STATE OF MICHIGAN
IN THE SUPREME COURT

AUDREY WEST and RANDY WEST,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ANDREW ALBERT, and STEVE BUTZIN,

Defendants-Appellants.
_____/

Supreme Court No. 161948

Court of Appeals No. 348452

Court of Claims No. 18-000236-MZ

DEPARTMENT OF NATURAL RESOURCES' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

APPELLANT'S APPENDIX

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Counsel of Record

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Dated: October 25, 2021

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STATE OF MICHIGAN

COURT OF CLAIMS

AUDREY WEST and RANDALL WEST,

Plaintiffs,

vs.

Case No: 18-00236-MZ
Honorable Stephen Borello

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ANDREA ALBERT, and STEVE BUTZIN,

Defendants.

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PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COMES the Plaintiffs, Audrey West and Randy West, by and through their attorneys, Ernst & Marko Law, PLC, and for their Complaint against the above-named Defendants, state as follows:

COMMON ALLEGATIONS

1. At the time of the filing of this Complaint, Plaintiff Audrey West ("Audrey") is/was a resident of the City of Grayling, County of Crawford, State of Michigan.

2. At the time of the filing of this Complaint, Plaintiff Randy West ("Randy") is/was a resident of the City of Grayling, County of Crawford, State of Michigan.

3. That Defendant State of Michigan is a "Governmental Agency" appropriately defined by the Governmental Liability Statute, to wit: MCL § 691.1401(a) and Plaintiff in this matter is pleading facts in avoidance of governmental immunity pursuant to that statute as well as, more specifically, MCLA § 691.1405, which holds a Governmental Agency, including the Michigan Department of Natural Resources, (hereinafter, "MDNR") liable for bodily injury and/or property damage resulting from the negligent operation of a motor vehicle of which the governmental agency is an owner by any officer, agent, or employee of the governmental agency.

4. At the time of the filing of this Complaint, Defendant Andrea Albert is/was a resident of the City of Rapid City, County of Antrim, State of Michigan, and worked as a conservation officer for Defendant MDNR.

5. At the time of the filing of this Complaint, Defendant Steve Butzin is/was a resident of the City of Hale, County of Iosco, State of Michigan, and worked as a conservation officer for Defendant MDNR.

6. The amount in controversy herein exceeds the sum of twenty-five-thousand ($25,000.00) dollars, exclusive of costs, interest, and attorney's fees.

7. On or about January 6, 2018, at or about 12:30pm, Plaintiffs Audrey and Randy West were riding on a snowmobile, with Randy driving the snowmobile and his daughter Audrey riding on the back, and were lawfully travelling on Pinney Bridge Road, approximately 2.8 miles east of M-66 in Chestonia Township, Antrim County, State of Michigan.

8. On or about January 6, 2018, at or about 12:30pm, Defendants Albert and Butzin, while on duty in their positions as MDNR conservation officers, were each driving Michigan Department of Natural Resources owned snowmobiles, and were driving in the wrong direction at a high rate of speed on Pinney Bridge Road, taking up Mr. West's lane.

9. As a result of Defendants' presence in Plaintiff's driving lane, Plaintiff Randy was forced to slam on his brakes so as to avoid colliding with Defendants.

10. The snowmobile carrying Plaintiffs went off the edge of the road, into the trees, and ultimately landed in the Jordan River, on top of Plaintiff Randy.

11. Plaintiff Audrey was later found unconscious, face down in the Jordan River, hung over a log.

12. Plaintiff Randy was later found trapped under his snowmobile and completely submerged under water, until a citizen was able to free him.

13. That as a result of Defendants' negligence, Plaintiffs sustained severe and serious personal injuries. Plaintiff Audrey suffered injuries including, but not limited to, a traumatic brain injury, damage to her teeth, a chipped T-6 vertebra, as well as other injuries and damages to be discovered through the course of litigation. Plaintiff Randy suffered injuries included, but not limited to, a cracked T-3 vertebra, leg injury, 40% loss of vision in his right eye, injury to his wrists, as well as other injuries and damages to be discovered through the course of litigation.

14. That at all times pertinent hereto, Defendants Albert and Butzin were servants, agents, and/or employees of Defendant MDNR acting within the scope of his employment.

15. At the above mentioned time and place, Defendant MDNR was the owner of certain snowmobiles, and had given permission, tacitly or otherwise, for Defendants Albert and Butzin, to drive the subject vehicles.

16. As owner of the above-mentioned vehicles being driven by Defendants Albert and Butzin, Defendant State of Michigan – MDNR remains liable for bodily injuries resulting from the negligent and/or grossly negligent operation of a motor vehicle by any permissive user of vehicles they own: MCL § 257.401, MCL § 691.1405, and Sections 29 and 30 of the Motor Carrier Act of 1980, 49 USC 13901, *et seq*.

17. This action is brought pursuant to the provisions of MCL § 600.6431, and MCL § 691.1405 for bodily injury resulting from the negligent operation of a motor vehicle by an employee of a governmental agency which governmental agency, SOM-MDNR, is the owner.

