Public Policy Position
Amicus Curiae in *West v Detroit* (MSC Case No. 157097)

The Government Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 655 members. The Government Law Section is not the State Bar of Michigan and the position expressed herein is that of the Government Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Government Law Section has a public policy decision-making body with 21 members. On August 6, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 8 members voted in favor of the Section's position on the amicus curiae in *West v Detroit* (MSC Case No. 157097), 0 members voted against this position, 0 members abstained, 13 members did not vote.

Explanation: See the attached amicus curiae.

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STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

FAYTREON ONEE WEST

Plaintiff-Appellant,

v

CITY OF DETROIT

Defendant-Appellee.

_____/

MSC No. 157097
MCOA No. 335190
LC No. 15-005357-NO
(Wayne County Circuit Court)

BRIEF OF *AMICI CURIAE* MICHIGAN MUNICIPAL LEAGUE AND THE GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN

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STATEMENT OF THE BASIS OF JURISDICTION

On January 23, 2018, Plaintiff-Appellant filed an application for leave to appeal the December 12, 2017 Opinion of the Court of Appeals. This Court issued an order directing the clerk to schedule oral argument on whether to grant the application or take other action on June 1, 2018. This Court has jurisdiction to consider and deny the application pursuant to MCR 7.301(A)(2).

STATEMENT OF THE QUESTION INVOLVED

IS PLAINTIFF'S FAILURE TO TIMELY SERVE A WRITTEN NOTICE UPON ANY INDIVIDUAL WHO MAY LAWFULLY BE SERVED WITH CIVIL PROCESS DIRECTED AGAINST THE GOVERNMENTAL AGENCY A FATAL DEFICIENCY UNDER MCL 691.1404(2) THAT BARS PLAINTIFF FROM BRINGING A CLAIM UNDER THE HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY, MCL 691.1402(1)?

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

Amici Curiae Michigan Municipal League and the Government Law Section of the State Bar of Michigan answer, "Yes."

The Court of Appeals answered, "Yes."

STATEMENT OF INTEREST

The Michigan Municipal League (hereinafter, "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 521 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (the "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 *amici 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: John C. Schrier, city attorney, Muskegon; Robert J. Jamo, city attorney, Menominee; Clyde J. Robinson, city attorney, Kalamazoo; Eric D. Williams, city attorney, Big Rapids; Lori Grigg Bluhm, city attorney, Troy; James J. Murray, city attorney, Boyne City and Petoskey; Thomas R. Schultz, city attorney, Farmington and Novi; Lauren Trible-Laucht, city attorney, Traverse City; Ebony L. Duff, city attorney, Oak Park; Steven D. Mann, city attorney, Milan; and Christopher J. Johnson, general counsel, Michigan Municipal League.

Amicus Curiae The Government Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of nearly 700 attorneys who represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to government and municipal law. The Government Law Section provides education,

information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Governmental Law Section is committed to promoting the fair and just administration of governmental law. In furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous amicus curiae briefs in state and federal courts.[1] The GLS Council is interested in emphasizing the importance of preserving governmental Immunity under the Governmental Liability for Negligence, Act 170 of 1964.

Amici curiae have a longstanding interest in assuring a clear and correct interpretation of MCL 691.1401 *et seq.* The Governmental Tort Liability Act was enacted by Michigan's Legislature to create strong protections for governmental bodies and their officers, employees, and volunteers. Michigan's broad immunity thus protects governmental parties from the distractions and expenses of defending tort lawsuits filed against them in the same way that the doctrine of sovereign immunity has historically protected the state. See generally *Ross v Consumers Power Co,* 420 Mich 567, 596; 363 NW2d 641 (1984). This Court emphasized that governmental immunity "protects the state not only from liability, but from the great public expense of having to contest a trial." *Odom v Wayne County*, 482 Mich 459, 478; 760 NW2d 217 (2008). The statute also is predicated on the theory that governmental parties engage in a great deal of risky conduct in the course of serving the public, often are seen as deep-pocket

[1] The Government Law Section Council, the decision-making body of the Section, is currently comprised of 21 members. The filing of this Amicus Curiae Brief was authorized on August 6, 2018 at a special meeting of the Council held in accordance with the Council's Bylaws. A quorum of the Council was present at the meeting (8 members), and the motion passed unanimously. The position expressed in this amicus curiae brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

defendants, and lawsuits against them may serve to deter useful and socially desirable conduct because of the risk of suit. To guard against this, the Legislature enacted broad protections for governmental parties of all kinds.

