

STATE OF MICHIGAN  
IN THE SUPREME COURT

HANY F. KOULTA, Personal Representative  
of the ESTATE OF SAMI F. KOULTA,

Plaintiff-Appellant,

v

OFFICER DANIEL MERCIEZ,  
OFFICER ROBERT WROBLEWSKI  
and OFFICER STEVEN HILLA,

Defendants-Appellees,

and

CITY OF CENTERLINE,

Defendant.

---

Supreme Court  
Case No. 131891

Court of Appeals  
Case No. 266886

Macomb Circuit Court  
Case No. 04-5221-NO

131 891

**BRIEF OF AMICI CURIAE  
MICHIGAN MUNICIPAL LEAGUE AND  
MICHIGAN TOWNSHIPS ASSOCIATION**

**PROOF OF SERVICE**

**FILED**

MAY 29 2007

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

GARAN LUCOW MILLER, P.C.  
ROSALIND ROCHKIND (P23504)  
Attorneys for Amici Curiae  
Michigan Municipal League and  
Michigan Townships Association  
1000 Woodbridge Street  
Detroit, MI 48207-3192  
Telephone: (313) 446-5522

**TABLE OF CONTENTS**

	<u>Page</u>
Table of Authorities .....	ii
Statement of Interest .....	iv
Statement of the Issues Presented .....	vi
Statement of Facts .....	1
Argument .....	2
Preliminary Statement .....	2
I.    THE “PUBLIC DUTY” DOCTRINE, AS SET FORTH IN <i>WHITE V BEASLEY</i> , 453 MICH 308 (1996), BARS PLAINTIFF’S CLAIMS .....	4
II.   DEFENDANTS’ CONDUCT DID NOT AMOUNT TO “GROSS NEGLIGENCE,” AS DEFINED BY MCL 691.1407(7)(a) .....	10
III.  DEFENDANTS’ CONDUCT DID NOT CONSTITUTE THE PROXIMATE CAUSE OF THE ACCIDENT, AS DEFINED IN <i>ROBINSON V CITY OF DETROIT</i> , 462 MICH 439 (2000) .....	12
Relief Requested .....	18
Proof of Service	

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>Cases</u></b>	
<i>Beaudrie v Henderson</i> , 465 Mich 124; 631 NW2d 308 (2001) .....	2, 5
<i>Buczowski v McKay</i> , 441 Mich 96; 490 NW2d 330 (1992) .....	4
<i>Cuffy v City of New York</i> , 69 NY2d 255; 505 NE2d 937 (1987) .....	6
<i>Dean v Childs</i> , 474 Mich 914; 705 NW2d 344 (2005) .....	13
<i>Helper v Center Line Public Schools</i> , 477 Mich 931; 723 NW2d 459 (2006) .....	13
<i>Johnson v City of Detroit</i> , 457 Mich 695; 379 NW2d 895 (1998) .....	4
<i>Jones v Reynolds</i> , 438 F3d 685 (6th Cir 2006) .....	9
<i>Koulta v Merciez</i> , 477 F3d 442 (6th Cir 2007) .....	9
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999) .....	10
<i>Makris v City of Grosse Pointe Park</i> , 180 Mich App 545; 448 NW2d 352 (1989); <i>lv den</i> 436 Mich 872; 463 NW2d 709 (1990) .....	8
<i>Moning v Alfono</i> , 400 Mich 425; 254 NW2d 759 (1977) .....	14
<i>Paige v City of Sterling Heights</i> , 476 Mich 495; 720 NW2d 219 (2006) .....	14, 16

*Reaume v Jefferson Middle School*,  
477 Mich 1109; 729 NW2d 840 (2007) ..... 13

*Robinson v City of Detroit*,  
462 Mich 439; 613 NW2d 307 (2000) ..... vi, 12-14, 16

*Simonds v Tibbitts*,  
165 Mich App 480; 419 NW2d 5 (1988) ..... 8

*Skinner v Square D*,  
445 Mich 153; 516 NW2d 475 (1994) ..... 15

*Tarlea v Crabtree*,  
263 Mich App 80; 687 NW2d 333 (2004);  
*lv den* 472 Mich 891; 695 NW2d 69 (2005) ..... 11

