STATE OF MICHIGAN

IN THE SUPREME COURT

AFTER REMAND TO THE COURT OF APPEALS
(Beckering, PJ, and Borrello and M.J. Kelly, JJ)

HELEN YONO,

Plaintiff / Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant / Appellant.

Supreme Court No. 150364
Court of Appeals No. 308968
Court of Claims No. 11-000117-MD

AMICUS CURIAE BRIEF BY MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS ASSOCIATION

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COUNTER-STATEMENT OF JURISDICTION

Amicus curiae respectfully submit the inherent, preexisting immunity of the state has not been waived in the instant case.[1] Michigan adheres to the jurisdictional principle of sovereign immunity.[2] The state created the courts and so is not subject to their jurisdiction absent express legislative waiver.[3] A failure on the part of a claimant to both plead and prove that a claim falls within the Legislature's strict waiver of immunity deprives the court of first instance, and therefore, all subsequent courts, of jurisdiction to consider the claim.[4] Jurisdictional defects may be raised at any time, even after appeal.[5]

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[1] *Mack v City of Detroit*, 467 Mich 186, 190 and n 18; 649 NW2d 47 (2002) (a claimant must plead *and* prove at the outset that a case will fit within the narrow exceptions to immunity to move beyond the summary disposition stage on a motion under MCR 2.116(C)(7)).

[2] *Ross v Consumers Power Co*, 420 Mich 567, 596-97; 363 NW2d 641 (1984); *Ballard v Ypsilanti Twp*, 457 Mich 564, 567-69 and 573-76; 577 NW2d 890 (1998).

[3] *Ballard*, *supra* at 568, citing *Ross*, *supra* at 598. See also *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002) and *Sanilac County v Auditor General*, 68 Mich 659, 665 36 NW 794 (1888) ("[t]he state is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure"). Accord *Mack*, *supra* at 195 ("a governmental agency is immune *unless* the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government" and holding that a claimant must plead *and* prove at the outset that a case will fit within the narrow exception to move beyond the summary disposition stage on a motion under MCR 2.116(C)(7)) (emphasis added).

[4] *Atkins v SMART*, 492 Mich 707, 714-15 and n 11; 822 NW2d 522 (2012), quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-69; 118 NW 919 (1908) ("[I]t being optional with the [L]egislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred *any limitations it chose*."). Of course, as this Court recently stated, "the Legislature is not even required to provide [*any*] exception to governmental immunity…." *Fairley v Dep't of Corrections*, 497 Mich 290, ___, n 15; ___ NW2d ___ (June 5, 2015) (bracket in original) (emphasis added), citing *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212; 731 NW2d 41 (2007).

[5] *Fox v Bd of Regents of Univ of Michigan*, 375 Mich 238, 242-43; 134 NW2d 146 (1965).

In this case, notwithstanding the conclusions of the Court of Appeals panels that allowed this case to proceed against MDOT, Plaintiff's claim simply does not implicate the Legislature's waiver of immunity because Plaintiff has failed to both *plead* and *prove* her claim falls within the "highway exception" to immunity.[6] Applying this Court's well-established rules of statutory interpretation for the governmental tort liability act (GTLA) to the plain language of the "highway exception", MCL 691.1405, the state's duty to repair and maintain highways "extends only to the improved portion of the highway designed for vehicular travel". The defect in the parallel parking area at issue in this case (between the curb and the edge of the parallel parking area – see MDOT's Brief, Appendix, 19a) is not within the improved portion of the highway designed for vehicular travel under the "highway exception". Therefore, this Court does not have jurisdiction over Plaintiff's claim and it should be dismissed *sua sponte*.[7]

Indeed, the alternate issue presented by *amicus curiae* in its brief in support of the state's Application for Leave to Appeal, to wit, "[w]hether the standard of review applied to plaintiff's claim and to the state's governmental immunity under MCR 2.116(C)(7) was correct in light of this Court's requirement a claimant both *plead* and *prove* in avoidance of the preexisting and

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[6] *Mack*, *supra* at 198-99, 202-03 and nn 14 and 15. See also *Pohutski*, *supra* at 688; *Ballard*, *supra* at 567-69 and 573-76 (explaining the history of common law immunity, the Legislature's statutorily created exceptions, and the fact that immunity must be expressly waived by statute because Michigan adheres to the jurisdictional view of governmental immunity); *Ross*, *supra* at 596-97 (same); *Michigan State Bank v Hastings*, 1 Doug 225, 236; 41 Am Dec 549 (1844) ("a state… cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction…and an act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary"). See also *Mead v. State*, 303 Mich 168, 173-74; 5 NW2d 740 (1942) (explaining common law sovereign immunity and noting waiver cannot occur by judicial fiat recognizing claims that do not exist and waiver "can only be done by the legislature").