For decades, this Court has consistently interpreted and applied the statute to protect government defendants from liability except when the complained-of conduct falls within a narrowly-construed exception. And for decades, this Court has decided cases arising under the statute in a clear and cogent way that allows government defendants to invoke the legislatively-provided protections of the statute at an early stage of the proceedings, thus saving the enormous resources that would otherwise be spent on litigation costs and protecting government defendants from the distraction of participating in the defense of litigation against them.

The Court of Appeals' opinion in this case properly reaffirms these principles by disallowing a plaintiff from serving an entity not listed in MCL 691.1404(2), and by extension, MCR 2.105(G)(2), and then proceeding with a claim under the highway exception to governmental immunity. The language of MCL 691.1404(2) is clear: the required notice must be served "upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency[.]" MCR 2.105(G)(2) identifies "the mayor, the city clerk, or the city attorney of a city" as proper individuals of the city who may be served. Amici curiae have a strong interest in ensuring that the language of the statute is enforced as written and that service upon an individual not listed in MCR 2.105(G)(2), absent express formal delegation, is insufficient to circumvent governmental immunity.

Many municipalities are large and employ large staffs. It is critical that only those individuals listed in MCR 2.105(G)(2) are served with a notice of intent to file a claim under the highway exception. Without such a restriction, notice could be sent, for example, to any one of a municipality's large law department members or as here, to a division and not even to a specific individual. It would be entirely too easy for a notice to fall through the cracks if such a notice could be served upon any member of a city-wide law department. And it could certainly result in gamesmanship by opportunistic plaintiffs' attorneys.

Amici have a particular interest in proper resolution of this case, a resolution which would reaffirm the broad interpretation to be given to governmental immunity and compliance with the statutory text of MCL 691.1404(2). Such a resolution will assure that the longstanding protections surrounding governmental immunity are preserved. If the scope of governmental immunity under the statute is to be significantly narrowed by allowing service of the requisite notice on others not listed in MCL 691.1404(2) and, in turn, MCR 2.105(G)((2), this should not be by judicial decision; it should be by legislative act.

For the reasons stated herein, the Michigan Municipal League and the Government Law Section of the State Bar of Michigan request that this Court deny leave to appeal, or failing that, issue a peremptory order affirming the Court of Appeals' December 12, 2017 decision.

INTRODUCTION

The Court of Appeals' opinion in this case properly applied the well-established principles of statutory interpretation in determining that under MCL 691.1404(2), the notice provision of the highway exception to governmental immunity, Plaintiff-Appellant Faytreon Onee West's claim against Defendant-Appellee City of Detroit is barred. The language of MCL 691.1404(2) is clear and unambiguous: the required notice must be served "upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency[.]" MCR 2.105(G)(2) in turn identifies "the mayor, the city clerk, or the city attorney of a city" as proper individuals of the city who may be served. West's notice, which was sent to the "City of Detroit Law Department," simply does not suffice.

This appeal provides the Court an opportunity to reinforce a subject of major significance to the State's jurisprudence, i.e., the manner of the enforcement of statutory notice provisions and the need for them to be interpreted and enforced as plainly written in whatever context they arise. This Court has recognized that, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. *Rowland v Washtenaw County Rd Commission,* 477 Mich 197, 212; 731 NW2d 41 (2007). In a trilogy of rulings starting with *Rowland,* and including *McCahan v Brennan,* 492 Mich 730; 822 NW2d 730 (2012) and *Atkins v Suburban Mobility Authority for Regional Transportation,* 492 Mich 707; 812 NW2d 522 (2012), the Court addressed and discussed various statutory notice provisions that are part of Michigan's jurisprudence. These cases emphasize that statutory notice provisions must be interpreted and enforced as written. No saving construction of the notice statute, such as requiring a defendant to

prove actual prejudice, is allowed. Thus, even when supplemented with presumed "institutional knowledge of the underlying facts of an injury," an improper or imprecise written notice of a claim fails to meet the statutory notice provisions of MCL 124.419. *Atkins*, 492 Mich at 709

In this case, the Court is called upon to determine the precise meaning of the term "individual" as used in MCL 691.1404(2). The text of MCL 691.1404(2) governs the outcome here and proves the propriety of the City's position that service upon the "City of Detroit Law Department" – undisputedly not an "individual" – is insufficient under the text of the statute. Short of explicit legislative authorization to do so, courts do not properly burden governmental agencies with additional liability through accepting a notice less than what is precisely required by MCL 691.1404(2). To do so would be contrary to sound judicial expressions recognizing that it is the legislature's role to determine when and under what terms the State may be sued; the judiciary has no authority to restrict or amend those terms.