18. Pursuant to MCL § 600.6475, Defendants in the ownership or operation of a motor vehicle are not entitled to use the defense of "governmental function" as a defense to this negligence action.

19. That on or about May 2, 2018, Plaintiffs pursuant to MCLA 691.1406, notified Defendants by a signed Verified Notice of Intention to File a Claim of the location, the nature of the collision, the injuries sustained, that the Defendant SOM-MDNR was the known owner of the vehicle at the time, and that Defendants Albert and Butzin were the vehicle operators and governmental employees. Each Plaintiff executed and verified the claim per the statute.

COUNT I – NEGLIGENCE & GROSS NEGLIGENCE
(As to Defendants Albert and Butzin)

20. Plaintiffs incorporate by reference all aforementioned paragraphs as though fully set forth herein.

21. On or about January 6, 2018, at or about 12:30pm, Plaintiff Randy West was driving his snowmobile, with his daughter Plaintiff Audrey West riding on the back, when Defendants Butzin and Albert were driving at a high rate of speed in the opposite direction on

the wrong side of the same trail as Plaintiffs, causing Plaintiffs' vehicle to leave the roadway injury Plaintiffs Audrey and Randy West.

22. At the aforementioned time and place Defendants Butzin and Albert carelessly, negligently, and recklessly drove in the wrong direction at a high rate of speed as Plaintiffs, thereby causing each Plaintiff to incur severe permanent injuries as set forth hereinafter.

23. Defendants Albert and Butzin, while operating a vehicle upon the public trail of Pinney Bridge Road in Chestonia Township, Antrim County, State of Michigan, owed certain duties and responsibilities to operate said vehicle in a lawful, careful, and prudent manner, with due diligence and regard for other vehicles and persons lawfully upon said roadways.

24. Defendants Butzin and Albert negligently, carelessly, and recklessly breached said duties and responsibilities in the following manner, including but not limited to:

a. Operating said motor vehicle at a high rate of speed, greater than would permit Defendants to stop said vehicle within the assured, clear distance ahead, taking into consideration prevailing road, weather, traffic, and any and all other conditions then and there existing, in violation of MCL 257.627 and appropriate amendments thereto;

b. Operating said motor vehicle at a dangerous and illegal speed so as to endanger the person and property of others upon the highway, and Plaintiff in particular, contrary to MCL 257.627 and appropriate amendments thereto;

c. Driving without due care and caution and in a manner so as to endanger vehicles and individuals, and Plaintiff in particular, by failing to keep said vehicle under control so as to avoid a collision contrary to MCL 257.626(b);

d. Failing to keep a proper lookout for other vehicles lawfully upon the highway in light of existing road and traffic conditions;

e. Driving a motor vehicle in a negligent, careless, and reckless manner and with willful disregard for the safety of others upon the highway, and Plaintiffs in particular, and without due caution and circumspection and at a speed so as to endanger persons and property, contrary to MCL 257.626 and appropriate amendments thereto;

f. Driving to the left side of a roadway despite Defendants' view being obstructed so as to create a hazard where Plaintiffs' vehicle approached from the opposite direction, in violation of MCL 257.639;

g. Operating said motor vehicle without proper and reasonable observation of conditions then and there existing and without drawing reasonable and proper conclusions which were necessary at the time and under the circumstances, so as to reduce the speed of said and/or bringing same to a stop or alter the course of said vehicle;

h. Performing other acts of negligence not yet known to Plaintiff but will be ascertained during the discovery of said litigation.

25. Plaintiffs were free from any act of negligence and/or omission contributing in whole or in part to the occurrence of said collision and the resulting damages and injuries.

26. As a direct and proximate result of the carelessness, negligence, and recklessness of Defendants, Plaintiff Audrey West was thrown from the snowmobile she was riding on, knocked unconscious, and sustained serious, permanent injuries and a permanent impairment of body function, including, but not limited to:

a. Traumatic brain injury;

b. Damage to her teeth;

c. Chipped T-6 vertebrae;

d. Neck, head, and back injuries;

e. Headaches;

f. Physical pain, chronic pain, and suffering;

g. Severe physical pain and suffering;

h. Severe shock and injury to the nervous system;

i. Other damages and injuries to be determined through discovery.

27. As a direct and proximate result of the carelessness, negligence, and recklessness of Defendants, Plaintiff Randy West was thrown from his snowmobile, knocked unconscious,

and sustained serious, permanent injuries and a permanent impairment of body function, including, but not limited to:

a. Cracked T-3 vertebrae;

b. Leg injury;

c. Forty (40) percent loss of vision in his right eye;

d. Injury to his wrists;

e. Physical pain, chronic pain, and suffering;

f. Severe physical pain and suffering;

g. Severe shock and injury to the nervous system;

h. Other damages and injuries to be determined through discovery.

28. Prior to the occurrence of this collision, each of the Plaintiffs were reasonably strong and healthy, engaged in the normal activities of life.

29. As a direct and proximate result of the negligence of Defendants, an objectively manifested impairment of an important body has affected each Plaintiff's general ability to lead their normal life.