*White v Beasley*,  
453 Mich 308; 552 NW2d 1 (1996) ..... vi, 2, 4-9

**Statutes / Court Rules / Other Authorities**

2 Cooley, Tort (4th ed), §300 ..... 5

42 U.S.C. §1983 ..... 9

MCL 418.375(2) ..... 14

MCL 691.1401, *et seq* ..... 2, 4

MCL 691.1407(2) ..... 3, 10, 12, 14, 16

MCL 691.1407(2)(c) ..... 10

MCL 691.1407(7)(a) ..... vi, 10

Prosser & Keeton, Torts (5th ed.), §42 ..... 15

## STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 516 Michigan local governments of which 425 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amicus curiae is authorized by the Legal Defense Fund's board of directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Debra A. Walling, corporation counsel, Dearborn; Andrew J. Mulder, city attorney, Holland, William B. Beach, city attorney, Rockwood; Randall L. Brown, city attorney, Portage; W. Peter Doren, city attorney, Traverse City; Clyde Robinson, city attorney, Battle Creek; Eric D. Williams, city attorney, Big Rapids; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; John E. Johnson, Jr., corporation counsel, Detroit; and William C. Mathewson, general counsel, Michigan Municipal League.

The Michigan Townships Association is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing 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 Board of Directors of the Michigan Townships Association has authorized the filing of this brief.

Amici curiae urge the Court to affirm the direction of the Court of Appeals that judgment be entered in favor of defendants Daniel Merciez, Robert Wroblewski, and Steven Hilla. In the alternative, the Court is urged to simply deny plaintiff's Application for Leave to Appeal.

## STATEMENT OF THE ISSUES PRESENTED

- I. Whether the “public duty” doctrine, as set forth in *White v Beasley*, 453 Mich 308 (1996), bars plaintiff’s claims.
- II. Whether defendants’ conduct amounted to “gross negligence,” as defined by MCL 691.1407(7)(a).
- III. Whether defendants’ conduct constituted the proximate cause of the accident, as defined in *Robinson v City of Detroit*, 462 Mich 439 (2000).

## **STATEMENT OF FACTS**

Amici Curiae, the Michigan Municipal League and Michigan Townships Association, rely on the Statement of Material Facts and Proceedings as set forth in the defendants-appellees' Response in Opposition to Plaintiff's Application for Leave to Appeal.

## ARGUMENT

### *Preliminary Statement*

In *Beaudrie v Henderson*, 465 Mich 124 (2001), this Court considered and reconfirmed the “public duty doctrine” adopted in *White v Beasley*, 453 Mich 308 (1996). Specifically agreeing with Justice Brickley’s statement in *White, supra*, 453 Mich, at 321, that “[p]olice officers must work in unusual circumstances” and, thus, “deserve unusual protection,” the *Beaudrie* Court restricted the public duty doctrine to cases alleging a failure to provide police protection from the criminal acts of third parties. *Beaudrie, supra*, 465 Mich, at 140-141. In so holding, the Court concluded that the governmental immunity provided by the Legislature in MCL 691.1401, *et seq*, provided sufficient protection to governmental employees sued in other contexts: “[T]he need for expanding the public duty doctrine outside the police protection context is undermined by the comprehensive protections from liability provided to government employees by the governmental immunity statute.” *Beaudrie*, 465 Mich, at 142. However, when a member of the public seeks to impose civil liability on a police officer for actions taken in the performance of his public duties, alleging that the officer’s conduct failed to protect the public from direct injury by a third party, this Court concluded that, even with the broad protection afforded by the GTLA, the public good was best served by providing police officers with the additional protection of the public duty doctrine. In this way, with the protection of both governmental immunity and the public duty doctrine, police officers could proceed with the performance of their public responsibilities without fear

that they would expose themselves to liability if the arguably imperfect rendering of those duties was alleged to contribute to harm suffered by an innocent member of the public at the direct hands of a third party.

Even when, as in the case at bar, the governing legal principals are clear, resolution of these cases is demanding because they inevitably present tragic facts and sympathy for the victims of third-party criminal conduct who have sustained injury that, they contend, could have been avoided if the police officer had done his job better. These are cases where the officer has had no intent to allow or cause injury to the plaintiff, but where he has simply been doing his job. The principles that emerge from these cases go beyond the facts of any one case, and beyond the natural sympathy that all parties feel for the innocent victims of crime. Rather, they evince a balance that has been struck by both the Legislature and the courts between the public good and a private need.

