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STATE OF MICHIGAN
IN THE SUPREME COURT
(Judges Shapiro, Cameron and Letica)

NORMAN CHAMPINE,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

No. 18-000028-MZ
COA No. 347398
MSC No.

PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

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Dated: July 20, 2020

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Order Appealed from and Relief Sought

The Plaintiff in this case brought suit pursuant to MCL 691.1402 after being injured on I-696 when a chunk of concrete from the roadbed crashed through his windshield and struck him in the face. Following discovery, Defendant moved for summary disposition, contending that Plaintiff failed to properly file a notice in the Court of Claims before commencing suit and claiming that the notice Plaintiff did serve on Defendants was deficient. Specifically, Plaintiff had sent a notice directly to Defendants' agents instead of first filing that notice in the Court of Claims. In opposing Defendant's motion, Plaintiff argued that because his Complaint was filed in the Court of Claims prior to the expiration of the notice period, that Complaint was able to serve as his notice. The Court of Claims disagreed, and issued its order granting summary disposition on December 12, 2018. The Court then denied Plaintiff's Motion for Reconsideration on January 9, 2019. Because the court's grant of summary disposition left no remaining claims in this case, it was a final order for the purposes of appeal, pursuant to MCR 7.202(6)(a)(i). Plaintiff timely filed his claim of appeal on January 25, 2019.

The parties proceeded to oral argument at the Court of Appeals on March 4, 2020. Thereafter, the Court issued its 2-1 opinion affirming the grant of summary disposition. The majority did not rule on whether Plaintiff's notice was substantively deficient. Instead, it held that Plaintiff was required to file a notice in the Court of Claims before commencing suit and that he could not rely on his Complaint to serve as that notice despite the Complaint being filed before the expiration of the notice period. *Champine v Dept of Transp*, unpublished opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 347398) (Exhibit N).

Judge Shapiro dissented. He reasoned that in certain contexts, the legislature explicitly requires that a notice be filed before a Plaintiff can commence suit, such as in a medical malpractice

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action. In the case of a highway defect case brought within the Court of Claims, however, the statutory authority merely requires that the Defendants be given notice of the nature and location of the defect within a certain period of time. There is no authority for the proposition that the Complaint itself cannot serve as that notice, and there was no dispute that Plaintiff's Complaint was filed within the notice period. Judge Shapiro then further asserted that not only should Plaintiff's Complaint been able to serve as his notice, but that the Complaint also complied with the substantive notice requirements and adequately identified the location of the defect that caused his injuries. As a result, Judge Shapiro would have reversed the grant of summary disposition and would have remanded for further proceedings.

Plaintiff respectfully submits that both the trial court and the Court of Appeals erred in concluding that Plaintiff failed to comply with the applicable notice requirements. This Court should grant this application pursuant to the standard set forth in MCR 7.305(B)(2), as the issue presented in this application has significant public interest. In this action against the state, a Michigan resident was injured when a government entity failed to properly maintain a highway within its exclusive control. There is no question regarding that point, just as there is no question that the responsible entity was placed on notice within the applicable time period when Plaintiff commenced his action in the Court of Claims. In holding that Defendant was entitled to summary disposition on the basis of a lack of notice, both the Court of Claims and the majority of the Court of Appeals panel imposed requirements on the Plaintiff that were not contemplated by the legislature. As this Court has frequently noted, the natural state of our government is immunity and it is the right of the legislature to create an exception to that immunity. Thus far, the courts in the present case have worked in contravention of the legislature's clear intent by holding that

Plaintiff's cause of action is barred despite him meeting the requirements set forth in MCL 691.1404(1).

Likewise, granting this application is proper pursuant to MCR 7.305(B)(3), as this is an issue of major significance to the State's jurisprudence. The residents of this state are entitled to clarity regarding when and how they are permitted to bring suit against a state actor that has caused injury. And while this Court has previously set forth that exceptions to governmental immunity are to be narrowly interpreted, that narrow interpretation cannot cross a line into imposing additional obligations on litigants without advance notice.

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STATEMENT OF QUESTIONS INVOLVED

I. DID THE MAJORITY IN THE COURT OF APPEALS ERR IN CONCLUDING THAT SUMMARY DISPOSITION WAS PROPER BECAUSE PLAINTIFF'S NOTICE WAS NOT TIMELY FILED IN THE COURT OF CLAIMS DESPITE THE FACT THAT PLAINTIFF'S COMPLAINT WAS FILED IN THE COURT OF CLAIMS BEFORE THE EXPIRARION OF THE NOTICE PERIOD?