30. As a direct and proximate result of the negligence of Defendants, Plaintiffs have suffered, and will continue to suffer in the future, pain, humiliation, permanent scarring, disfigurement, mental anguish, embarrassment, gross indignity, and inconvenience because of the permanent nature of said injuries.

31. As a direct and proximate result of the negligence of Defendants, Plaintiffs were forced to seek care and treatment from hospitals, physicians, and specialists; Plaintiffs have expended large sums of money for said care and treatment and will continue to expend such sums in the future.

32. As a direct and proximate result of the negligence of Defendants, and the injuries sustained, Plaintiffs have suffered the loss of enjoyment of life and are unable to indulge in those normal daily and recreational activities indulged in prior to the occurrence of this incident.

33. At the time of the occurrence of this incident, Plaintiff Randy was remuneratively employed and have sustained considerable wage loss and will continue to sustain such wage loss in the future.

WHEREFORE, Plaintiffs pray this Honorable Court enter its Judgment against Defendant for whatever amount in excess of twenty-five-thousand ($25,000.00) dollars to which Plaintiffs may be found to be entitled by the trier of fact, together with costs, interest, and attorney's fees so wrongfully incurred.

COUNT II- LIABILITY OF DNR UNDER MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY

34. Defendant DNR is liable for any / all injuries sustained by Plaintiffs as a result of the incident pursuant to MCL 691.1405.

35. The motorized snowmobiles being used by the DNR officers in this case to transport them on a public road is a "motor vehicle" under MCL 691.1405.

36. Therefore, the Defendant DNR does not have any immunity in this matter and is responsible for the negligence of its officers, agents, and/or employees in this case.

COUNT III – NEGLIGENT ENTRUSTMENT/GROSS NEGLIGENCE
(As to Defendant State of Michigan - MDNR)

37. Plaintiffs incorporate by reference all aforementioned paragraphs as though fully set forth herein.

38. Upon information and belief, Defendant, State of Michigan - MDNR, had the opportunity to train, observe and have knowledge of Defendants Albert and Butzin's driving practices and habits.

39. On January 6, 2018, Defendant State of Michigan – MDNR allowed their snowmobiles to be entrusted to Defendants Albert and Butzin, with MDNR's express or implied consent and/or knowledge.

40. At all times relevant, Defendant MDNR knew or reasonably should have known that by allowing Defendants Albert and Butzin to drive the above described snowmobiles that they would likely be involved in a traffic accident.

41. Upon information and belief, given Defendant Butzin and Albert's driving habits, improper training, and driving history, it was foreseeable that they would cause a motor vehicle accident, and specifically would cause Plaintiffs to suffer a motor vehicle accident.

42. Defendant MDNR owed a duty to the general public and Plaintiffs not to negligently and/or grossly negligently allow their snowmobiles by Defendants Butzin and Albert without proper training, due care and caution, and not to allow said vehicle to be operated in such a manner so as to endanger the general public and, specifically, the Plaintiffs' health, life, and property, in violation of the motor vehicle codes of the State of Michigan and the common law.

43. Upon information and belief, contrary to the duties owed to Plaintiff, Defendant MDNR negligently and/or gross negligently breached these duties by allowing the above-mentioned snowmobiles to be operated by persons who Defendant knew or should have known would operate the vehicle in a careless, reckless, or incompetent manner, in violation of the motor vehicle codes of the State of Michigan and the Common Law.

44. That as the direct and proximate result of Defendant MDNR entrustment of the above-mentioned snowmobiles to Defendants Albert and Butzin, Plaintiffs sustained a variety of serious, severe, and permanent injuries, including but not limited to the injuries more fully stated above in Count I.

WHEREFORE, Plaintiffs pray this Honorable Court enter its Judgment against Defendants, for whatever amount in excess of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS to which Plaintiffs may be found to be entitled by the trier of fact, together with costs, interest and attorney fees so wrongfully incurred.

Respectfully submitted,

Jonathan R. Marko (P72450)
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645 Griswold Street, Suite 4100
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jon@ernstmarkolaw.com

Dated:

PROOF OF SERVICE

I hereby certify that on January 17, 2019, I presented the foregoing paper to the Court via Overnight Mail and the above listed attorneys of record via First Class Mail.

Marissa A. Williams

VERIFICATION OF COMPLAINT

I, Audrey and Randy West, declare in accordance with the Court of Claims Act and under the penalty of perjury that the following statements are true:

1. The Complaint is not being filed for any improper purpose.
2. To the best of my knowledge, information, and belief, formed after reasonably inquiry, the claims and other legal contentions set forth in the Complaint are warranted by existing law or by a good faith, non-frivolous argument for extension, modification, or reversal of existing law, or the establishment of new law.
3. To the best of my knowledge, information, and belief, formed after reasonably inquiry, the allegations in the Complaint are well grounded in fact and have evidentiary support, or, where identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

AUDREY WEST

RANDY WEST

ERNST & MARKO LAW

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January 17, 2019

VIA OVERNIGHT MAIL
Michigan Court of Claims
925 W. Ottowa Street
P.O. Box 30185
Lansing, MI 48909

Re: Audrey West & Randy West

Dear Clerk:

Enclosed please find the following:

- *Plaintiff's Amended Complaint*
- *Verification of Complaint*
- *Proof of Services*

Please file according to your standard procedure and return a time stamped copy.