It is respectfully submitted that, 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 the analysis of the duties owed by governmental employees to members of the public, the parameters of permissible litigation against police officers whose conduct allegedly failed to afford protection from third-party injury is narrow, and do not include the circumstances presented by the case at bar.

**I. THE “PUBLIC DUTY” DOCTRINE, AS SET FORTH IN  
*WHITE V BEASLEY*, 453 MICH 308 (1996), BARS  
PLAINTIFF’S CLAIMS.**

As explained by the Michigan Supreme Court in *Buczowski v McKay*, 441 Mich 96, 100-101 (1992), the question of duty is the threshold issue in every tort suit, and it raises the “question of whether the defendant is under any obligation for the benefit of the particular plaintiff” and concerns “the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.” This critical question of duty is present in every case, even those commenced against a governmental defendant. Thus, in *Johnson v City of Detroit*, 457 Mich 695, 710 (1998), for example, the Court held that the conclusion that the public building exception applied to avoid the City’s governmental immunity did not answer the question of whether any duties had been owed to the plaintiff. Moreover, and as confirmed by the Michigan Supreme Court in *White v Beasley*, 453 Mich 308 (1996), when the defendant is a governmental employee, the question of duty also requires the additional consideration of the “public duty doctrine” which limits the circumstances in which governmental employees might otherwise have been found to owe duties to a particular plaintiff based on traditional tort considerations.<sup>1</sup> The lead opinion of Justice Brickley in *White, supra*, explained the public duty doctrine:

We hold that the public-duty doctrine applies in Michigan. As defined by Justice Cooley, the public-duty doctrine provides

---

<sup>1</sup> The *White* opinion confirmed that the public duty doctrine exists independent from the question of a defendant’s statutory immunity under MCL 691.1407(1), *et seq.* *White, supra*, 453 Mich, at 321-324.

[t]hat if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. [2 Cooley, Tort (4th ed), §300, pp 385-386.]

Applied to police officers, the public-duty doctrine insulates officers from tort liability for the negligent failure to provide police protection unless an individual plaintiff satisfies the special-relationship exception. [Citation omitted]

In its March 30, 2007 Order, this Court directed the parties, and invited amici, to address “whether the ‘public duty’ doctrine, as set forth in *White v Beasley*, 453 Mich 308 (1996), bars plaintiff’s claims.” It is respectfully submitted that plaintiff’s claims are barred by the analyses set forth in *White v Beasley*, *supra*.<sup>2</sup> Regardless of how artfully plaintiff may attempt to plead her claim to avoid the public duty doctrine, the essence of that claim is a complaint that the defendant officers failed to prevent Chrissy Lucero from driving when they ordered her to leave the Offrink premises.

In *White*, *supra*, the Court considered the potential liability of the defendant police officer who had responded to a call for assistance, heard witnesses’ statements that a

---

<sup>2</sup> Indeed, consistent with the ruling of the Court of Appeals in this case, it may seriously be questioned whether the defendants owed any legally cognizable duty to the plaintiff, even without regard to the public duty doctrine. As private citizens, defendants would have had no duty to prevent Chrissy Lucero from driving while drunk. The opinion in *Beaudrie v Henderson*, *supra*, made clear that, even where the public duty doctrine is inapplicable, a plaintiff is still required to establish the existence of a common law duty owed by the police officer to the plaintiff. “The liability of government employees, other than those who have allegedly failed to provide police protection, should be determined using traditional tort principles without regard to the defendant’s status as a government employee.” *Beaudrie*, *supra*, 465 Mich, at 134.

woman was being attacked by her husband within an apartment, but left without any attempt to contact the woman or gain entry. Several hours later, the woman died at her husband's hand. Concluding that no viable claim could be asserted against the officer as a result of his failure to take any steps to protect the woman, the lead opinion of Justice Brickley held that the public duty doctrine remained valid in Michigan, adopted the articulation of that doctrine as quoted above, while also adopting the following "special relationship" exception from *Cuffy v City of New York*, 69 NY2d 255; 505 NE2d 937 (1987):

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;

(2) knowledge on the part of the municipality's agent that inaction could lead to harm;

(3) some form of direct contact between the municipality's agents and the injured party; and

(4) that party's justifiable reliance on the municipality's affirmative undertaking . . . .