Court of Claims Answered: NO
Court of Appeals Answered: NO
Defendant-Appellee Answered: NO
Plaintiff-Appellant Answered: YES

II. THOUGH NOT ADDRESSED BY THE COURT OF APPEALS, DID THE COURT OF CLAIMS ERR IN GRANTING SUMMARY DISPOSITION UPON CONCLUDING THAT PLAINTIFF'S NOTICE WAS DEFICIENT FOR FAILING TO ADEQUATELY STATE THE LOCATION OF THE HIGHWAY DEFECT?

Court of Claims Answered: NO
Court of Appeals Did Not Answer
Defendant-Appellee Answered: NO
Plaintiff-Appellant Answered: YES

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INTRODUCTION

On December 17, 2017 Plaintiff was severely injured when a chunk of concrete that was lifted from the poorly maintained and deteriorating roadbed on west bound I-696 was projected through his windshield, striking him in the face while he was going 70 mph. Plaintiff's was the *second* such incident in six months where an unsuspecting motorist was severely injured; on May 15, 2017 a woman travelling in the same stretch of I-696 was similarly seriously injured when a piece of dislodged concrete came through her windshield. The notoriously poor condition of this stretch of freeway was well-known to MDOT and local police agencies. For example, MDOT Maintenance Engineer, Marlon Spinks, admitted to the police during the investigation of this incident that "there had been similar type complaints of debris coming in through people's windshields on 696" prior to the incident involving Plaintiff.

Plaintiff sent his MCL 691.1404(1) notice via certified mail to MDOT on December 28, 2018 (Ex. A). MDOT acknowledged receipt on December 30, 2017 (Ex. B). Thus, Plaintiff fully complied with the timing requirement of the notice statute. Additionally, while not required as a precondition to MDOT's liability, Plaintiff filed his claim with the Court of Claims on February 6, 2018, only 51 days after the incident, thus satisfying MCL 600.1404(2), and he served MDOT with the Complaint on March 26, 2018. Plaintiff then served MDOT with his First Amended Notice on February 7, 2018, which included a copy of the police report (Ex. C). Therefore, MDOT and the Court of Claims received direct notice and were served with Plaintiff's complaint before expiration of the 120-day notice period. Stated otherwise, to the extent a filing with this Court was required before the expiration of the 120-day period, Plaintiff complied.

As far as the content of the notice, Plaintiff gave the best and most specific location he could provide given the precise pothole could not be determined, despite the best efforts of the

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police, which included the freeway being closed to traffic and multiple officers both walking and driving the freeway. However, the crumbling and decaying road surface made it impossible to identify the "exact" pothole form where the chunk was dislodged. Indeed, the Warren Police report states there were "in excess of one thousand 'potholes'" in the area Plaintiff was injured. Nonetheless, their conclusion was: "The evidence suggests Norman Champine was struck as a result of the concrete being kicked up from the roadway…"

STATEMENT OF FACTS

On December 17, 2017 Plaintiff was operating his car when he entered westbound I-696 from Gratiot Ave. As he proceeded at the posted speed limit of 70 mph, an approximate 20-pound piece of concrete came through his window striking him square in the face, shattering most of the bones from his eye brows down and loss or near destruction of all his teeth. Not surprisingly, Plaintiff has a very limited recall of what happened after being struck:

> Q. Okay. As far as -- just as far as the accident itself, do you have any specific memory of how it occurred?
> A. No, no, I don't. I never -- if I recall I never saw the rock. I mean, obviously I would have swerved but, no, I don't recall. I don't recall it coming through. I don't recall anything.
> Q. Okay.
> A. I don't recall it hitting me, none of that.
> Q. All right. You don't recall specifically where it happened either?
> A. I don't. [Exhibit D, Champine dep., p 119.]

Plaintiff's lack of recollection is understandable given the serious injuries he sustained, including TBI, multiple facial bone, nose, orbital socket and jaw fractures; loss of numerous teeth (and the eventual extraction of all teeth); lacerations and contusions and head trauma necessitating multiple surgeries, extended hospitalization and intensive rehabilitation.

