STATE OF MICHIGAN

IN THE MICHIGAN SUPREME

MARIE DEAN, PERSONAL REPRESENTATIVE OF THE ESTATES OF TALEIGHA MARIE DEAN, DECEASED, AARON JOHN DEAN, DECEASED, CRAIG LOGAN DEAN, DECEASED, AND EUGENE SYLVESTER, DECEASED,

Plaintiff-Appellee,

v

JEFFREY CHILDS,

Defendant-Appellant,

and

THE CHARTER TOWNSHIP OF ROYAL OAK, DAVID FORD, FRANK MILES, JR., FRANCES THURMAN, JERRY SADDLER and CYNTHIA PHILLIPS,

Defendants.

Supreme Court
Case No. 126393

Supreme Court
Previous Case No. 122171

Court of Appeals
Case No. 244627 (On Rem)

Court of Appeals
Previous Case No. 240573

Oakland Circuit Court
Case No. 01-029844-NO

126393

DEFENDANT-APPELLANT JEFFREY CHILDS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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MICHIGAN SUPREME COURT

GARAN LUCOW MILLER, P.C.
ROSALIND ROCHKIND (P23504)
ROGER A. SMITH (P27722)
Attorneys for Defendant-Appellant
1000 Woodbridge Street
Detroit, MI 48207-3192
Telephone: (313) 446-5522

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ARGUMENT

Plaintiff-Appellee, Marie Dean, seeks to impose liability on defendant-appellant, Jeffrey Childs, for his alleged gross negligence while attempting to fight a fire during the course of his employment as a firefighter for the Charter Township of Royal Oak. This matter is now pending before this Court on Childs' Application for Leave to Appeal, seeking review of that portion of the May 13, 2004 Opinion of the Michigan Court of Appeals which permits this matter to proceed against him on plaintiff's state tort claim.[1] As articulated in that Application, it is defendant's position that this claim is barred by governmental immunity, and/or the public duty doctrine, and/or the absence of any common law duty. Whether pursuant to the public policy decision of the Michigan Legislature when it enacted MCL 691.1407(2), or the public policy considerations inherent in analysis of the duties owed by governmental employees to members of the public, Michigan law does not favor second-guessing the split second decisions made by firefighters engaged in providing firefighting services to the community. Accordingly, the parameters of permissible litigation against these public servants are quite narrow and do not include the circumstances presented by this case.

In its Order of January 28, 2005, this Court directed that this case be scheduled for oral argument "on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1)." Pursuant to this Order, the parties are to address "only the question whether Childs' actions or omissions were 'the' proximate cause of the

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[1] *Dean v Childs*, 262 Mich App 48 (2004).

deaths under *Robinson v City of Detroit*, 462 Mich 439 (2000)." Thus, this Supplemental Brief, permitted by the January 28, 2005 Order, is similarly limited to that question.

WHERE PLAINTIFF'S DECEDENTS DIED IN A HOUSE FIRE, THE EFFORTS TAKEN BY THE FIREFIGHTERS TO PUT OUT THE FIRE COULD NOT CONSTITUTE "THE PROXIMATE CAUSE" OF THEIR DEATHS AND DEFENDANT CHILDS WAS ENTITLED TO GOVERNMENTAL IMMUNITY UNDER MCL 691.1407(2).

In *Robinson v City of Detroit*, 462 Mich 439 (2000), this Court considered the statutory phrase "the proximate cause" and concluded that its use in MCL 691.1407(2) demonstrated the Legislative intent to provide "tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause." *Robinson*, 462 Mich, 319. This Court having determined in *Robinson* that the phrase "the proximate cause" is not the legal equivalent of the phrase "a proximate cause", and having also provided a definition of the phrase "the proximate cause" as gleaned from its opinion in *Stoll v Laubengayer*, 174 Mich 701 (1913), the question presented by this case concerns the application of that definition to the facts alleged by plaintiff herein.[2] Simply stated, plaintiff contends that the Royal Oak Township fire department was dispatched to the scene of a fire where plaintiff's

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[2] Michigan has long recognized the distinction between the use of the phrases "a proximate cause" and "the proximate cause". See, *e.g.*, *Kirby v Larson*, 400 Mich 585 (1977); *Ignotov v Reiter*, 425 Mich 391, 400 (1986) [opinion Boyle, J.]. See also, *Allstate Ins Co v Freeman*, 432 Mich 656, 698-699 (1989).