(453 Mich, at 320)

The policy considerations articulated by Justice Brickley in *White*, in support of the confirmation of the public-duty doctrine, included concern that a police officer be protected from liability which would be based on his "conformity with, or failure to conform to, statutes or ordinances not intended to create tort liability." This concern is directly applicable to the case at bar where plaintiff seeks to impose liability on the defendants due to their failure to exercise their authority as police officers to detain

Chrissy Lucero or otherwise restrict the method by which she removed herself from the area in which she had created the disturbance requiring police intervention. The policy considerations discussed in *White* also included a concern that governmental employees be protected from liability that would otherwise be based solely on their job titles. In other words, “[t]he job titles of government employees alone should not create a duty to specific members of the public.” (453 Mich, at 319) As applied to the case at bar, this concern dictates that no liability attach to the defendant police officers for their failure to do that which no private citizen would have been required to do for the protection of the motoring public: take control of Chrissy Lucero and prevent her from driving.<sup>3</sup>

Likewise, the discussion of the “special-relationship” exception is pertinent to the circumstances presented in the case at bar and explains why that exception is inapplicable to this case:

The test articulated in *Cuffy* responds to these concerns by insulating police officers from liability arising from their tortious on the job conduct in almost all instances where a plaintiff alleges a failure to provide police protection. Yet, the test also provides plaintiffs with some relief in the particularly egregious case of an officer promising police protection, but negligently carrying out that promise. Although this test may deny recovery to some deserving plaintiffs, we prefer to be cautious when exposing police officers to on the job liability. Police officers must work in unusual circumstances. They deserve unusual protection. \* \* \*

(453 Mich, 321)

As tragic as this case is, it does not present a “particularly egregious case of an officer promising police protection, but negligently carrying out that promise.” Rather, it

---

<sup>3</sup> Nor, for that matter, would any liability attach to that private citizen who “ordered” Ms. Lucero to drive away from the premises in her own vehicle.

is an example of police officers responding to a call for assistance, and diffusing the situation they confronted, separating the parties, and requiring that Chrissy Lucero leave the premises she had been stalking. Their alleged error was in failing to dictate the means by which she would leave the area, allegedly contributing to injury to an innocent third-party who was, ten minutes later, involved in a motor vehicle accident with Lucero.<sup>4</sup>

The concurring analyses of Justices Boyle and Cavanagh in *White v Beasley*, *supra*, also support application of the public duty doctrine to the circumstances presented in the case now before the Court. Justice Boyle’s concurring opinion sought to limit application of the doctrine to allegations of nonfeasance, while leaving open the question of its application to allegations of affirmative misconduct. Justice Cavanagh would have expressly limited application of the doctrine to an alleged failure to protect an individual from action taken by third parties, while expanding the “special-relationship” exception in cases of identifiable, foreseeable victims with respect to ongoing criminal activity. The concerns expressed in these opinions are not implicated by the circumstances presented by the case at bar because, regardless of how phrased, the plaintiffs are complaining of a

---

<sup>4</sup> It is also noteworthy that *Simonds v Tibbitts*, 165 Mich App 480 (1988) and *Makris v City of Grosse Pointe Park*, 180 Mich App 545 (1989), were each cited in *White* as opinions that had relied on the public duty doctrine. (*White, supra*, 453 Mich, at 322, n7) Both of these opinions confronted allegations similar to those presented in the case at bar, and in both cases the Court of Appeals held that no duty had been owed to members of the motoring public to keep an intoxicated driver off the street. The result would have been no different in *Makris* if, after stopping the vehicle for a traffic violation, the officer had not simply permitted the intoxicated driver to drive away, but actually “ordered” him to move on.

failure to protect rather than affirmative misconduct, and a member of the motoring public does not constitute an “identifiable” victim.

Similar concerns were discussed by the 6th Circuit Court of Appeals in *Jones v Reynolds*, 438 F3d 685 (6th Cir 2006), when considering, and rejecting, application of the court’s “state created danger” theory of liability under 42 USC §1983 to circumstances where police officers allowed, and even encouraged, an illegal drag race to occur on the public streets, resulting in the death of a bystander. The discussion is instructive, both with respect to the meaning of the requisite “affirmative act”, as well as the discussion of the requirement that the conduct at issue place a specified, identifiable, person at risk. A member of the public simply did not suffice.<sup>5</sup> This conclusion is consistent with the “public duty doctrine” articulated in *White, supra*, which prohibits suit unless a duty to a specified individual can be demonstrated that is different than the duty owed to the public by virtue of the defendant’s status as a police officer.