Somehow, Plaintiff was able to maintain control of his car and exit at Mound Road. The Warren Police Department responded to a gas station just off I-696, where Plaintiff had pulled

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over. Evidence Technician Scott Taylor responded to the scene, took photographs and secured the bloody chunk of concrete that was next to Plaintiff's vehicle (Ex. E, Taylor dep, p 15).



Officer Taylor proceeded to the hospital and photographed Plaintiff and then went with a "slew of other officers, that's when we started going up and down 696 from I-94 to Mound to see if we could figure out where it came from." (Ex. E, p 19.) Notwithstanding the best efforts of a small army of Warren Police Officers and completely closing down westbound I-696, the police were not able to determine the "exact" pothole from where the chunk came:

> Q. What were you specifically out there to investigate? What kind of things were you looking for?
>
> A. That's a very good question. Originally Detective Chisolm wanted me to document the potholes on 696 from I-94 to Mound to see if possibly this piece of concrete came out of. There was about four million of them ***so that absolutely was impossible to do***. I photographed a few of them and tried to take some long shot photographs of all the potholes because ***it would literally be impossible to see if that came from the ground up or to put it into a specific pothole***. We also looked up every overpass to see if there was any apparent signs of concrete coming off the bridge from decay. [Ex. E at 21.]

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Officer Taylor photographed one area which showed the representative deterioration



Warren Detective Brent Chisolm was lead in the investigation. Det. Chisholm spoke with Plaintiff at the hospital, but Plaintiff was only able to give him the general location on I-696; Plaintiff did not remember "specifically" where it happened, and he did not know what lane he was in (Ex. F Chisolm dep, p 18). After speaking with the Plaintiff, Det. Chisolm met up with multiple additional police personnel "to do a systematic search of the freeway to try to see if we could determine ourselves where this chunk of concrete came from." The systematic search included several Warren PD vehicles and the complete shut-down of the freeway:

> There were at least two fully marked scout cars and the evidence technician car. We blocked off the -- we started at 94, went north on 94 to 696 westbound, blocked off traffic and just started from there to look to see if we could place where maybe this chunk of concrete came from. And so we blocked off traffic and were trying to determine it. ***Very shortly we***

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> ***realized that that was not a task that was going to be possible due to the number of abnormalities in the concrete or potholes.***
>
> * * *
>
> Q. Okay. And you said that there were too many for you to be able to pinpoint -- I'll let you define what you saw.
> A. There were a significant number of potholes, so many so that to count all the potholes and try to place a chunk of concrete over the multiple mile span would have been arduous and time intensive for the police department so ***we did not believe that we would be able to accomplish that***. [Ex. F, pp 19-20.

The roadway examination also included several officers on foot, walking down the freeway:

> Q. All right. So you close down traffic, shut down the freeway?
> A. Yes.
> Q. And then you start walking for some distance?
> A. Yes.
> Q. All right. And as you're walking you notice what you ultimately conclude to be thousands – potentially thousands of potholes?
> A. I believe I said over 1,000 just –
> Q. An estimate?
> A. Yes.
> Q. Maybe even a guesstimate?
> A. Yeah. I counted -- again, I counted you know, a number of them and I said, well, that's clearly over 1,000 in this stretch.
> Q. Not practical to start taking this piece of concrete and trying to match it up to the potential thousands of potential points this could have come from?
> A. Correct. [Ex. F, pp 58-59.]

Detective Chisolm then directed that an exemplar chunk of concrete be taken from the roadbed so that its markings could be compared with the markings on the chunk that came through Plaintiff's windshield. After examining the chunk in question and comparing it to the exemplar, Det. Chisolm concluded that the markings were consistent with the roadbed versus a chunk coming off a bridge or overpass:

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(Chunk which struck Plaintiff).



(Exemplar chunk obtained by Warren PD).

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As part of this analysis, Det. Chisolm also "assigned out every bridge to either some of the patrol officers, Officer Taylor, and myself and we checked all the bridges…" The conclusion was that the chunk did not come from a bridge or overpass. (Ex. F, p 24.)