West's interpretation of MCL 691.1404(2) essentially rewrites the statutory text of MCL 691.1404(2) to provide that service of a notice need be neither exact nor precise. Any allowance by this Court of less than service of the notice upon the individuals identified in MCR 2.105(G) contravenes the clear and explicit language of MCL 691.1404(2).

The Court of Appeals' opinion is also properly reaffirmed on public policy grounds. The decision presents a prime example of the Court of Appeals' proper deference to the wisdom of the legislature for policy decisions. The Court of Appeals was bound to, and did, give due deference to the mandate of MCL 691.1404(2) and MCR 2.105(G)(2). That the notice may have ultimately gotten to the proper individual, as West suggests, does not alter

this requirement. Stated another way, the Court of Appeals was not free to supplant its views for those of the legislature and thereby question the wisdom of the legislation, *Oakland County Bd of County Road Commissioners v Michigan Property and Casualty Guaranty Association,* 456 Mich 590; 575 NW2d 751 (1998); *Council of Organizations and Others for Education About Parochiad, Inc v Governor*, 455 Mich 557; 566 NW2d 208 (1997).

In *Glancy v City of Roseville,* 457 Mich 580; 577 NW2d 897 (1998), which interpreted Michigan's Governmental Tort Liability Act, this Court reiterated that the responsibility for drawing lines in a complex society, of identifying priorities, of weighing the relevant considerations, and of choosing between competing alternatives is the legislature's job, not that of the judiciary. A reversal by this Court would result in an intrusion into the legislature's analysis and rationale for the passage MCL 691.1404(2).

In sum, MCL 691.1404(2) sets forth the manner in which service of the notice of intent to file a claim under the highway exception must be effectuated, including the proper individuals upon who service may be made against the governmental agency. The Court of Appeals correctly held that, after a plain reading of MCL 691.1404(1) and (2) in conjunction with one another, "[t]he city of Detroit Law Department is not an 'individual,' and therefore, is not a being that 'may be lawfully served with civil process against' the city." (Plaintiff's Appendix at p A069).

For these reasons, denial of West's application for leave to appeal, or alternatively peremptory affirmance, is proper.

STATEMENT OF FACTS

Amici Curiae rely upon the Supplemental Counter-Statement of the Material Proceedings and Facts set forth in Defendant-Appellee's Supplemental Brief in Opposition to Plaintiff's Application for Leave to Appeal.

STANDARD OF REVIEW

This Court reviews *de novo* a circuit court's decision regarding a motion for summary disposition. *Petipren v Jaskowski*, 494 Mich 190, 201; 833 NW2d 247 (2013). In making the determination of whether the moving party was entitled to judgment as a matter of law, the court reviews the entire record. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Stated otherwise, giving the benefit of the doubt to the non-movant, an appellate court is charged with independently determining whether the movant would have been entitled to judgment as a matter of law.

Relying upon its governmental immunity, Defendant brought its motion for summary disposition pursuant to MCR 2.116(C)(7). A motion premised on immunity is properly considered under that rule as it tests whether a claim is barred because of immunity granted by law. *Fane v Detroit Library Commission,* 465 Mich 68; 631 NW2d 678 (2001). In order to survive a motion for summary disposition based upon a governmental immunity defense, a plaintiff is bound to allege facts justifying the application of an exception to governmental immunity (*Id.*). An appellate court reviews the affidavits, pleadings, and other documentary evidence submitted by the parties, and where appropriate, construes the pleadings in favor of the non-moving party. *Bryant v Oakpointe Villa Nursing Center, Inc,* 471 Mich 411; 684 NW2d 864 (2004). A motion brought pursuant to MCR 2.116(C)(7) is properly granted if no factual development could provide a basis for recovery. *Haliw v Sterling Heights,* 464 Mich 297; 627 NW2d 581 (2001).

