

/s/ Liisa R. Speaker  
Liisa R. Speaker (P65728)  
Jodi M. Latuszek (P70547)  
SPEAKER LAW FIRM, PLLC  
230 N. Sycamore St., Suite D  
Lansing, MI 48933  
Attorneys for Amicus Curiae,  
Michigan Association of Justice

## PROOF OF SERVICE

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

Kitty L. Groh (P36722)  
Farhat & Story, P.C.  
1003 North Washington Ave.  
Lansing, MI 48906  
Counsel for Plaintiffs-Appellees

Christine D. Oldani (P25596)  
David K. Otis (P31627)  
535 Griswold, Suite 2400  
Detroit, MI 48226  
Counsel for Defendant-Appellant  
City of Lansing

Thomas M. Tupper (P42908)  
Tupper & Associates  
3496 East Lake Lansing Rd., Ste 170  
East Lansing, MI 48823  
Counsel for Defendant VFW

James S. Jamo (P36650)  
Grua, Jamo & Young, PLC  
2401 East Grand River Ave.  
Lansing, MI 48912  
Counsel for Defendants Wampler

I declare that the statements above are true to the best of my information, knowledge, and belief.

Respectfully submitted,

Dated: December 28, 2007

/s/ Jodi M. Latuszek  
Jodi M. Latuszek