Det. Chisolm also notified MDOT of the incident the day it happened. Det. Chisolm was put in contact with Marlon Spinks, an MDOT Maintenance Engineer. Det. Chisolm and Mr. Spinks discussed the incident and whether Mr. Spinks "was aware of any prior complaints." Mr. Spinks advised that "there [had] been other similar type complaints of debris coming in through people's windshield on 696." (Ex. F, p 45). Mr. Spinks took possession of the injury-causing chunk and the exemplar. (Ex. F, p 47. The Incident Report states: "MDOT Maintenance Engineer Marlon Spinks investigated this incident for the State of Michigan, Department of Transportation. He was identified and furnished with a copy of the police report, scene photos, and the concrete rocks that were involved in the incident. Spinks took possession of the concrete for the State and advised that they would be secured by the State of Michigan as part of the chain of custody (evidence) in this matter. WPD Evidence tags #170065832.002 & .003." The final determinations of the Warren PD were: "The evidence suggests Norman Champine was struck as a result of the concrete being kicked up from the roadway…" (Ex. G.)

MDOT Engineer Spinks has testified he learned of the incident from Warren PD the day it happened and within a day or two drove the roadway with his foreman and "patch crew" because his supervisor told him "to go out and try to find this area." (Ex. H, Spinks dep, pp 59-60). The plan was to try to find an open hole; however, when asked if it was found, Mr. Spinks replied: "It's 696. Honestly, there's a ***bunch of*** open…. There were ***open areas*** that I saw and he saw. And we were like, yeah, we need to get another round of patching going out here." (Ex. H, pp 63-64). Mr.

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Spinks also admitted to receiving a copy of the Warren PD report and photographs and to retrieving the concrete chunks from Warren PD.

MDOT had been aware for a significant time of the rapidly and significantly deteriorating condition of westbound I-696 in Macomb County. In fact, a nearly identical incident happened on May 17, 2017 when a chunk of concrete came through a motorist's windshield causing serious injury:



The next day, MDOT representatives and their counsel met at the MSP Post and inspected the concrete at issue. Certainly, then, MDOT was on notice that the roadbed was deteriorating to the point that motorists were in danger. (Ex. I.)

The MSP responded to Plaintiff's FOIA request by producing numerous accident reports involving cars on I-696 struck by flying concrete and the issue has been covered regularly by the local media. (Ex. J.)

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Crashes caused by broken concrete through windshields raise concerns along I-696

Woman knocked unconscious by debris recovering

By **Rod Meloni** - Reporter, CFP ®, **Sierra Pedraja** - Editor, **Derick Hutchinson**

Posted: 7:04 PM, May 18, 2017
Updated: 7:04 PM, May 18, 2017

WARREN, Mich. - Pieces of concrete -- some weighing as much as 10 pounds -- are littered across parts of I-696 and they're creating a dangerous situation for many drivers.

* * *

A closer look at the roads showed that the chunks of concrete were not coming from the Hoover Street Bridge but were simply pieces of crumbling concrete breaking free from the 50-year-old highway. [Click On Detroit, May 18, 2017, Ex. K.]

Consequently, the dangerously deteriorating condition of westbound I-696 was well-known to MDOT long before the incident involving Plaintiff.

Only 11 days after the incident, on December 28, 2017, Plaintiff sent his first notice to MDOT via certified mail. The "green card" received back indicates it the notice was received by MDOT on December 30, 2017. The notice stated, sent before Plaintiff had access to the Warren PD report indicated:

> Please allow this letter to serve as notification pursuant to MCL 691.1404 of a highway defect. The location of the defect is the Hoover Road bridge over I-696 West ("overpass"), approximately above the third travel lane. Our client, Norman Champine, was operating his vehicle west on I-696 at approximately 1:45 p.m. on December 17, 2017, when a piece of concrete from the overpass came through his windshield. Mr. Champine sustained severe injuries to his face, jaw, eyes and related areas. We are unaware of any eye witnesses, but believe the incident was investigated by the Warren Police Department. [Ex. A.]

On February 6, 2018, 51 days after the incident, after obtaining the Warren PD report, Plaintiff filed his complaint in the Court of claims which, in pertinent part, states:

> 3. On December 17, 2018 at approximate 1:40 p.m., Plaintiff was operating a motor vehicle in a westerly direction on I-696 between Gratiot and Mound when 10" x 8" x 5" jagged chunk of concrete from the roadbed weighing approximately

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20lbs became dislodged and was projected like into the air and through the windshield of Plaintiff's vehicle.

4. The heavy, jagged concrete projectile smashed into Plaintiff's face causing severe trauma that included multiple facial bone, nose, orbital socket and jaw fractures; loss of numerous teeth (and the eventual extraction of all teeth); lacerations and contusions and head trauma necessitating multiple surgeries, extended hospitalization and intensive rehabilitation. One of Plaintiff's treating surgeons has indicated that Plaintiff sustained fractures to virtually every bone below his eyebrows.