This dispute involves the question of statutory interpretation which the Court reviews *de novo*. *People v Kolanek,* 491 Mich 382, 393; 817 NW2d 528 (2012). As observed by the Court in *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999), "[O]ur primary task in construing the statute, is to discern and give effect to the intent of the legislature." The words

of the statute are the most reliable evidence of the legislature's intent and a court must give each word its plain and ordinary meaning. *Krohn v Home Owners Insurance Co,* 490 Mich 145, 156; 802 NW2d 281 (2011). In interpreting a statute, a court considers both the plain meaning of a critical word or phrase as well as its place and purpose in the statutory scheme. *Sun Valley Foods, supra,* at p 237, *citing Bailey v United States,* 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

ARGUMENT

Plaintiff's Failure To Timely Serve a Written Notice Upon Any Individual Who May Lawfully Be Served With Civil Process Directed Against the Governmental Agency Is A Fatal Deficiency Under MCL 691.1404(2) That Bars Plaintiff From Bringing A Claim Under The Highway Exception To Governmental Immunity, MCL 691.1402(1)

The rule of law commands that the courts of this State respect the legislative policy choices as expressed in the language of the statutes that come before them. *McCahan,* 492 Mich at 748 n 29. Here, the Court of Appeals correctly held that, under the plain language of MCL 691.1404(1) and (2), "[t]he city of Detroit Law Department is not an 'individual,' and therefore, is not a being that 'may be lawfully served with civil process against' the city." (Plaintiff's Appendix at p A069). Accordingly, West cannot be permitted to proceed with her highway claim against the City of Detroit where the notice required in MCL 691.1404(2) was not properly served.

A. This Court has consistently applied the well-established rules of statutory construction when interpreting notice of intent to sue provisions

Time and time again, this Court has recognized and reiterated that statutory analysis must begin with the wording of the statute itself. *Robinson v City of Detroit*, 462 Mich 439; 459 NW2d 307 (2000). Each word of a statute is presumed to be used for a purpose, and as far as possible, effect must be given to every word, clause, and sentence. *Id*., citing *University of Michigan Bd of Regents v Auditor General*, 167 Mich 444, 450; 132 NW2d 1037 (1911). In *Robinson*, the Court reiterated the principle that it could "not assume that the legislature inadvertently made use of one word or phrase instead of another." 462 Mich at 318, citing *Detroit v Redford Township*, 253 Mich 453, 456; 235 NW 217 (1931). Instead, the clear language of a statute must be followed. *City of Lansing v Lansing Township*, 356

Mich 641, 649; 97 NW2d 804 (1959). The words of a statute provide "the most reliable evidence of its intent…" *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981); *Sun Valley Foods v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). It is only where a statute is ambiguous that a court properly looks outside of the statute to ascertain the legislature's intent. *Turner v Auto Club Insurance Association*, 448 Mich 22, 27; 528 NW2d 681 (1985).

On multiple occasions, this Court has applied these principles when addressing various statutory notice provisions. The *Rowland* court, which also addressed the highway exception to governmental immunity, characterized MCL 691.1404(1) as "straight forward, clear, unambiguous, and not constitutionally suspect." *Rowland*, 477 Mich at 219. Accordingly, the Court determined that the provisions of MCL 691.1404(1) should be enforced as written. (*Id.*). The Court explained:

> [T]he statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the name of the witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident even if there is no prejudice…

477 Mich at 219. In sum, the legislature will waive governmental immunity in cases of personal injury or property damage only when written notice of the claim is served on the proper individual(s) at the governmental agency within 120 days. No judicially created exception, such as an actual prejudice requirement, will avoid a clear statutory mandate.

The *Rowland* decision rested not only on the Court's engagement in the appropriate statutory analysis, but also upon the results of its search for a rational basis for the existence of MCL 691.1404(1). That rationale includes the fact that a road must be

promptly repaired to prevent further injury. (*Id*. at 205). The Court also explained that notice of intent to sue provisions are enacted by the legislature to provide the State the opportunity to investigate and to evaluate claims, to reduce the uncertainty of the event of future demands, or even to force a claimant to an early choice as to how to proceed. (*Id*. at 211-212).