Feel free to contact our office should you have any further questions. Thank you for your prompt and timely handling of this matter.

Very truly yours,

ERNST & MARKO LAW, PLC

Marissa A. Williams

/maw

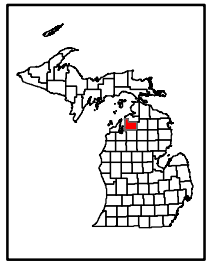
cc: James T. Farrell, Esq.

MAIN OFFICE:
645 GRISWOLD STREET, SUITE 4100
DETROIT, MI 48226

MID MICHIGAN OFFICE:
600 EAST BROADWAY, SUITE 101
MOUNT PLEASANT, MI 48858

Michigan Department of Natural Resources Designated Snowmobile Trails

Antrim County, MI
April 2, 2019



N

0 1 2 Miles

- Parking Lot
- State Forest Campground
- Designated Snowmobile Trails
- Highway
- Paved Road
- Gravel or Dirt Road
- State Forest Land
- Federal Land
- Lakes and Rivers
- County Boundary Outline

LP4, LP476[1] Mancelona Rd West of Crooked Lake Rd

LP4, LP76, LP768[2] Kregula Rd East of US 131

Michigan.gov/snowmobiling

CHARLEVOIX

Graves Crossing

Pinney Bridge

Intermediate Lake

Lake Bellaire

Bellaire

Mancelona

LP4, LP76, LP 768[2]

LP4, LP76[1]

KALKASKA

STATE OF MICHIGAN
COURT OF CLAIMS

AUDREY WEST, and
RANDY WEST,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, ANDREA ALBERT, and STEVE BUTZIN,

Defendants.

No. 18-000236-MZ

HON. STEPHEN L. BORRELLO

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THE DEFENDANTS' JANUARY 4, 2019 MOTION FOR SUMMARY DISPOSITION BASED ON GOVERNMENT IMMUNITY

Relief Requested

The Michigan Department of Natural Resources, and Conservation Officers Andrea Albert and Steven Butzin, defendants herein, by Dana Nessel, Attorney General for the State of Michigan, and James T. Farrell, Assistant Attorney General, move for summary disposition under MCR 2.116(C)(7) because defendants are entitled to government immunity and government-employee immunity for the claims asserted against them in the Complaint.

Grounds for Relief

This Motion should be granted because:

1. This lawsuit arises out of a January 6, 2018 incident where plaintiffs were injured while riding a snowmobile on Pinney Bridge Road where that road runs next to the Jordan River, approximately 2.8 miles east of M-66 in Chestonia Township, Antrim County. Plaintiff, Randy West, was operating the snowmobile, and his daughter, Audrey West, was his passenger. They claim they were run off the road by Michigan Department of Natural Resources ("DNR") Conservation Officers Andrea Albert and Steven Butzin ("the COs"), who were operating State-owned snowmobiles while acting in the course of their employment with the DNR. In fact, Mr. West was cited for careless operation of his snowmobile and the COs were given lifesaving awards. In any event, plaintiffs have filed this suit claiming the COs were negligent, and grossly negligent, in the operation of their State-owned snowmobiles, and as a result each plaintiff suffered serious injuries; and further, that the DNR is vicariously liable for the COs' negligent and gross negligent conduct and was itself negligent and grossly negligent in entrusting the State-owned snowmobiles to the COs.

2. Plaintiffs filed their three-count, unverified Complaint in the Court of Claims on November 7, 2018. Count I alleges that the COs were negligent and grossly negligent in the operation of their State-owned snowmobiles and as a direct and proximate result of their negligence and gross negligence plaintiffs suffered serious personal injuries. Count II claims the DNR is liable for plaintiffs' injuries

under MCL 257.401 (the owners' civil liability statute), and MCL 691.1405 (the motor vehicle exception to government immunity), and "Sections 29 and 30 of the Motor Carrier Act of 1980," (i.e., 49 USC §§31138 and 31139, which deal with insurance coverage requirements for interstate motor carriers of passengers and property). Count III claims the DNR is liable for negligent and grossly negligent entrustment of the State-owned snowmobiles to the COs.