[7] "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is *absolutely void*." *Fox*, *supra* at 242 (emphasis added).

inherent immunity of the government?", and the question which this Court has asked the parties to address in its order granting the state's application, to wit, "[w]hether questions of fact on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury?" are fundamental questions that must be resolved because of the jurisdictional limits imposed on the judiciary by the Legislature.[8]

"Governmental immunity" unlike other *affirmative* defenses under MCR 2.116(C)(7) is "a characteristic of government" and "[i]t is the responsibility of the party seeking to impose liability on the governmental agency to demonstrate that the claim falls within one of the exceptions."[9] A claimant failing to make out a *prima facie* case that an exception to governmental immunity applies cannot access the courts of this state because the condition precedent to the state's waiver has not been met.[10] This rule applies where the procedural and substantive conditions of the Legislature's waiver have not been satisfied.[11] It is incumbent on the judiciary to respect its proper role when addressing a motion for summary disposition on grounds of governmental immunity and to ensure the claimant both pleads *and* proves facts in avoidance of immunity.[12] Otherwise, the central purpose of immunity of the government to be free from the burden of constant litigation will be lost.[13]

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[8] *Mead*, *supra*.

[9] *Fairley*, *supra*, quoting *Mack*, *supra* at 201.

[10] *Id*., citing *McCahan v Brennan*, 492 Mich 730, 746; 822 NW2d 747 (2012).

[11] *Moulter*, *supra*; *Atkins*, *supra* (proper notice of a claim is a condition precedent to allowing the case against the government to proceed); *McCahan*, *supra* at 735 (same), *Fairley*, *supra* at 6-8.

[12] *Mack*, 467 Mich at 190 and n. 18.

[13] *Walsh v Taylor*, 263 Mich App 618, 624-25; 689 NW2d 506 (2004) (Talbot, J.), citing *Mitchell v Forsyth*, 472 US 511, 526 (1985).

If the Court disagrees with this jurisdictional statement, then *amicus curiae* would submit the Court's jurisdiction is limited to considering whether Plaintiff has, as a matter of law, both pleaded and proved her case under MCL 691.1402, such that the additional elements of her claim against the state can proceed.[14] In the latter case, the Court has jurisdiction over the questions of law presented in this appeal pursuant to Mich Const 1963, art 6, § 4.[15]

[14] Even if a claimant pleads and proves a sufficient claim *in avoidance of* the state's immunity, he or she must still proceed to prove the tort claim by demonstrating that the state breached its duty, the breach was the factual and legal (proximate) cause of the claimant's injuries, and that no mitigating defenses exist, e.g., the open and obvious doctrine. *Suttles v State Dep't of Transportation*, 457 Mich 635, 653; 578 NW2d 295 (1998).

[15] See also MCL 600.212; MCL 600.215(3); MCR 7.301(A)(2), (7); and MCR 7.302(C)(2)(b).

STATEMENT OF QUESTIONS PRESENTED

In its order[16] granting leave to appeal in this case, the Court requested the parties to brief the following issues:

(1) Whether a vehicle engages in "travel" under MCL 691.1402(1) when it parks in, including pulls into and out of, a lane of a highway designated for parking?

Amicus curiae answer: No. Applying this Court's well-established rules of statutory interpretation for the governmental tort liability act (GTLA) to the plain language of the "highway exception", MCL 691.1405, the state's duty to repair and maintain highways "extends only to the improved portion of the highway designed for vehicular travel". The defect in the parallel parking area at issue in this case (between the curb and the edge of the parallel parking area – see MDOT's Brief, Appendix, 19a) is not within the improved portion of the highway designed for vehicular travel. Therefore, any vehicle utilizing this area to park, including pulling into and out of such area, is not engaged in "travel" as that term must be construed under the highway exception.