The *McCahan* Court also reaffirmed and applied the fundamental approach articulated in *Rowland*. In particular, it spoke to the interpretation of the notice provision in the Court of Claims Act, MCL 600.6431. Doing so, it made clear that the *Rowland* rationale applies to all statutory notice of suit provisions: when the legislature specifically qualifies the ability to bring a claim against the State or one of its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction of the notice statute is allowed. 492 Mich at 733. Likewise, when the legislature conditions the ability to pursue a claim against the State on a plaintiff having provided specific statutory notice, courts may not engraft an "actual prejudice" component onto a statute before enforcing a legislative prohibition. (*Id*. at 744). So too, the *McCahan* court observed that "[p]rovisions requiring notice to a particular entity . . . further ensure that notice will be provided to the proper governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified." (*Id*.).

Similarly, in addressing the statutory notice provisions of the Metropolitan Transportation Authorities Act, MCL 124.419, the *Atkins* court held that the statutory notice of a plaintiff's application for certain benefits, even when supplemented with a governmental agency's presumed "institutional knowledge" of the underlying facts of an injury, did not constitute written notice of a third party claim sufficient to comply with the notice provision at

issue there. 492 Mich at 709. In reaching that result, the Court stated the obvious: "statutory notice requirements must be interpreted and enforced as plainly written." (*Id*.). The Court reiterated that governmental agencies in Michigan are statutorily immune from tort liability but, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. (*Id*. at 714). The *Atkins* court noted that the plaintiff's interpretation of MCL 124.419 essentially re-wrote the statutory text so as to provide that notice of any one claim, however distinct, suffices as notice of any other claim that a plaintiff may pursue even when the statute requires explicit written notice of such a claim. (*Id*. at 717-720). The *Atkins* court also accused the Court of Appeals of replacing a simple and fair statutory test with one based on apparent or imputed knowledge. (*Id*. at 721). It said that such an approach entirely subverts the notice process instituted by the legislature when the legislative purpose behind the process is clear. The statute at issue required specific statutory notice of any claim so that a common carrier defendant does not have to anticipate or to guess whether a claim will be filed at some point in the future. Instead it must be told of the claim within 60 days. (*Id*.). The Court concluded its opinion by pointing out those statutory notice requirements, like the one at issue before it, must be interpreted and enforced as plainly written. The legislature has determined that it will waive governmental immunity in cases of personal injury or property damage that occur in connection with common carrier passengers for hire only when written notice of the claim is served on the transportation authority within 60 days. (*Id*. at 722). The *Atkins* opinion enforced that legislative determination.

Finally, this Court recently reaffirmed that the statutory requirements of MCL 691.1404(1) must be enforced as written, and that a notice that the plaintiff had suffered

"severe and permanent injuries" did not satisfy §1404(1)'s requirement that the notice "specify…the injury sustained." *Brown v City of Sault Ste Marie*, 910 NW2d 300 (2018).

The directive from this Court is thus clear: the plain language of a notice of intent to sue provision must be applied.

B. The plain language of MCL 691.1404(2) compels the conclusion that service upon the "City of Detroit Law Department" is insufficient

Applying the rationale of *Rowland*, *McCahan*, and *Atkins,* in addition to the well-established principles of statutory construction, it is clear that, under the plain language of MCL 691.1404(2), West's service upon the "City of Detroit Law Department," was insufficient.

A governmental agency in Michigan is shielded from tort liability when it is engaged in the exercise or discharge of a governmental function and its conduct does not fall within one of the statutory exceptions to immunity. MCL 691.1407(1).[2] Pursuant to the highway exception to governmental immunity found at MCL 691.1402(1), a person who sustains bodily injury or property damage "by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." As this Court has observed, "inasmuch as the Legislature is not even required to

[2] MCL 691.1407(1) states that:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational limits." *Rowland,* 477 Mich at 212.

One such limitation on the right to sue is the requirement that there be timely and proper notice. As provided in MCL 691.1404(1):

> As a condition to any recovery for injury 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.