3. Plaintiffs' theories of recovery fail because the defendants are protected by immunity.

a. Count I (claims of negligence and gross negligence against the COs): Under the government tort liability act, MCL 691.1401 et seq., individual State employees have immunity for their employment-related conduct that does not amount to gross negligence; and further, their gross negligence must be the proximate cause of plaintiffs' injuries before liability can be imposed. MCL 691.1407(2). Thus, plaintiffs' ordinary negligence claim against the COs is barred by the COs' government-employee immunity. Moreover, the negligent operation of a snowmobile is not actionable under Michigan law. MCL 324.73301(1)-(2). And while plaintiffs plead in the alternative that the COs' conduct amounted to gross negligence, plaintiffs fail to allege that the COs' conduct was the proximate cause of their injuries, thus failing to state a claim outside of their immunity. MCL 691.1407(2). See *Robinson v City of Detroit,* 462 Mich 439, 458-59 (2000).

b. Count II (claims of liability against the DNR): The DNR has no liability under the Owners' Civil Liability Act. See *Alex v Wildfong*, 460 Mich 10, 21-22 (1999); *Haberl v Rose*, 225 Mich App 254, 270 (1997) (J. Saad's dissent). In addition, a snowmobile is not a "motor vehicle" under the motor vehicle exception to government immunity, MCL 691.1405, and, hence, that exception doesn't apply to these facts. See, e.g., *Stanton v City of Battle Creek*, 466 Mich 611, 618 (2002). And, finally, 49 USC §§ 31138 and 31139 are not applicable to the DNR for any number of reasons including the fact that the DNR is not an for-hire interstate motor carrier, and, at the time of this incident, the DNR was not engaged in the transportation of passengers or property; therefore, the DNR is not subject to regulation by the Secretary of Transportation for purposes of maintaining minimum levels of financial responsibility for public liability and property damage for transportation of passengers or property for commercial purposes by motor vehicle.

c. Count III (claim of negligent entrustment against the DNR): The DNR has immunity for a claim of negligent entrustment because that claim does not fall within one of the exceptions to government immunity, and to the extent plaintiffs rely on MCL 691.1405 as the applicable exception to the DNR's immunity for this claim, the DNR repeats that MCL 691.1405 does not apply to these facts because a snowmobile is not a "motor vehicle" as that term is used in the exception, and, in addition, because negligent entrustment

of a snowmobile is not "the operation of a motor vehicle" as that term is used in the exception. See, e.g., *Chandler v County of Muskegon*, 467 Mich 315, 319-22 (2002).

4. Finally, plaintiffs' Complaint is not verified as required by the Court of Claims Act. MCL 600.6434(2). The Complaint is therefore subject to summary dismissal. See *Progress Michigan v Attorney General*, 2018 Mich App LEXIS 2649, *15; 2018 WL 3039871.

5. There is an expanded factual statement and legal argument in the attached Brief.

6. On December 6, 2018, counsel for the defendants spoke with plaintiffs' attorney, Jonathan R. Marko, concerning the legal arguments raised herein and requested that he dismiss this case. Mr. Marko was not persuaded to voluntarily dismiss this case based on that conversation.

Respectfully submitted,

Dana Nessel
Attorney General

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P.O. Box 30736
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Date: January 4, 2019

CERTIFICATE OF SERVICE

The undersigned certifies that on the date indicated, a copy of **THE DEFENDANTS' JANUARY 4, 2019 MOTION FOR SUMMARY DISPOSITION BASED ON GOVERNMENT IMMUNITY** was served on counsel of record by first class mail.

Date: 1-4-2019

Terri J. Davis

STATE OF MICHIGAN

COURT OF CLAIMS

AUDREY WEST and RANDY WEST,

Plaintiffs,

v

DEPARTMENT OF NATURAL RESOURCES, ANDREW ALBERT, and STEVE BUTZIN,

Defendants.
_____/

OPINION AND ORDER

Case No. 18-000236-MZ

Hon. Stephen L. Borrello

Pending before the Court is defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). Also pending before the Court is defendants' March 1, 2019 motion to strike, as well as defendants' March 5, 2019 and March 12, 2019 motions to quash and to hold discovery in abeyance. For the reasons stated herein, defendants' motion for summary disposition is GRANTED in part and DENIED in part. The motion to strike is DENIED. Furthermore, the Court accepts for filing plaintiffs' first amended complaint, and will afford defendant 14-days from the issuance of this opinion and order to file an answer to the first amended complaint. Finally, the motions to quash and to hold discovery in abeyance are DENIED.

I. BACKGROUND

According to the allegations in the complaint, plaintiff Randy West was driving a snowmobile on Piney Bridge Road in Chestonia Township on or about January 6, 2018. Plaintiff

Audrey West was riding on the back passenger seat of the snowmobile. The complaint alleges that defendants Andrew Albert and Steve Butzin, while in the course of their employment as conservation officers employed by defendant Department of Natural Resources (DNR), were driving snowmobiles owned by the DNR at the same time. The complaint alleges that Albert and Butzin were traveling towards plaintiffs and were driving in the wrong direction, obstructing the oncoming lane in which plaintiffs were riding, "at a high rate of speed" on Pinney Bridge Road.

The complaint alleges that Albert and Butzin's presence in the wrong lane forced Randy to slam on his breaks. This maneuver caused plaintiffs' snowmobile to swerve off the road and crash into nearby trees. Audrey was thrown from the snowmobile into a river. The complaint alleges that she landed with such force so as to render her unconscious. Randy was later found, according to the complaint, trapped under the snowmobile, in the river. The complaint alleges that plaintiffs suffered serious personal injuries, including but not limited to traumatic brain injury, broken bones, and, in the case of Randy, the loss of approximately 40% of the vision in his right eye.