5. Defendant MDOT has been aware for years of the progressively worsening condition of the roadbed of I-696, generally in both directions, between I-94 and I-75, and specifically westbound between Gratiot and Mound, and its condition of serious and dangerous disrepair since at least the beginning of 2017.

6. Stated otherwise, it would be apparent to any casual observer who travelled this section of I-696, and especially to a reasonably competent MDOT inspector, that the roadbed was failing, including significantly sized chunks/cracks forming virtually everywhere, that would likely result in chunks of concrete being dislodged and catapulted into the air.

7. The section of I-696 westbound from Gratiot to Mound was not reasonably safe for vehicular travel many months before the date of this incident but, in any event, longer than 30 days preceding the incident.

8. Before this incident, there were multiple instances on this section of I-696 of dislodged concrete chunks from the roadbed penetrating the passenger compartments through windshields and, in some instances, striking occupants causing serious injuries.

9. The investigation of the Warren Police Department immediately after the subject incident determined there existed, in their estimation, "in excess of one thousand 'potholes' from I-94 to Mound." These "potholes" are the result of concrete chunks being dislodged from the improved portion of the highway designed for vehicular travel; in many instances, these heavy chunks of concrete are catapulted into the air whereupon they become a dangerous threat to unsuspecting drivers and occupants.

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> 10. The investigation of the Warren Police Department resulted in the conclusion that the chunk of concrete which severely injured Plaintiff was from the roadbed.
>
> 11. The Warren Police Department turned over to Defendant MDOT the subject piece of concrete; Plaintiff hereby gives notice to Defendant MDOT that this piece of evidence, and any related to it, be preserved.

On February 7, 2018, Plaintiff served MDOT with his First Amended Notice of Claim which restated, essentially, those details stated in his complaint, which were supplemented with the detail learned from the police report. Ex. C.

After Plaintiff commenced this cause of action, the parties proceeded to discovery. Following discovery, Defendant moved for summary disposition. Defendant essentially offered two arguments in support of its motion. First, Defendant argued that because Plaintiff's notice was not sent to the Court of Claims within 120 days of the accident, Plaintiff failed to meet his statutory requirement. Defendant then argued that none of Plaintiff's pleadings in this case, which *were* filed in the Court of Claims within 120 days of the accident, satisfied the notice requirement because Plaintiff did not describe the location of the accident with sufficient specificity.

Plaintiff opposed the motion for summary disposition and argued that he was permitted to serve his notice directly on MDOT and that because his complaint was filed before the expiration of the 120 day notice period, it was able to serve as the notice and was thus properly served on the Court of Claims in a timely manner. Plaintiff further argued that the notice was sufficiently specific as to the location of the defect, particularly in light of the circumstances of the case.

Without holding a hearing on the motion, the Court of Claims granted Defendant's motion for summary disposition on December 12, 2018. The Court held that summary disposition was proper because the notice was not filed in triplicate in the Court of Claims during the 120 day notice period and specifically found that the Complaint could not serve as notice. The Court then

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held that the notice was also deficient because it failed to identify the specific location of the highway defect. Similarly, the Court denied Plaintiff's Motion for Reconsideration on January 9, 2019.

Plaintiff appealed as of right, timely filing his claim of appeal on January 25, 2019. Plaintiff raised two issues on appeal- whether Defendant was timely served with the statutorily required notice and whether the contents of that notice met the statutory requirements. The parties proceeded to oral argument at the Court of Appeals on March 4, 2020. At oral argument, the parties focused on each of the two issues raised in Plaintiff's brief on appeal. Thereafter, the Court issued its 2-1 opinion affirming the grant of summary disposition. The majority did not rule on whether Plaintiff's notice was substantively deficient. Instead, it held that Plaintiff was required to file a notice in the Court of Claims before commencing suit and that he could not rely on his Complaint to serve as that notice despite the Complaint being filed before the expiration of the notice period. *Champine v Dept of Transp*, unpublished opinion of the Court of Appeals, issued April 16, 2020 (Docket No. 347398) (Exhibit N).