It is respectfully submitted that each of the analyzes set forth in *White v Beasley, supra*, support application of the public duty doctrine in the circumstances presented in the case at bar.

---

<sup>5</sup> Rejecting the existence of a “special danger”, the *Jones* court explained, 438 F3d, at 696: “A special danger exists ‘where the state’s actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.’ *Kallstrom*, 136 F3d at 1066. In the only cases where we have recognized a ‘state created danger,’ the government could have specified to whom it was putting at risk, nearly to the point of naming the possible victim or victims.” See also, *Koulta v Merciez*, 477 F3d 442 (6th Cir 2007).

**II. DEFENDANTS' CONDUCT DID NOT AMOUNT TO "GROSS NEGLIGENCE," AS DEFINED BY MCL 691.1407(7)(a).**

Even were it concluded that the public duty doctrine was inapplicable to this case, and that a common law duty had been owed to plaintiff's decedent to keep Chrissy Lucero from driving away, defendant police officers are entitled to the governmental immunity provided to them by the Legislature in MCL 691.1407(2). As pertinent to the case at bar, that immunity applies unless the plaintiff sustained her burden of demonstrating that the officers' conduct amounted to "gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). The term "gross negligence" has been statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). As noted by this Court in *Maiden v Rozwood*, 461 Mich 109, 122 (1999), the conduct so defined is "substantially more than negligent."

The inquiry in the case at bar is whether the officers' conduct was substantially more than ordinarily negligent when they directed Chrissy Lucero to leave the area of the Offrink home without preventing her from doing so by driving, when they allegedly had knowledge that would have placed them on notice that she might be too intoxicated to legally drive. It is respectfully submitted that this conduct was not so reckless as to demonstrate a substantial lack of concern for whether an injury results. Rather, the officers were in the course of doing their job by removing the source of the disturbance at the Offrink home.

In *Tarlea v Crabtree*, 263 Mich App 80 (2004), the Court of Appeals considered the statutory definition of gross negligence and offered the following guidance:

By statute, to be liable in tort, a governmental employee must act with gross negligence. [Citations omitted] Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” [Citation omitted] Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness. Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.

The much less demanding standard of care – gross negligence – suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.

(263 Mich App, 90)

In the case at bar, it cannot be said that the officers’ conduct demonstrated a singular disregard for substantial risks, or that they simply “did not care”. When examining the question of “gross negligence”, it is important to place the conduct into its appropriate context. If taken out of the context of what brought the officers to the area, it might appear that a potentially intoxicated woman, who was otherwise minding her own business, was being ordered to drive away from the area for no apparent purpose. However, in context, it is apparent that the officers were responding to a call of a disturbance being created by Chrissy Lucero, and when they told her to leave the area and ensured that she did so, they were performing their police function of diffusing the

situation they had confronted. This is not reckless conduct that demonstrates a substantial lack of concern for whether an injury results. To hold otherwise would subject police officers to the potential for liability whenever their efforts to perform their public safety functions unintentionally resulted in placing another member of the public in harm's way.

**III. DEFENDANTS' CONDUCT DID NOT CONSTITUTE THE PROXIMATE CAUSE OF THE ACCIDENT, AS DEFINED IN *ROBINSON V CITY OF DETROIT*, 462 MICH 439 (2000).**

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. In *Robinson*, as in the case at bar, the injuries occurred as a result of the reckless driving of a third party. In both cases, the conduct of the reckless driver constituted criminal conduct, in *Robinson* because the driver was fleeing from the police and violating the rules of the road, and in the case at bar because the driver was driving while intoxicated and violating the rules of the road. In both cases the plaintiff attempted to impose liability on the defendant police officers, alleging that their conduct was causally related to the reckless driving and they had, therefore, placed the public, and specifically the motoring public, in danger from the reckless driver.