Thus, to bring a claim under MCL 691.1402(1), such as West purports to do here, she must first provide notice in compliance with MCL 691.1404(1), served to the proper individual under MCL 691.1404(2). In pertinent part, MCL 691.1404(2) provides as follows:

> The notice may be served upon *any individual*, either personally, or by certified mail, return receipt requested, *who may lawfully be served with civil process directed against the governmental agency*, anything to the contrary in the charter of any municipal corporation notwithstanding.

(Emphasis added). Pursuant to MCR 2.105(G)(2), individuals of a defendant city who may lawfully be served with civil process include "the mayor, the city clerk, or the city attorney[.]"

Resolution of the precise meaning of the term "individual" as used in MCL 691.1404(2) is the key to deciding this appeal. The plain language of MCL 691.1404(2) compels the conclusion that service upon the "City of Detroit Law Department" – undisputedly not an "individual" – is insufficient. The City's position, that service "upon any individual…who may be lawfully served with civil process directed against the governmental agency" means those individuals identified in MCR 2.105(G)(2), is the only

one that furthers the legislative intent underlying the enactment of the Governmental Tort Liability Act. It alone gives meaning to the clear and plain language used in MCL 691.1404(2) while satisfying fundamental rules of statutory construction. Again, notice provisions are intended to provide the State the opportunity to timely investigate and to evaluate claims, to reduce the uncertainty of the extent of future demands, or even to force a claimant into an early choice as to how to proceed. Provisions requiring notice to a particular individual further ensure that notice will be provided to the proper governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified. *McCahan*, 492 Mich at 744.

Indeed, the Court of Appeals has repeatedly held that service of the notice of intent to file a claim under the highway exception against a city was improper where it was not served upon the mayor, city clerk, or city attorney as required by MCR 2.105(G)(2). See, e.g., *Jones v City of Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued June 26, 2012 (Docket No. 304155) (Defendant's Appendix at pp 10b-12b) (notice sent to Pontiac's city hall, addressed "Attention: Risk Management" was not service upon a proper individual as required by MCR 2.105(G)(2)).[3] Many of these cases involved, just as in this case, service upon the "City of Detroit Law Department."[4] Tallying up these cases, at least 15 judges from the Court of Appeals have

[3] This unpublished decision is cited because it is a particularly factually analogous application of the requirement.

[4] See, e.g., *Withers v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 18, 2016 (Docket No. 324009) (Plaintiff's Appendix at p A051) (notice sent through regular mail to the "City of Detroit Law Department" insufficient); *Powell v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued Aug. 8, 2017 (Docket No. 332267) (Defendant's Appendix at pp 16b-20b) (notice mailed by plaintiff's attorney to "City of Detroit Law Department" was fatal to plaintiff's claim where "Plaintiff did not provide the trial court with evidence that she served, personally or by registered mail, the mayor, city clerk, city
(continued on next page)

expressly considered whether service of notice upon the "City of Detroit Law Department" satisfied MCL 691.1404(2) and have concluded that such service did *not* satisfy the statute. That decision is the correct one.

Short of explicit legislative authorization to do so, courts may not burden governmental agencies with additional liability through accepting a notice less than what is precisely required by MCL 691.1404(2). *McLean v Dearborn*, 302 Mich App 68, 81; 836 NW2d 916 (2013) ("We see no great injustice in requiring plaintiffs seeking to provide notice to defendants under the statute to serve their notices on the correct parties."). To do so would be contrary to sound judicial expressions recognizing the legislature's intention to confer immunity on governmental agencies for most of the activities in which they participate. As specifically observed by the Court in *Ross v Consumers Power Company (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), the consensus which that Court's efforts produced were not viewed as the Justices' individual respective determinations as to what would be most fair or just or the best public policy. Rather, the *Ross* decision was intended

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attorney, or other authorized person, as required by this Court in *McLean*."); *Church v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 12, 2017 (Docket No. 335413) (Defendant's Appendix at pp 27b-32b) (notice sent by plaintiff's attorney via certified mail to "City of Detroit Law Department…clearly failed to meet the requirement that it be served on an individual who may 'lawfully be served with civil process directed against' the City of Detroit"); *Garza v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 18, 2018 (Docket No. 334342) (Defendant's Appendix at pp 37b-43b) ("[t]here is no dispute that plaintiff did not serve an 'individual' who can lawfully accept process for defendant" when she sent a letter to the "'City of Detroit Law Department,' but not defendant's city attorney individually."); *Sadler v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2018 (Docket No. 336117) (Defendant's Appendix at pp 44b-49b) (same).

to reflect the legislature's intention concerning the nature and scope of governmental immunity. (*Id*. at 596).