Judge Shapiro dissented. He reasoned that in certain contexts, the legislature explicitly requires that a notice be filed before a Plaintiff can commence suit, such as in a medical malpractice action. In the case of a highway defect case brought within the Court of Claims, however, the statutory authority merely requires that the Defendants be given notice of the nature and location of the defect within a certain period of time. There is no authority for the proposition that the Complaint itself cannot serve as that notice, and there was no dispute that Plaintiff's Complaint was filed within the notice period. Judge Shapiro then further asserted that not only should Plaintiff's Complaint been able to serve as his notice, but that the Complaint also complied with the substantive notice requirements and adequately identified the location of the defect that caused

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his injuries. As a result, Judge Shapiro would have reversed the grant of summary disposition and would have remanded for further proceedings.

Further facts necessary to the resolution of the issues will be included in the discussion section below.

STANDARD OF REVIEW

Defendant contends that summary disposition is proper pursuant to MCR 2.116(C)(7), which provides that a motion for summary disposition may be raised where a claim is barred because of immunity. To survive a motion brought pursuant to MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). "All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party." *Smith*, 223 Mich App at 616. A plaintiff can overcome such a motion by alleging facts that support application of an exception to governmental immunity. *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009).

ANALYSIS

I. THE COURT OF CLAIMS ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION ON THE BASIS THAT PLAINTIFF DID NOT TIMELY FILE A NOTICE IN THE COURT OF CLAIMS

The governmental tort liability act, MCL 691.1401 *et seq*., provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]" *Ross v Consumers Power Co* (On Rehearing), 420 Mich 567, 595; 363 NW2d 641 (1984), citing MCL 691.1407. A plaintiff may only sue a governmental entity in tort if

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the suit falls within one of the enumerated statutory exceptions to governmental immunity. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 392; 822 NW2d 799 (2012).

One of these exceptions is that a governmental agency with jurisdiction over a highway must maintain the traveled portion of the highway in reasonable repair. MCL 691.1402(1); *Glancy v City of Roseville*, 457 Mich 580, 584; 577 NW2d 897 (1998). "But to sue the agency for failing to maintain the highway in reasonable repair, the plaintiff *must provide the agency* notice of the defect within 120 days of the injury…. The main purpose of this notice is 'to provide the governmental agency with an opportunity to investigate the claim while the evidentiary trail is still fresh and, additionally, to remedy the defect before other persons are injured.' *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009)." *Milot v. DOT*, 318 Mich. App. 272; 897 N.W.2d 248 (2016).

The notice requirement is set forth in MCL 691.1404(1), which provides that:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) *shall serve a notice on the governmental agency* of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Where suit is being brought against the state, as in the present case, MCL 691.1404(2) further provides that the notice must be filed in triplicate with the clerk of the Court of Claims.

The Michigan Supreme Court in *Rowland v. Washtenaw County Rd. Comm'n*, 477 Mich. 197, 201; 731 N.W.2d 41 (2007) exhaustively analyzed the public policy behind notice provisions in the context of the governmental immunity statute, MCL 691.1404(1) and held: "We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury." (Emphasis added). The Court reasoned that notice to the *agency* is rational because it

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allows the agency to conduct its investigation while "the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach." *Id.* 211 citing *Ridgeway v Escanaba*, 154 Mich 68, 72-73; 117 NW 550 (1908).

Here, there is no dispute that Plaintiff served his notice "on the governmental agency [MDOT]" well before the 120-day period expired. However, the Court of Claims held that because the notice was not filed in the Court of Claims during that period, the notice was insufficient. As the Court of Claims and Defendant each acknowledged, Plaintiff's Complaint *was* filed in the Court of Claims within the 120-day notice period. The Court erred in concluding that the Complaint could not satisfy the statutory notice requirement.

In holding that a complaint cannot serve as a notice, the Court of Claims emphasized that MCL 691.1404 explicitly provides that the filing of a statutory notice is "a condition of recovery." Plaintiff does not disagree regarding the statutory language, but instead argues that the Court's interpretation of that language was plainly incorrect. Nothing about the phrase "a condition of recovery" indicates that a complaint may not serve as a notice. Instead, the statute just requires that *in order to recover* his damages, a Plaintiff must file a notice with the clerk of the Court of Claims within 120 days of the subject accident. Had the legislature intended a Plaintiff to file a notice *as a condition of commencing an action* as opposed to *as a condition of recovery*, the legislature could have done so. It did not. It was not, respectfully, the role of the Court of Claims or the Court of Appeals to insert language into the statutory requirements that was not intended by the legislature.