(2) Whether the defendant presented evidence of the design of the highway at issue which, if left unrebutted, would establish that the plaintiff fell in an area of the highway not "designed for vehicular travel" under MCL 691.1402(1)?

Amicus curiae answer: Yes. The defect in the parallel parking area at issue in this case (between the curb and the edge of the parallel parking area – see MDOT's Brief, Appendix, 19a) is not within the improved portion of the highway designed for vehicular travel. The facts demonstrating the location of this defect demonstrate it is not an *actionable* defect, because its location does not fall within the narrow confines of the definition of "highway" in the "highway

[16] 497 Mich 1040; 863 NW2d 142 (2015).

exception" and as interpreted and applied by this Court. Therefore, plaintiff cannot overcome her burden to both plead and prove her claim falls within the "highway exception" to immunity.[17]

(3) If so, whether the plaintiff produced evidence establishing a question of fact regarding the defendant's entitlement to immunity under MCL 691.1402(1)?

Amicus curiae answer: No. The defect in the parallel parking area at issue in this case (between the curb and the edge of the parallel parking area – see MDOT's Brief, Appendix, 19a) is not within the improved portion of the highway designed for vehicular travel – no factual offering can rebut MDOT's proofs when applying the correct interpretive parameters in the "highway exception" to the circumstances of this case.

(4) Whether questions of fact on a motion for summary disposition involving governmental immunity under MCR 2.116(C)(7) must be resolved by the trial court at a hearing or submitted to a jury, see *Dextrom v Wexford County*, 287 Mich App 406, 430-433; 789 NW2d 211 (2010); *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).

Amicus curiae answer: Yes. It is the position of *amicus curiae* that when faced with a governmental entity's claim of immunity from suit, a trial court must always decide, as a matter of law, whether the claimant has both pleaded and proved sufficient facts to access the courts and proceed with his or her claim against the government. Of course, in the latter case, the claimant must still prove the necessary elements of the underlying tort claim allowed by the GTLA, i.e., negligent operation of a government-owned vehicle under the motor vehicle exception under MCL 691.1405, gross negligence under MCL 691.1407(2)(c) and (8)(a), that an actionable defect existed in the highway under MCL 691.1402, etc.

[17] *Mack*, 467 Mich at 190 and n 18.

"Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., governmental agencies are broadly shielded from tort liability."[18] That is, governmental agencies engaged in governmental functions are immune from suit, *unless* a statutory exception applies.[19] Inherent in the GTLA's broadly conferred immunity is the requirement that a party seeking to avoid such immunity must both plead and prove his or her claim falls within one of the limited number of statutory exceptions to immunity.[20] Therefore, just as the state does not *waive* immunity by failing to raise the defense, a claimant cannot invoke the court's jurisdiction unless his or her claim is both *pleaded* and *proved.*[21]

In most cases, the trial court or the court of claims is the court of first instance in claims brought against the government. As such, the court of first instance must be mindful of the limits of its jurisdiction over such claims. If the claimant has failed to demonstrate the case falls within a statutory exception, then the claimant has failed to satisfy the statutory conditions precedent to the Legislature's strictly confined waiver of the government's inherent immunity.

The reason for this is that unless a statutory exception *applies* in a given case, the governmental agency cannot be deemed to have *waived* its preexisting and inherent immunity. The Legislature, on behalf of the people of the state of Michigan, confer jurisdiction on courts over claims against the government in only a small subset of cases. Otherwise, the immunity of the government has not been waived.

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[18] *Fairley, supra*.

[19] *Mack, supra*.

[20] *Id*.

[21] *Id*. See also *McCann v Michigan*, 398 Mich 65, 77, n 1; 247 NW2d 521 (1976) (RYAN, J.) (the inapplicability of immunity, i.e., that the government is not immune from suit, is an element of plaintiff's case).

Indeed, pleading and proving a claim in avoidance of immunity is a "condition precedent" to the waiver and to a court's exercise of jurisdiction over the claim. The procedural consequences of the rule of law that the government is inherently immune unless the claimant has satisfied the condition precedent to waiver is that the appellate courts have immediate jurisdiction over appeals from a trial court's order *denying* the government's claim of immunity under MCR 2.116(C)(7), *or* "denying a motion for summary disposition under MCR 2.116(C)(10)." See MCR 7.203(A) and MCR 7.202(6)(a)(v). Further, the application of governmental immunity is a question of law, subject always to *de novo* review by the appellate tribunal addressing its application to a given case.[22]

[22] *Mack*, *supra* at 193.