In May 2018, plaintiffs filed a notice of intent (NOI) to file a claim in this Court against defendants. The NOI identifies the time and location of the incident, as well as the nature of plaintiffs' alleged injuries and damages. In addition, the NOI is signed by plaintiffs and it is verified by a notary public.

In November 2018, plaintiffs filed a complaint against defendants in this Court. Count I alleges negligence and gross negligence against Albert and Butzin. Plaintiffs allege that Albert and Butzin "carelessly, negligently, and recklessly drove in the wrong direction at a high rate of

speed as Plaintiffs, thereby causing each Plaintiff to incur severe permanent injuries . . . ." Count I continues, asserting that Albert and Butzin operated their snowmobiles at an illegal rate of speed and that they acted without regard for other vehicles or persons lawfully present on the roadway. In particular, they allege that Albert and Butzin drove in the wrong lane of traffic despite having an obstructed view of the oncoming lane. Plaintiffs allege injuries that occurred, according to ¶ 26 of the complaint, "As a direct and proximate result" of Albert and Butzin's operation of their snowmobiles.

Count II of plaintiffs' complaint[1] alleges that the DNR is liable under the motor vehicle exception to governmental immunity, MCL 691.1405, for Albert and Butzin's use of the DNR-owned snowmobiles. Count III alleges a claim of negligent entrustment/gross negligence against the DNR for its decision to entrust Albert and Butzin with snowmobiles, alleging that the DNR should have known the conservation officers were likely to be involved in an accident.

II. SUMMARY DISPOSITION

The matter is before the Court on defendants' motion for summary disposition filed pursuant to MCR 2.116(C)(7). Defendants argue that plaintiff has failed to plead facts in avoidance of governmental immunity. First, defendants argue that a snowmobile is not a "motor vehicle" under the motor-vehicle exception to governmental immunity, MCL 691.1405, and that plaintiffs' claims against it must be dismissed as a result. Second, defendants argue that, assuming snowmobiles are "motor vehicles," Count III—negligent entrustment—should be

[1] Plaintiffs filed an amended complaint in January 2019 that re-numbered the second and third counts of their complaint. This opinion references the counts as they have been numbered in the amended complaint. Previously, plaintiff alleged that the DNR was liable under MCL 257.401, the owners' liability statute. Plaintiffs have since withdrawn that claim.

dismissed because entrustment of a vehicle is not the "operation" of a motor vehicle within the plain language of MCL 691.1405. Third, Albert and Butzin argue that they are entitled to immunity with respect to plaintiffs' claims against them because: (1) they are immune from claims of ordinary negligence; (2) plaintiffs failed to allege that Albert and Butzin's conduct was *the*—as opposed to "a"—proximate cause of their injuries. Finally, defendants argue that plaintiffs' initial failure to file a verified complaint[2] requires dismissal of this action.

Summary disposition is warranted under MCR 2.116(C)(7) if dismissal is appropriate because of immunity granted by law. "In determining whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence." *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2010).[3] "[A] governmental entity is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). In general, governmental immunity is to be construed broadly, while exceptions thereto must be construed narrowly. *Stanton v City of Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002). In the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, the Legislature has enumerated certain exceptions to immunity. A plaintiff must plead in avoidance of immunity, which is a task that can be accomplished by "stating a claim that fits within a statutory exception

[2] The amended complaint contains a verification page.

[3] In this case, defendants contend that summary disposition is warranted on the pleadings alone. And while defendants have attached documentary evidence to their briefing, they have failed to identify with any precision the pertinent pages of that documentary evidence. The Court will not scour the record for evidence to support defendants' contentions. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 377; 775 NW2d 618 (2009).

or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Mack*, 467 Mich at 204.

A. COUNT II OF PLAINTIFFS' COMPLAINT—MOTOR VEHICLE EXCEPTION

Turning first to plaintiffs' claim against the DNR, plaintiffs have pled that the DNR is liable under the motor-vehicle exception, MCL 691.1405. That exception provides that:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948. [MCL 691.1405.]

The DNR argues that the exception is inapplicable because a snowmobile is not a "motor vehicle." The term "motor vehicle" is not defined in the statute, so resort to a dictionary definition is warranted. *Yoches v City of Dearborn*, 320 Mich App 461, 470; 904 NW2d 887 (2017). In *Stanton v City of Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002), the Michigan Supreme Court, by reference to what it characterized as a narrow definition of the term "motor vehicle," defined "motor vehicle" as an automobile, truck, bus, or similar motor-driven conveyance[.]" In *Stanton*, the Supreme Court held that a forklift was a piece of industrial equipment, and not a "motor-driven conveyance" that was similar to an automobile. *Id.*

In the instant case, it is apparent from the pleadings that the snowmobiles at issue are not automobiles, trucks, or buses; thus, application of the exception hinges on whether they are a "similar motor-driven conveyance." For clarity as to what constitutes a "similar motor-driven conveyance," the Court finds useful published decisions applying the term. For instance, in *Regan v Washtenaw Co Rd Comm'rs (On Remand)*, 257 Mich App 39, 47-48; 667 NW2d 57 (2003), a "broom tractor" and a "tractor mower" were motor vehicles. The *Regan* Court

explained that "[b]oth vehicles are clearly motor-driven conveyances, in that they are motorized and carry or transport operators over the road, or alongside the road, while the operators are performing governmental duties." *Id.* at 47. The "principal function" of the vehicles as tractors was not dispositive; rather, the fact that they were both being driven on the road and carrying operators over the road at the time of the incident was significant. *Id.* at 47-48.