Lest there be any doubt regarding the plain meaning of the statute in question, this Court only need to look to other statutory notice provisions. For example, MCL 600.2912b states that "a person *shall not commence* an action alleging medical malpractice against a health professional

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or health facility *unless* the person has given the health professional or health facility written notice under this section not less than 182 days *before the action is commenced*." Here, had the legislature intended to require a Plaintiff to file a notice before a complaint was filed, it would have written MCL 1404 identically to how it wrote MCL 600.2912b.

Perhaps because the Court of Appeals is aware that the legislature knows how to impose a pre-suit notice requirement on a Plaintiff, it has previously assumed that a Complaint *can* serve as a notice in the context of the highway exception to governmental immunity. In *Goodhue v DOT*, 319 Mich App 526; 904 NW2d 203, n4 (2017) that Court stated that it "assumed, without deciding, that the complaint qualifies as a proper notice." Here, the Court of Claims diverged from that assumption, without any statutory support for the diversion. In doing so, the Court reversibly erred. The Court of Appeals then affirmed that error, deviating from its prior assumption in *Goodhue*.

Rather than follow the assumption from Goodhue, the majority here held that it was bound by its prior decision in *Burise v Pontiac*, 282 Mich App 646; 766 NW2d 311 (2009). Yet as Judge Shapiro explained in his dissenting opinion, *Burise* has no applicability to the question presented in this case. In *Burise*, the Court *was not* addressing whether a notice is a condition precedent for filing a complaint. It was, instead, addressing whether a notice that was timely filed but deficient could be cured within the 120-day window. In addressing that question, the Court stated that "Accordingly, before bringing suit, a claimant must provide, within 120 days from the time of injury, notice to the governmental agency that (1) specifies the exact location and nature of the defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses." *Id*. at 653. The phrase "before bringing suit" used within that passage did not amount to a holding of the Court of Appeals, but was, rather, mere dicta. By relying on that language to affirm

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summary disposition here, the Court of Appeals clearly erred. That error must be corrected, or else the Court of Appeals will effectively have bypassed the legislature by rewriting MCL 691.1404.

Based on the unambiguous statutory language, Plaintiff was not precluded from filing his Complaint within the 120-day period in order to satisfy the notice requirement. Indeed, as the Court of Claims acknowledged, it is well-established that a Plaintiff's notice "need not take any particular form." Thus, the fact that the notice took the form of a complaint is not fatal to Plaintiff's claim where the notice was timely filed. The analysis should end there. However, Plaintiff will briefly address an additional concern of the Court of Claims.

In holding that Plaintiff's Complaint could not serve as notice, the Court of Claims noted that the purpose of the notice requirement was to give the government an opportunity to investigate a claim and determine the extent of its liability. The Court of Claims then held that if a complaint was utilized as a notice, the government would not have any meaningful opportunity to do those things. The Court's reasoning is both statutorily unsupported and logically flawed. Under the Court's reasoning, Plaintiff would have been permitted to file his notice in triplicate in the Court of Claims on day 120 *and then immediately file his Complaint*. Under that scenario, the government would have no additional time than it had in the present case to investigate the claim or determine its liability. Again, in the context of medical malpractice, there is a 182 day window *between* the notice period and the time that a complaint can be filed. There is no such window in the context of the highway exception. The Court inserted requirements that do not exist and then dismissed Plaintiff's cause of action for failing to comply with those non-existent requirements.

Finally, to the degree that it is at all relevant whether the government had an opportunity to investigate the claim pre-suit, the record demonstrates that the concerns of the Court of Claims

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were misplaced. The Warren Police Department notified MDOT of the accident the very day it occurred, and the investigation into the accident began immediately. Defendant was not deprived of any opportunity in this case. Indeed, Defendant would be hard pressed to find an instance in which it had a greater opportunity to investigate the nature and merit of Plaintiff's claim than the present case.

II. THE COURT OF CLAIMS ERRED IN DETERMINING THAT PLAINTIFF'S NOTICE WAS LEGALLY INSUFFICIENT IN ITS DESCRIPTION OF THE LOCATION OF THE HAZARD

Though not ruled on by the majority of the panel in the Court of Appeals, the Court of Claims additionally erred in holding that Plaintiff's notice, regardless of the form it took, we deficient for failing to state the location of the defect with specificity. Defendant argued below, and the Court of Claims agreed, that MCL 691.1404 required Plaintiff to provide the *exact* location of the highway defect in his notice and that Plaintiff's inability to specify which of the thousands of potholes produced the offending chunk of concrete was fatal to his claim.