STATEMENT OF INTEREST BY *AMICUS CURIAE*

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative efforts. Its membership is comprised of approximately 521 Michigan local governments, of which approximately 450 are also members of the Michigan Municipal League Legal Defense Fund. The MML operates the Legal Defense Fund through a board of directors. The purpose of the legal defense fund is to represent the interests of member local governments in litigation and appeals concerning issues of statewide significance for local governments.

Amicus curiae Michigan Townships Association (MTA) is a Michigan non-profit corporation consisting of more than 1,230 townships within the State of Michigan (including both general law and charter townships). The MTA provides education, exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws and statutes of the state of Michigan.

The members of *amicus curiae* are largely self-insured and maintain retention amounts which provide primary coverage for claims paid pursuant to § 2 of the Governmental Tort Liability Act (hereafter referred to as the GTLA, unless otherwise stated), MCL 691.1402, the "highway exception" to governmental immunity. Therefore, this Court's consideration of the issues raised by MDOT in this case is of significant importance to *amicus curiae*.[23]

[23] While *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143, 161-62; 615 NW2d 702 (2000) held that the fourth sentence of MCL 691.1402, by the statute's terms at the time of the Court's decision, only applied to state and county road commissions, the Legislature has since amended MCL 691.1402(1) by enacting 2012 PA 50. The limitations and duties found in the fourth sentence of MCL 691.1402(1) now apply to all "governmental agenc[ies,]" including members of *amicus curiae*.

INTRODUCTION

It is the position of *amicus curiae* that the location of the defect in the instant case does not fall within the "highway exception" to governmental immunity as a matter of law. The government's legal duty to maintain and repair highways extends only to those *portions* of highways designed *and* used for constant vehicular travel. Applying the interpretive principle of strict construction of exceptions to immunity to the facts of this case reveals that Plaintiff's claim must fail as a matter of law. To expand the definition of "highway" within the meaning of the exception to governmental immunity to include defects in locations such as the one at issue in this case would be judicial usurpation of the Legislature's narrowly confined waiver of the government's jealously guarded immunity.

The evidence presented by the state and by Plaintiff should have been assessed by the trial court under the proper reviewing framework for claims against an immune governmental entity. As the burden is always on the claimant to both plead and prove his or her claim falls within an exception to the government's preexisting and inherent immunity,[24] it is incumbent on the trial court to assess at the preliminary stage of the proceedings whether it has jurisdiction to proceed further.[25]

"[T]he circuit court is *without jurisdiction* to entertain an action against the State of Michigan unless jurisdiction shall have been acquired by legislative consent."[26] To determine its

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[24] *Mack*, 467 Mich at 204.

[25] *Greenfield Const Co Inc v Mich Dept of State Hwys*, 402 Mich 172, 193; 261 NW2d 718 (1978) (stating that "[l]egislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a *valid* claim against the state and subjects the state to the jurisdiction of the court").

[26] *Id*. at 194 (emphasis added).

own jurisdictional limits over the claim, therefore, the circuit court must determine at the summary disposition stage whether a claimant has plead sufficient facts to prove his or her claim meets an exception to immunity.[27]

The requirement that a claimant both plead and prove his case in avoidance of immunity is simply affirmation of the jurisdictional principle of immunity. This Court has consistently applied the jurisdictional principle applicable to governmental immunity law in Michigan.[28] This means absent an *express* legislative waiver of the government's inherent and preexisting immunity from suit, a governmental entity has not submitted to the jurisdiction of the courts.[29] In such cases, jurisdiction over the governmental entity is lacking because the Legislature has not *waived* the state's immunity.[30]

For a court to exercise jurisdiction over the merits of a claim brought against a governmental entity, it must be first be determined that the court has jurisdiction to consider the claim. Under MCR 2.116(C)(7), governmental immunity is ordinarily presented in a motion for summary disposition by the government. According to this Court's jurisprudence, the trial court must then determine whether the plaintiff has both pleaded and proved his or her claim sufficiently

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[27] *Id*.