In *Nawrocki v Macomb County Road Commission*, 463 Mich 143; 615 NW2d 702 (2000), this Court identified the "one basic principle" that guided its decision – that the immunity conferred upon governmental agencies is broad in scope and that the statutory exceptions thereto are to be narrowly construed. That same rationale, emphasizing the broad corporate governmental immunity and the narrowness of the statutory exception, must also prevail here. Such an approach requires a careful reading and adherence to the language of MCL 691.1404(2). In light of the clear and unambiguous language of MCL 691.1404(2), the Court properly enforces the legislative determination demanding that the notice of intent be served upon an individual who may be lawfully served with civil process directed against a governmental agency. West's notice, which was sent to the "City of Detroit Law Department" simply does not suffice under the clear and unambiguous directives of MCL 691.1404(2).

C. West's position disregards the plain language of the statute.

West urges this Court not to adopt an "overly technical interpretation of the statute disfavored in" *Plunkett v Dep't of Transportation*, 286 Mich App 168; 779 NW2d 168 (2009). (Plaintiff-Appellant's Supplemental Brief, p 6). *Amici curiae* provide two responses to this argument. First, while the *Plunkett* Court stated that "a liberal construction of the notice requirement is favored to avoid penalizing an inexpert layman for some technical defect," the *Plunkett* Court emphasized that all the pertinent facts must be contained *within the notice itself*. *Id*. at 177, n 15 (observing prior case law stating that "[i]n determining the sufficiency of *the notice*…*the whole notice and all of the facts stated therein* may be used and considered…")

(emphasis added). Moreover, *Plunkett* involved the statutory provision governing the required content of the notice (MCL 691.1404(1)), and did not even mention service of process under MCL 691.1404(2) – a point which the Court of Appeals correctly noted. (Plaintiff's Appendix at p A070). Second, while West relies on *Plunkett* to argue that "an ordinary citizen" should not be fatally penalized for "a technical or artful defect" (Supplemental Brief, pp 4-5), those concerns are not present here. There was no "inexpert layman" involved. West's counsel – not West – authored and served the notice. (Plaintiff's Appendix at pp A001-A012).

The result which a*mici curiae* urge here is not one requiring strict compliance, *Rowland*, *supra*, over substantial compliance, *Plunkett*. Rather, *amici curiae* submit that this Court should adopt an interpretation of the statute that enforces the plain meaning of the words used by the legislature in MCL 691.1404(2). As observed by the *McCahan* court, this is not *strict* enforcement of the notice provision but is the course any court must follow. The court must give a reasonable interpretation to the language that the legislature passed and that the governor signed into law. There is nothing "strict," as opposed to reasonable, for a court to require that the notice be served upon a proper "individual…who may lawfully be served with civil process directed against the governmental agency" (as listed in MCR 2.105(G)(2)). The rule of law demands that the courts of this State respect the legislative policy as expressed in the statutes that come before them. Here, because West did not comply with the plain language of MCL 691.1404(2), she was properly precluded from maintaining her highway claim against the City of Detroit.

Next, West contends that use of the word "shall" in MCL 691.1404(1) and use of the word "may" in MCL 691.1404(2) "would certainly allow the citizen to reasonably believe that a municipality may accept service in a broader manner than the statute suggests." (Plaintiff-

Appellant's Supplemental Brief, pp 5-6). West's suggestion that the phrase "[t]he notice *may* be served" means that service under MCL 691.1404(2) is not limited to the individuals identified in MCR 2.105(G)(2) or the manner prescribed in § 1404(2) invents a whole new way of giving notice of a highway defect claim. It is one which the legislature never contemplated nor embraced when drafting and enacting MCL 691.1404(2). Use of the word "may" in MCL 691.1404(2) denotes more than one permissible option, as set forth in MCR 2.105(G)(2) (listing several individuals upon whom service can be properly made). There is no rule of statutory construction that would allow the statute to be read to say that service can be prescribed in any way and that the statute simply offers some ideas for service of the notice. Indeed, the Court of Appeals has held, correctly so, that service of the notice on a defendant's third-party administrator (TPA) was insufficient. *McLean*, 302 Mich App at 78-80. West's interpretation of MCL 691.1404(2) essentially rewrites the statutory text of MCL 691.1404(2) to provide that service of a notice need be neither exact nor precise. Any allowance by this Court of less than service of the notice upon the individuals identified in MCR 2.105(G) contravenes the clear and explicit language of MCL 691.1404(2).