However, in *Robinson*, as in the case at bar, and regardless of whether there was any causal relationship between the conduct of the police officer and the reckless driving, the conduct of the officer did not constitute “the proximate cause” of the plaintiff’s injury. Indeed, given that Chrissy Lucero has pled guilty to second degree murder as a result of her actions, and given that the plaintiff has already obtained a judgment of \$750,000 in a civil suit filed against Ms. Lucero, it is logically and legally impossible to argue that it was the conduct of the police officers that constituted the “one most immediate, efficient, and direct cause” of the plaintiff’s injury.

This Court has considered the application of the definition of “the proximate cause” articulated in *Robinson* in several cases involving claims of governmental immunity, including *Dean v Childs*, 474 Mich 914 (2005) [allegedly grossly negligent firefighting did not constitute the proximate cause of injuries sustained by children caught in the burning home], reversing *Dean v Childs*, 262 Mich App 48 (2004); *Helfer v Center Line Public Schools*, 477 Mich 931 (2006) [alleged gross negligence of school bus driver who ordered child to get off of bus and to go home was not the proximate cause of child’s injuries sustained when she crossed the street and was hit by a car], reversing *Helfer v Center Line Schools*, CA #265757 (6/20/06); and *Reaume v Jefferson Middle School*, 477 Mich 1109 (2007) [alleged gross negligence of school wrestling coach by initiating moves without warning was not the proximate cause of injuries received while engaged in the wrestling activity], reversing *Reaume v Jefferson Middle School*, CA #268071

(8/15/06). These cases reflect adherence to the legislative policy choices embodied in MCL 691.1407(2).

Moreover, and significantly, in *Paige v City of Sterling Heights*, 476 Mich 495 (2006), this Court considered the meaning of the phrase “the proximate cause” as used in MCL 418.375(2), and concluded that its meaning in that statute was identical to its meaning as used in MCL 691.1407(2). In so doing, and to the extent that there may have been any doubt about its meaning as discussed in *Robinson, supra*, the *Paige* Court effectively clarified that “the proximate cause” means “the sole cause”:

In this case involving the Worker’s Disability Compensation Act (WDCA), MCL 418.101 *et seq*, the first issue is whether the phrase “the proximate cause” in MCL 418.375(2) means the sole proximate cause, i.e., “the one most immediate, efficient, and direct cause of the injury or damage.” We conclude that it does, as we did in construing the identical phrase in the governmental tort liability act (GTLA), MCL 691.1401 *et seq*, in *Robinson v Detroit*, \* \* \*.

(476 Mich, 498-499)

It is thus clear that the immunity afforded by MCL 691.1407(2) cannot be avoided unless it is established that the conduct of the governmental employee constituted the “sole cause” of the injury. That most certainly may not be said in the circumstances of the case at bar. Ms. Lucero’s conduct was so significant that she is currently serving a sentence as a result of her conviction for second degree murder.

In *Moning v Alfano*, 400 Mich 425, 438 (1977), the Michigan Supreme 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.” In other words, the question is whether the law should impose liability because of certain conduct, even if that conduct breached the relevant standard of care, and even if the conduct was a cause in fact of the injuries sustained. As explained 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 Alfonso*, 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. \* \* \*<sup>6</sup>

When a governmental employee’s conduct has been questioned, examination of the causative element requires that the conduct constitute “the proximate cause” before (as a matter of policy), liability may be imposed. As with the question of “proximate

---

<sup>6</sup> 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]

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. However, unlike the considerations relevant to a determination of “a proximate cause”, the relevant policy decision in these cases 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 holdings in *Robinson v City of Detroit*, and *Paige v City of Sterling Heights, supra*, it required a causal relationship so significant that it nullified the effect of other “proximate causes.” Or, as stated in *Paige*, it required that the conduct of the governmental employee constitute the sole proximate cause.

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 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. If there is no one cause

that is the immediate cause, *and* the efficient cause, *and* the direct cause – if there is no one cause that may be deemed the “sole” cause – governmental immunity may not be avoided.

**RELIEF REQUESTED**

Amici, the Michigan Municipal League and Michigan Townships Association, respectfully request that this Court affirm the judgment of the Court of Appeals or, in the alternative, deny plaintiff's Application for Leave to Appeal.

GARAN LUCOW MILLER, P.C.  
Attorneys for Amici Curiae  
Michigan Municipal League and  
Michigan Townships Association

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

Dated: May 24, 2007.  
707377.1