[28] *Ross*, *supra* at 599, citing *People ex rel Ayres v Board of State Auditors*, 42 Mich 422, 427-28; 4 NW 274 (1880) ("No claim against the State could…be allowed except by the Legislature" and stating "[t]he State has never, before or since, allowed itself to be sued in its own courts" and "in providing for a different method of determining claims against the State, it was not deemed proper to include it within the judicial power.").

[29] As explained by this Court in *Mack*, *supra* at 202 "a governmental agency *is* protected by immunity" and "[t]he presumption is, therefore, that a governmental agency *is* immune and can only be subject to suit if a plaintiff's case falls within a statutory exception." (emphasis in original).

[30] *Id*. at 202-03.

to invoke the jurisdiction of the trial court before the case can even proceed.[31] This is because immunity is inherent in the operations and functioning of government.[32] If a claimant cannot meet this high standard of proof, the court lacks jurisdiction to further consider the claim and it must be dismissed.[33]

In the instant case, the Court of Appeals equated the government's burden when asserting immunity under MCR 2.116(C)(7) to an ordinary litigant's burden under MCR 2.116(C)(10), stating "the movant bears the initial burden to show that he or she is entitled to immunity as a matter of law."[34] Yet, this has never been the standard for assessing whether a claim has pierced the veil of the government's immunity.[35]

The preexisting, and inherent immunity of the governmental entity defendant is jurisdictional, which is why the assertion of immunity *is not* an affirmative defense,[36] and which is why immunity cannot be *waived* by a failure to assert it.[37] By incorporating the MCR 2.116(C)(10) standard and placing the burden on the government to prove it is *not* entitled to

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[31] *Id*. See also *Odom v Wayne County*, 482 Mich 459, 478-79; 760 NW2d 217 (2008).

[32] *Mack*, *supra* at 198-203.

[33] *Id*.

[34] *Yono v Dep't of Transportation (On Remand)*, 306 Mich App 671, 679; 858 NW2d 128 (2014), citing *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013) (a case in which a claim was said to be barred by a statute of limitations defense (a true affirmative defense) *not* a governmental immunity defense (which is not an "affirmative defense", see *Mack*, *supra*)).

[35] *Mack*, *supra* at 195, 198-203 (discussing historical characteristics of the government's immunity from suit). See also *Lash v City of Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007).

[36] *Mack*, *supra*; *Odom*, *supra*.

[37] *Ballard*, *supra* 457 Mich at 568 (stating "the state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment").

immunity, the Court of Appeals opinion requires the government to consent to the court's jurisdiction, and to then affirmatively prove it is entitled to immunity, the latter of which it is supposed to enjoy by virtue of the inherent characteristics of its functioning.[38] Immunity is immunity from *suit* not just liability.[39] When multiplied by the number of each governmental entity that must defend itself under the pleading standards espoused by the Court of Appeals in this case, the costs of just that portion of litigation that requires proof of immunity is of great concern to *amicus curiae*.[40]

[38] *Mack*, *supra*.

[39] "[T]he purpose of governmental immunity is to protect the governmental body, not only from liability, but from the trial itself." *Walsh v Taylor*, 263 Mich App 618, 624-25; 689 NW2d 506 (2004) (Talbot, J.), citing *Mitchell v Forsyth*, 472 US 511, 526 (1985).

[40] *Odom*, *supra* at 478-79 (2008) (citing *Mack*, *supra*, at 203, n 18 and *Walsh*, *supra* at 624 and stating "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial" and placing on the claimant the burden to both plead and prove his or her case "relieves the government of the expense of discovery and trial in many cases").

ARGUMENTS

I. DESIGNATED PARALLEL PARKING AREAS ON A HIGHWAY FALL OUTSIDE THE SCOPE OF THOSE "PORTIONS" OF THE HIGHWAY DESIGNED FOR VEHICULAR TRAVEL AND THUS A VEHICLE PARKING, PULLING INTO, OR OUT OF SUCH AN AREA IS NOT ENGAGED IN "TRAVEL" AS THAT TERM IS USED IN THE HIGHWAY EXCEPTION

A. Standard of Review

A court's interpretation of the statutory terms in the GTLA is reviewed *de novo*.[41]

B. Applicable Law

The first question presented in the Court's order granting leave to appeal requires the parties to address the interpretation of the highway exception. The Court of Appeals interpreted MCL 691.1401(c) and MCL 691.1402 (1) of the GTLA, the "highway exception" to governmental immunity. More particularly, the court examined the meaning and scope of the definition of "highway" as used within that provision, and as further interpreted by this Court's jurisprudence.