In another case involving a tractor, *Yoches*, 320 Mich App at 474, the Court of Appeals held that a tractor towing a hay wagon on the road was a motor vehicle under the GTLA. The tractor and hay wagon were "invariably connected to the roadway itself" because they were being "used to carry numerous passengers on a roadway[.]" *Id.* (citation and quotation marks omitted). In addition to tractors, the Court of Appeals has held that a "Gradall hydraulic excavator" was a motor vehicle for purposes of the exception. *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274, 278; 705 NW2d 136 (2005). In that case, the Court of Appeals explained that:

> when the Gradall is not being used for excavation, it can be driven along the roadways just like a truck and transports both its attached excavation unit and the driver. At the time of the accident in this case, the driver was returning the Gradall to defendant's garage from the project site. The Gradall was being driven on a public roadway when it struck the rear of Daniel Wesche's vehicle. Under these circumstances, we conclude that the trial court did not err in ruling that the Gradall is a motor vehicle for the purposes of MCL 691.1405. [*Id.* (emphasis added).]

With those authorities as a guide, the Court concludes that the snowmobiles at issue, according to the allegations contained in plaintiffs' complaint, were "motor vehicles" as that term is used in the GTLA. There has been no dispute whether the snowmobiles were "motor-driven conveyances." In addition, the allegations in this case compel the conclusion that the snowmobiles were "similar" to automobiles, trucks, or cars. The complaint alleges that the

snowmobiles at issue were being driven on a public roadway. Moreover, the vehicles were, by all accounts, being used to transport Albert and Butzin on the travel lanes of the roadway and to assist them in their duties as DNR employees. As a result, the Court concludes that the snowmobiles are similar to the tractors and excavators in the cases noted above. See, e.g., *Yoches*, 320 Mich App at 474. Cf. *Overall v Howard*, 480 Mich 896; 738 NW2d 760 (2007) (adopting Judge Jansen's partial concurrence/dissent, which reasoned that a golf cart being driven near a concession stand on the grounds of a high school football stadium was not a "motor vehicle" under MCL 691.1405). And contrary to defendants' contentions, the design of the snowmobiles or other, possible uses of the snowmobiles is not a controlling factor. See *Wesche*, 267 Mich App at 278 (focusing on the use *at the time* of the incident); *Regan (On Remand)*, 257 Mich App at 48 (rejecting a "principal function" analysis). As a result, summary disposition is not warranted on plaintiffs' claim asserted under MCL 691.1405.

B. COUNT III—NEGLIGENT ENTRUSTMENT

However, the Court agrees with defendants that Count III of the complaint, which asserts a claim of negligent entrustment, does not fit within the confines of the motor vehicle exception. See *Regan (On Remand)*, 257 Mich App at 51 n 13 (explaining that a claim of negligent entrustment was "not directly associated with the driving of a motor vehicle" and that such a claim "cannot survive."). As noted, plaintiffs have the duty of pleading in avoidance of immunity. *Mack*, 467 Mich at 204. A claim shall only lie under MCL 691.1405 for the "negligent operation" of a motor vehicle. Our Supreme Court has explained that, in the context of the motor-vehicle exception, the term "operation" "refers to the ordinary use of the vehicle *as* a motor vehicle, namely, driving the vehicle." *Chandler v Muskegon Co*, 467 Mich 315, 321-322; 652 NW2d 224 (2002). As recognized by the Court of Appeals in *Regan (On Remand)*, 257

Mich App at 51 n 13, plaintiffs' negligent entrustment claim is "not directly associated with the driving of a motor vehicle[.]"[4] The Court agrees with defendants that Count III must be dismissed.

C. COUNT I—CLAIMS AGAINST ALBERT & BUTZIN

Turning to defendants' next contention, the Court disagrees that Count I should be dismissed, at least to the extent it concerns allegations of gross negligence. In Count I, plaintiffs assert a tort claim against Albert and Butzin, two governmental employees. "MCL 691.1407(2) provides immunity for governmental employees, but MCL 691.1407(2)(c) provides an exception to that immunity when the employee's conduct constitutes gross negligence." *Yoches*, 320 Mich App at 476. A claim of ordinary negligence cannot lie against governmental employees, however. *Id.* See also MCL 691.1407(2). Instead, plaintiffs must prove gross negligence against the governmental employees and that the employees' gross negligence was "the proximate cause of the injury or damage." MCL 691.1407(2)(c). Thus, to the extent Count I asserts a claim of ordinary negligence, that aspect of the claim must be dismissed.