decedents were located in the rear of the home, but that they were not rescued because the firefighting efforts of Jeffrey Childs caused the fire in the front of the home to be pushed to the rear. Another firefighter, John Soave, opined that the action of Childs increased the danger to the children and either prevented him from rescuing the children, or likely decreased the time available for rescue.[3]

It is, however, respectfully submitted that, regardless of any further clarification that this Court may provide as to the phrase "the one most immediate, efficient, and direct cause of the injury or damage", the majority opinion of the Michigan Court of Appeals cannot stand because, *inter alia*, its application of this phrase converted the meaning of "the proximate cause" into nothing more than "cause in fact."[4] Moreover, an analysis of Michigan precedent discussing proximate cause demonstrates that, in no event, could the alleged grossly negligent firefighting of Jeffrey Childs constitute "the" proximate cause of the childrens' deaths because the causal effect of this conduct could not be deemed legally sufficient to nullify the causal effect of either the fire itself, or the conduct that caused the fire. Further, the effect of the fire was ongoing, and, as the dissenting opinion

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[3] These alleged facts, which have not been conceded by defendant but which were assumed to be true for purposes of his motion for summary disposition, were set forth in the affidavits of Marie Dean and John Soave, submitted by plaintiff in her responsive pleadings.

[4] Consider the following rationale articulated in the majority opinion, 262 Mich App, 58: "While it is likely that the arsonist was 'a proximate cause' of the children's deaths, plaintiff's evidence, if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner." Defendant disputes the finding that the Soave Affidavit would support such a conclusion, but even so, this is nothing more than a determination of cause in fact, not legal cause, and not "the proximate cause".

in the Court of Appeals concluded, the fire (or the conduct that caused it) was the direct cause of the deaths, the immediate cause of the deaths, and the efficient cause of the deaths. The firefighting of Jeffrey Childs was none of these.[5]

As succinctly stated in *Moning v Alfono*, 400 Mich 425, 437 (1977), "[t]he elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage." Moreover, as discussed throughout that opinion, these elements are distinct, although interrelated. Citing Prosser & Keeton, Torts (4th ed.), §42, p 244, the *Moning* Court noted that the question of proximate cause is a policy question, often indistinguishable from the question of duty, which asks whether the conduct at issue was "so significant and important a cause (of loss * * *) that the defendant should be legally responsible." *Moning,* 400 Mich, 438. Consideration of the elements of both proximate cause and duty involve the question of whether the law should impose liability because of certain conduct, even if that conduct breached the relevant standard of care, and even if

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[5] Since the effect of the conduct which caused the fire was always ongoing (analogous to the reckless driving in *Robinson, supra*), the firefighting was not even "proximate" in a temporal sense. And see, *Costa v Community Emergency Medical Services, Inc*, 263 Mich App 572, 579 (2004), where the Michigan Court of Appeals rejected the contention that emergency medical services provided by a fire department employee could constitute "the proximate cause" of injuries, even though that conduct was subsequent to the assaultive conduct which caused injury: "Further, given the undisputed evidence that Baker punched Costa in the face and knocked him down before Farenger and Schultz arrived on the scene, reasonable jurors could not have found that Farenger and Schultz' actions were the proximate cause of Costa's injuries." In other words, a temporal relationship alone is not sufficient to satisfy the requirement of "the proximate cause."

that conduct was causally related to the injuries sustained. As explained by this Court in *Skinner v Square D*, 445 Mich 153, 162-163 (1994):

> * * * We have previously explained that proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as "proximate cause." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977).
>
> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. Prosser & Keeton, Torts (5th ed.), §41, p 266. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. * * *[6]

Although the pending application presents issues concerning both duty and proximate cause, the issue on which oral argument has been permitted pertains to the causative element which, when a governmental employee's conduct has been questioned, requires that the conduct constitute "the proximate cause" before (as a matter of policy), liability may be imposed. As with the question of "proximate cause", the determination of "the proximate cause"involves the policy question of whether the governmental defendant *should* be legally responsible for the result which his conduct allegedly caused.