Because governmental immunity is jurisdictional, "[when] analyzing the highway exception, [this Court] must be governed by the statutory language."[42] This Court's common-law jurisprudence has therefore developed special rules for interpreting provisions that waive the government's pre-existing suit immunity. With respect to the GTLA, [this Court's] duty is to interpret the statutory language in the manner intended by the Legislature which enacted [the GTLA]."[43] Thus, in construing the GTLA, "courts may not speculate about an unstated purpose,"

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[41] *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002).

[42] *Grimes v MDOT*, 475 Mich 72; 715 NW2d 275 (2006).

[43] *Reardon v Dep't of Mental Health*, 430 Mich 398, 408; 424 NW2d 248 (1988), citing *Hyde v Univ of Mich Bd of Regents*, 426 Mich. 223, 244; 393 NW2d 847 (1986).

e.g., the creation of a common-law exception or an overly broad application of a statutory exception, "where the unambiguous text plainly reflects the intent of the Legislature."[44]

Specific provisions in the GTLA prevail over general statements in other parts of the statute.[45] The GTLA provisions granting immunity are broadly construed and the exceptions thereto are narrowly drawn.[46] As a result, "[t]here must be strict compliance with the *conditions* and *restrictions* of the [GTLA]."[47] In 1986, "the Legislature put its imprimatur on this Court's giving the exceptions to governmental immunity a narrow reading."[48]

This Court has developed a theme in addressing governmental immunity. As such, this Court strives for the following: (1) to faithfully interpret and define the GTLA "to create a cohesive, uniform, and workable set of rules which will readily define the injured party's rights

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[44] *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 704 (2002), citing *Pohutski*, *supra* at 683.

[45] *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002).

[46] *Nawrocki*, *supra* at 158.

[47] *Id*. at 158-59 (emphasis added). See also *Scheurman v Dep't of Transportation*, 434 Mich 619, 629-30; 456 NW2d 66 (1990).

[48] *Nawrocki*, *supra* at n 16. The principle of statutory construction requiring strict or narrow interpretation of exceptions to governmental immunity has a distinguished pedigree. 3 Sands, Sutherland Statutory Construction (4th ed), § 62.01, p 113 (stating that "the rule has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit" and "the standard of liability is strictly construed even under statutes which expressly impose liability"). The rule is not so much one of statutory interpretation as it is one of deference to the inherent characteristic of immunity and the closely guarded relinquishment thereof by the sovereign. *Manion v State Hwy Comm'r*, 303 Mich 1; 5 NW2d 527 (1942), cert den'd *Manion v State of Michigan*, 317 US 677 (1942). See also *United States v Sherwood*, 312 US 584, 590 (1941) (the government's consent to be sued is a relinquishment of sovereign immunity and must be strictly interpreted); *Shillinger v United States*, 155 US 163, 166, 167-68 (1894) ("the congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted"; "[b]eyond the letter of such consent the courts may not go, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government"; this is "a policy imposed by necessity").

and the governmental agency's liability"; (2) to "formulate an approach which is faithful to the statutory language and legislative intent"; and (3) develop a consensus of "what the Legislature intended the law to be.[49]

Applying these principles, this Court has developed a well-established jurisprudence concerning interpretation and application of MCL 691.1402. The construction and maintenance of highways is the discharge of a governmental function, for the improper discharge of which there is no liability, except as created by statute.[50] Interpreting and applying the highway exception requires a court to parse each sentence of the statute to ascertain the scope of the exception, as determined by the stated policy considerations of the Legislature.[51]

The GTLA additionally defines the term "highway" as follows:

> "Highway" means a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway. Highway does not include an alley, tree, or utility pole.[52]

In addition, MCL 691.1402 provides, in pertinent part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property 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. The liability, procedure, and remedy as to

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[49] *Nawrocki, supra* at 148-49.