Turning to the claim that Albert and Butzin acted with gross negligence, defendants ask the Court to dismiss the same for the reason that plaintiffs have failed to allege that Albert and Butzin's conduct was "the" proximate cause of their injuries, as opposed to "a" proximate cause. See *Robinson v Detroit*, 462 Mich 439, 468; 613 NW2d 307 (2000); *Curtis*, 253 Mich App at 563. Here, a review of the totality of plaintiffs' complaint reveals that plaintiffs have alleged that

[4] The Court notes the unpublished Court of Appeals decision cited in plaintiffs' brief that suggests a contrary result; however, the Court concludes that it is bound by the published decision in *Regan (On Remand)*, 257 Mich 39.

Albert and Butzin were "the one most immediate, efficient, and direct cause" of their injuries. See *Robinson*, 462 Mich at 459. Indeed, they allege that Albert and Butzin's actions were the only cause of their injuries; any focus by defendants on the complaint's use of the phrase "a proximate cause" is an elevation of form over substance.

D. VERIFICATION OF THE COMPLAINT

Finally, the Court rejects defendants' contention that this matter should be dismissed for the lack of verification in plaintiffs' initial complaint. Instead, the amended complaint can cure any deficiency that arose. As noted above, plaintiffs' initial complaint was not verified; however, the amended complaint contains a verification page. MCL 600.6434 imposes several requirements on a party's pleadings in actions filed in this Court. In pertinent part, § 6434(2) specifies that "[t]he complaint *shall be verified*." (Emphasis added). However, contrary to defendants' suggestions, § 6434(2)'s verification requirement is distinct from the verification required of a notice or claim in MCL 600.6431(1). Unlike §6431(1), which specifies that "No claim may be maintained" absent compliance with the statute, §6434(2) does not does not specifically preclude a claim from being maintained against the state for noncompliance with its provisions. In addition, unlike §6431(1), which specifies that verification must occur "before an officer authorized to administer oaths," §6434(2) merely specifies that the complaint be "verified." As a result, defendants' caselaw, which cites § 6431(1), is inapplicable, and the Court concludes that amendment of the complaint in this case was permissible in order for plaintiffs to achieve compliance with § 6434(2). Indeed, plaintiffs' NOI in this case satisfied § 6431(1), and the "bar-to-claims" language in § 6431(1) has not been implicated. Cf. *Progress Mich v Attorney General*, 324 Mich App 659, 671; 922 NW2d 654 (2018) (discussing § 6431).

Moreover, the Court of Appeals has already held that the failure to comply with § 6434(2) does not require dismissal of a complaint, or that any failure to comply can be cured by amendment. *Arnold v Dep't of Transp*, 235 Mich App 341, 346; 597 NW2d 261 (1999);[5] *Gilliland Constr Co v State Highway Dep't*, 4 Mich App 618, 620-621; 145 NW2d 384 (1966). As a result, the Court accepts the amended complaint, and the verification page therein satisfies § 6434(2).

III. DEFENDANTS' MOTION TO STRIKE

As it concerns the amended complaint,[6] the Court next turns its attention to defendants' March 1, 2019 motion to strike. Therein, defendants allege that they were not served with plaintiffs' first amended complaint or with plaintiffs' response to their motion for summary disposition. Proofs of service filed with this Court, as well as e-mails attached to plaintiffs' response to defendants' motion to strike, appear to indicate otherwise. Moreover, even assuming the same were not received, the Court declines to exercise its authority under MCR 2.115 to grant the motion to strike. Instead, the Court will permit defendants 14 days to file an answer to the amended complaint.

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[5] The Court's holding in *Arnold* concerned compliance with § 6434(2). The *Arnold* panel also, in dicta, discussed the doctrine of substantial compliance in the context of § 6431(1). Although the dicta in *Arnold* is at odds with recent caselaw discussing § 6431(1), see *Fairley*, 497 Mich 290; 871 NW2d 129 (2015), that dicta does not affect the validity of *Arnold*'s holding with respect to § 6432(2).

[6] The Court agrees with plaintiff that the amended complaint was by right in this case. Moreover, even if it were not by right, the Court would grant leave in this case.

IV. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED in part with respect to Count III of the first amended complaint, and with respect to the ordinary negligence claim asserted against Albert and Butzin in Count I.

IT IS HEREBY FURTHER ORDERED that defendants' motion for summary disposition is DENIED in part with respect to the allegations of gross negligence against Albert and Butzin in Count I, and with respect to the entirety of Count II (plaintiffs' claim under motor-vehicle exception).

IT IS HEREBY FURTHER ORDERED that defendants' motion to strike is DENIED.

IT IS HEREBY FURTHER ORDERED that defendants' motions to quash and to hold discovery in abeyance are DENIED.

This order does not resolve the last pending claim or close the case.

March 25, 2019

Stephen L. Borrello
Judge, Court of Claims