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[6] And as explained further in Prosser & Keeton, Torts (5th ed.), §42, pp 272-273:

> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question of whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred. * * * [footnotes omitted]

However, unlike the considerations relevant to a determination of "a proximate cause", the relevant policy decision in this case was made by the legislature when it enacted MCL 691.1407(2). Consistent with its acknowledged intent of a broad grant of immunity, the legislature clearly chose to seriously restrict the circumstances where suit would be permissible, even in the presence of gross negligence, and even if some causal relationship could be established. The Legislature required that a very significant causal relationship be present – more than the relationship required for a finding of "proximate cause". Consistent with this Court's holding in *Robinson v City of Detroit, supra*, and its citation to *Stoll v Laubengayer, supra*, it required a causal relationship so significant that it nullified the effect of other "proximate" causes.

Thus, in *Stoll v Laubengayer*, the Court held that the subsequent conduct of the plaintiff in sledding down the hill nullified the earlier negligence of the defendant who left his horse and wagon across a path. In *Morrison v City of Ironwood*, 189 Mich 117 (1915), the Court cited *Stoll, supra*, in its consideration of the causal relationship between the defendant's digging of a ditch in the snow, the subsequent snowfall which filled in the ditch, and the plaintiff's fall. The Court concluded that "the fall of snow was not such an independent, unforeseen cause which intervened between the claimed negligent act of the city in constructing the ditch as it did and the time of the injury, that it can be said to be the proximate cause of the accident, and that the city should have anticipated the possibility of the fall of snow and that some injury might therefore result from having the ditch unprotected and uncovered." *Morrison, supra*, 189 Mich, 122. In other words, the

subsequent snowfall did not operate to nullify the causal effect of the antecedent negligence of the defendant.[7] On the other hand, in *Bacon v Payne*, 220 Mich 672, 680 (1922), the Court found that the subsequent negligence of the plaintiff did nullify the earlier negligence of the defendant. After citing *Stoll, supra*, for its discussion of causation, the Court reversed a judgment entered against the defendant, finding that, while he may have been negligent, "his blunder could not in itself cause or contribute to the injury complained of, which would not have occurred" except for the subsequent negligence of the plaintiff. Likewise, firefighting, no matter how inadequate, cannot itself cause injury from fire. The existence of the fire is essential to the injury, and the legal effect of the fire cannot be nullified by subsequent firefighting necessitated by the existence of the fire itself. At most, the firefighting may act in conjunction with the fire to cause injury, but it cannot stand alone as "the proximate cause".

Consistent with these cases, in *Robinson v City of Detroit, supra*, this Court concluded that the alleged gross negligence of the police officers who engaged in a pursuit did not suffice to nullify the negligence of the driver of the pursued vehicle and, thus, did not constitute "the proximate cause" of the injuries resulting from the accident.

In many, and perhaps most, circumstances there may be no one cause which constitutes "the proximate cause" of the plaintiff's injuries. Rather, there may be more

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[7] Inadequate firefighting could not be considered an intervening, superseding cause, so as to nullify the causative effect of the antecedent fire-setting, as firefighting is reasonably foreseeable and the effect of the fire is ongoing. See Prosser & Keeton, Torts (5th ed.), §44, p 318, where in the context of their discussion of intervening causes, the authors note that "[i]f the defendant sets a fire, the failure of a third person to extinguish it, however unreasonable, will not relieve the defendant from liability."

than one proximate cause, each of which is sufficient to impose legal liability on each of the actors, and none of which is so significant as to nullify the causal effect of the others. Yet, pursuant to MCL 691.1407(2), legal liability may only be imposed on a governmental employee when the grossly negligent conduct of that employee is so significant a cause as to be denominated "the" proximate cause. As explained in the dissenting opinion of Justice Taylor in *Hagerman v Gencorp Automotive*, 457 Mich 720, 755, n7 (1998),[8] when considering the statutory phrase "the proximate cause" in the context of allegedly negligent medical treatment of a work-related injury:

> FN7. The majority chastises me for a failure to identify the specific extrinsic force that broke the chain of proximate causation in this case. Yet it is not necessary to do so because, by the terms of the statute, all we are to focus on is whether the work-related injury was the proximate cause of the death. As long as it was only a proximate cause, as the majority's own analysis of the facts seems to make clear it was, there can be no recovery under the statute. * * * There was not a single proximate cause of this death. To be noted, I do not contend that these forces were superseding intervening causes, which is indeed the fundamental confusion the majority labors under in its analysis; rather, they were only additional proximate causes. Consequently, I believe that, in light of the evidence in the record, the plaintiff failed to demonstrate that the work-related injury was "the proximate cause" of Mr. Hagerman's death as required by the statute.