Plaintiff acknowledges that the statute at issue does utilize the term “exact” when explaining the Plaintiff's obligation in his statutory notice. However, in the present case, both parties agree that it was *impossible* to locate the exact location of the hazardous condition. The Court of Claims did not find differently. It is uncontested that on the day of the accident, Plaintiff provided the chunk of concrete to the Warren Police Department and that the Warren Police Department in turn contacted Defendant. It is further uncontested that the investigating officers, who have the authority of law on their side, investigated the roadway and attempted to determine where it came from. However, because of the complete state of disrepair of the highway as a whole, the task was impossible as there were “thousands” of potholes that could have produced the concrete.

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Neither the Court of Claims nor either party has cited a case in which a notice was found to be deficient despite complete agreement that it was impossible to identify the exact location of the hazard. The Court of Appeals has previously stated that under those circumstances, in would perhaps find that the specificity aspect of the notice statute could be relaxed. In *Force v City of Owosso*, unpublished opinion of the Court of Appeals, issued April 15, 2004 (Docket No. 245996) (attached as Exhibit M), the Plaintiff fell when she stepped off of a curb and her foot landed in a hole, causing her to break her ankle. The Plaintiff's notice did not provide the exact location of the pothole, and the Defendant was granted summary disposition on that basis. In analyzing the sufficiency of the notice, this Court explained that the Plaintiff admitted that she was able to provide the exact location before the expiration of the notice period. The Court stated that

> We might hold differently if defendant had so neglected its highway that substantial defects existed all around the site of the fall, making it impossible to point out the exact location because of the number of defects and confusion of the moment. Plaintiff did not face that challenge, however, and there was no evidence reasonably explaining why plaintiff did not more specifically identify the site of her fall within the proper time frame.

The existence of the highway exception to governmental immunity evidences the legislature's intent to allow citizens to recover for injuries caused by the government's failure to properly maintain its highways. Here, if Defendant is granted summary disposition under these circumstances, a very clear message will be sent: if the government is in such dereliction of its duty to maintain and repair its highways that it becomes impossible to locate the exact hazard that ultimately injured someone, the government's complete failure will be rewarded with absolute immunity. As Judge Shapiro stated in his dissent, "A governmental agency should not be able to defeat a claim of negligence by letting the defect become 'unnoticeable' through extreme negligence. It is difficult to imagine any rationale by which the Legislature could have intended to

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allow suits against the state only for modest failures of maintenance, but to exclude suits for more severe failures."

As is explained above, the Warren Police and the Michigan Department of Transportation, who have the ability to completely shut down the highway in question to conduct their investigations, were unable to identify the location of the hazard because of the thousands of potholes that covered the surface of the roadway. Now, the government is attempting to argue that Norman Champine, who unexpectedly was struck in the face with a chunk of concrete that shattered his windshield while he was travelling at roughly 70 miles per hour, should have had the presence of mind to document not just the general area he was in, but the exact hole that produced the concrete. Norman Champine, who had no ability to enter the roadway on foot and search for the specific pothole, should have been able to do better when placing the government on notice that its negligence caused him catastrophic injury.

"[I]t is a venerable principle that a law will not be interpreted to produce absurd results." *K Mart Corp v Cartier, Inc*, 486 US 281, 324 n 2; 108 S Ct 1811; 100 L Ed 2d 313 (1988) (Scalia, J., concurring in part and dissenting in part) (quoted by Markman, J. when concurring in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55 (2006)). If MCL 691.1404 is interpreted as granting the government absolute immunity where the government's own negligence imposes an impossible condition on the Plaintiff's ability to recover, absurdity has prevailed.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Plaintiffs respectfully requests that this Honorable Court peremptorily reverse the Court of Claims order granting Defendant's motion for summary disposition and remand for further proceedings. Plaintiff's Complaint was filed in the Court of

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Claims within the notice period and was able to serve as his notice. That Complaint adequately set forth the location of the hazardous condition given the admitted impossibility of identifying which of the countless defects in the road caused Plaintiff's injuries. Alternatively, Plaintiff requests that this Court grant this Application for Leave to Appeal to give full consideration to the issues herein.

Respectfully submitted,

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