West's argument also suggests that West herself authored the notice and was the one responsible for determining who to serve the notice upon – which the facts of this case establish is incorrect. But in any event, West's argument is premised on a reading of MCL 691.1404(2) in isolation from the previous subsection, MCL 691.1404(1). To interpret the word "may" in §1404(2) to mean that service of the notice set forth in §1404(1) can be made upon individuals or entities beyond what is prescribed in §1404(2) would clearly frustrate the legislative intent of the statute when read as a whole. *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich App 222, 229-230; 886 NW2d 772 (2015).

In urging the Court to grant her requested relief, West likewise references the lack of prejudice stemming from her counsel's service on the City of Detroit Law Department, arguing that "[t]here is absolutely no evidence that, had the notice been addressed to corporation counsel rather than the law department, it would have been handled in any different manner." (Plaintiff-Appellant's Supplemental Brief in Support of Her Application for Leave to Appeal, 7/13/18, p 11). But the law is clear that there is no "actual prejudice" requirement in the statute. The *Rowland* court cautioned that courts which read an "actual prejudice" requirement into the statute not only usurp the legislature's power but simultaneously make legislative amendment to what the legislature wanted, to wit: a notice provision with no prejudice requirement possible. In fact, this Court even went so far as to specifically overrule *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), which engrafted "an 'actual prejudice' requirement into the [notice] statute," requiring the governmental agency to demonstrate actual prejudice in order to bar a plaintiff's claim where the plaintiff's notice failed to comply with the notice requirements. *Rowland*, 477 Mich at 213-214.

Finally, West argues that "nothing prohibits" the City of Detroit from adopting "alternate means of accepting notice." (Plaintiff-Appellant's Supplemental Brief, p 13). With respect to the issue of delegation and whether it should be decided by this Court at this time, it should be noted that one critical aspect of framing a question for review is to be sure that it encompasses questions actually raised and decided below. An essential attribute of appellate decision-making is "the focus of a prior heat-tested decision." Frank M. Coffin, *The Ways of a Judge: Reflections from the Federal Appellate Bench*, 52–53. It is for this reason that courts of last resort with discretionary jurisdiction strongly disfavor requests to review new issues because they have

not been narrowed and crystallized as a result of the process. Here, the City of Detroit did not delegate any authority for receiving service beyond those individuals expressly listed in MCR 2.105(G)(2). And neither the trial court nor Court of Appeals considered or decided this question, which was not raised below and is not present on these facts. Should this Court wish to consider whether an individual described in that rule can delegate the legal authority to accept lawful process under MCL 691.1404(2), it should do so in a case in which the facts underlying delegation are fully developed and the issue has been properly presented. This is not such a case.

MCL 691.1404(1) qualifies and allows a plaintiff to bring a claim against a governmental agency only upon meeting certain procedural requirements, i.e., serving notice on the governmental agency specifying certain details. MCL 691.1404(2), in turn, specifies that this notice must be served upon the proper individual who is lawfully permitted to accept service of civil process directed against the defendant governmental agency. West's interpretation, one which neither the trial court nor the Court of Appeals (either in this case or in several other cases) would accept, essentially re-writes the statutory command. West posits that, as long as the notice ultimately falls into the proper hands, service upon an individual not listed in MCR 2.105(G)(2) is inconsequential. This approach entirely subverts the statutory notice scheme adopted by the legislature and the legislative purpose underlying the notice of intent to sue.

For these reasons, denial of leave to appeal, or alternatively, peremptory affirmance, is proper.

RELIEF

WHEREFORE, *Amici Curiae* Michigan Municipal League and the Government Law Section of the State Bar of Michigan respectfully request that this Court deny Plaintiff-Appellant's application for leave to appeal the December 12, 2017 Opinion of the Court of Appeals, and grant any and all other relief which is proper in law and equity.

PLUNKETT COONEY

BY: /s/Mary Massaron

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