Likewise, the firefighting of Jeffrey Childs was not shown to be "the proximate cause" of the deaths of plaintiff's decedents. That conclusion is sufficient to support summary disposition in Child's favor premised on his governmental immunity, regardless of what, if anything, might constitute "the proximate cause".

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[8] Justice Taylor's dissenting opinion was cited with approval in *Robinson v City of Detroit, supra*, 462 Mich, 461-462.

Indeed, the legal position advanced herein by defendant is also consistent with the observations of the majority opinion in *Hagerman, supra,* 457 Mich, at 724, n2, 731, n8, wherein it considered whether any cause subsequent to the work-related injury was sufficient to nullify its causal effect. For example, at note 2, and assuming that the legislative phrase "the proximate cause" envisioned only one cause, the majority stated:

> * * * None of the relevant "forces" was "extrinsic" (or a superseding cause) because none of them could have caused the death alone or concurrently with the other causes independently of the single occurrence that irrefutably set in motion the chain of events leading to Mr. Hagerman's death. Thus, even if we adopted the "sole" proximate causation standard advocated by defendant and the dissent, the conclusion would be inescapable that the single legally recognized primary and proximate cause of Mr. Hagermans' death was the work-related injury that is not too remote, given the clear and unbroken nature of the chain of events directly tying the death to the injury. Although tragic and unlikely, the chain is direct and the consequences are not so remote as to preclude liability under subsection 375(2).

Just as the medical treatment received by the plaintiff in *Hagerman, supra*, was not perceived as nullifying the causative effect of the prior work-related injury which set the chain of events in motion, the firefighting in the case at bar could not nullify the causative effect of the fire. Similarly, at note 8, the *Hagerman* majority noted the dissent's citation to *Stoll v Laubengayer, supra*, and stated that *Stoll* did "not require proof of the sole cause or the last cause preceding the injury. Rather, the key word being 'efficient,' it references primary cause." Firefighting was not the primary cause of the injuries in the case at bar.

The language of MCL 691.1407(2) evidences the legislative intent that a governmental employee's immunity be avoided only when his gross negligence was so

significant that it nullified the effect of all other causes. This is consistent with the statutory phrase "the" proximate cause, which denotes only one cause, even though case law teaches us that in most circumstances there is not just one proximate, legally cognizable cause. Thus, consistent with the analysis in *Stoll v Laubengayer, supra*, where other causes do exist, governmental immunity will be avoided only where the employee's conduct is deemed to be such a significant cause of the injury that policy requires that it be deemed the only cause.[9] If there is no one cause that is the immediate cause, and the efficient cause, and the direct cause, governmental immunity may not be avoided.

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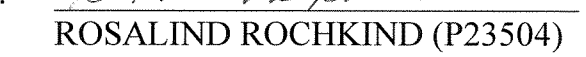
[9] Thus, governmental conduct did not nullify the causal effect of the assault in *Costa v Community Emergency Medical Services, Inc*, 263 Mich App 572 (2004), or the assault in *Miller v Lord*, 262 Mich App 640 (2004), regardless of whether the conduct preceded the assault or was subsequent to it. In neither case was the alleged gross negligence of the governmental employees "the proximate cause" of the injuries. And see *Tarlea v Crabtree*, 263 Mich App 80 (2004), when the alleged gross negligence was one of several causes that could not be isolated.

CONCLUSION

In *Robinson v City of Detroit, supra*, 462 Mich, 319, this Court held that the term "the proximate cause" in MCL 691.1407(2) meant "the one most immediate, efficient, and direct cause of the injury or damage". Regardless of how articulated – as primary cause, as an intervening and superseding cause, as the most significant cause, or as a cause that nullifies the effect of all other causes – as applied to the circumstances of the case at bar, it is clear that grossly negligent firefighting cannot be the proximate cause of the childrens' deaths as it cannot "trump" the fire itself.

Accordingly, defendant-appellant, Jeffrey Childs, respectfully requests that this Court grant his Application for Leave to Appeal and reverse the opinion of the Michigan Court of Appeals and the ruling of the Oakland County Circuit Court that denied him summary disposition.

GARAN LUCOW MILLER, P.C.
Attorneys for Defendant-Appellant

By: 

ROSALIND ROCHKIND (P23504)
1000 Woodbridge Street
Detroit, MI 48207-3192
Telephone: (313) 446-5522

Dated: February 24, 2005.
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