[50] *Braun v Wayne County*, 303 Mich 454, 457-58; 6 NW2d 744 (addressing CL 1929, § 3996, a predecessor to MCL 691.1402). See also *Thomas v Dep't of State Highways*, 398 Mich 1; 247 NW2d 530 (1976).

[51] *Nawrocki, supra* at 159-160.

[52] MCL 691.1401(c).

> county roads under the jurisdiction of a county road commission shall be as provided in…MCL 224.21. [T]he duty of a governmental agency to repair and maintain highways, and the liability for that duty, *extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel*….[53]

MCL 691.1401(c) and MCL 691.1402 are to be read together as a single, comprehensive law.[54] When construing the terms of these provisions together, as required, the Court must give effect to *all* terms and phrases used in the exception.[55]

This Court has stated it is "cognizant of the challenges presented by the drafting of the highway exception and mindful that [it is] 'constrained to apply the statutory language as best as possible as written….'"[56] In this latter regard, *Nawrocki* cautioned that an impermissibly "broad, rather than a narrow, reading of the highway exception is required in order to conclude that it is applicable to anything *but the highway* itself" and that such interpretations that did not "'limit[] governmental responsibility" in this way would be a "complete abrogation of this Court's duty to *narrowly* construe exceptions to the broad grant of immunity."[57]

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[53] MCL 691.1402 (1) (emphasis added).

[54] *Robinson v City of Lansing*, 486 Mich 1, 8, n 4; 782 NW2d 171 (2010).

[55] *Duffy v Dep't of Natural Resources*, 490 Mich 198, 213, n 5; 805 NW2d 399 (2011), citing *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010); *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

[56] *Duffy*, *supra* at 206, quoting *Nawrocki*, *supra* at 171.

[57] *Nawrocki*, *supra* at 175 (emphasis added).

C. Analysis

Within the parameters of the foregoing framework, it is no surprise this Court's interpretation of the term "highway" has been restricted to only those lanes or thoroughfares of a highway actually *designed* and *used* for ordinary vehicular travel.[58] The Legislature "did not intend to extend the highway exception indiscriminately to *every* 'improved portion of the highway'".[59] Thus, according to this construct, not "every 'improved portion of the highway' is also 'designed for vehicular travel.'"[60] Further, even if an improved portion of the highway is "designed for vehicular travel", it also does not follow that the area is necessarily a "travel lane" within the meaning of the term "highway" as used and applied in the GTLA.

Actionable defects are only those that exist within the physical confines of this narrowest definition of "highway". This is a conclusion dictated by the Court's interpretive principles when applying the exception and by the Legislature's policy of a narrowly confined waiver. The plain language of the statute, as well as this Court's jurisprudence fully supports this conclusion

"The highway exception…is limited exclusively to dangerous or defective conditions within the improved portion of the highway designed for vehicular travel; that is, the actual roadbed, paved or unpaved, designed for vehicular travel."[61] In keeping with his or her burden to

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[58] *Id*. See also *Mason v Wayne County Board of Comm'rs*, 447 Mich 130, 138; 523 NW2d 791 (1994) (stating "legislative line drawing [in the highway exception] is also explicable on the ground that *expanding the right to sue* past a certain point does not prevent accidents, and amounts to nothing more than an expanded obligation to pay")(emphasis added).

[59] *Grimes*, *supra* 475 Mich at 89 (emphasis added).

[60] *Id*. at 90.

[61] *Nawrocki*, *supra* at 151-52 (emphasis added).

plead and prove facts in avoidance of immunity,[62] a plaintiff pursuing a cause of action under the highway exception must demonstrate the existence of an actionable defect, and that the government's failure to fulfill its duty with respect to that defect was *the* proximate cause of the injury complained of.[63] A defect is not actionable, even if it is a defect, if it does not exist within the improved portion of the highway actually designed and used for regular and ordinary vehicular traffic.[64]

Strictly construing the language of the highway exception reveals two conclusions. First, if a defect is not located within the improved portion of a highway designed for vehicular travel, then it is not actionable, because it is not located in the "highway" as that term is defined and applied under MCL 691.1401(c) and MCL 691.1402(1). That the statute restricts the location of actionable defects to only a "portion" of the highway is a logical consequence of the statute's plain language. Second, the strict interpretation of the exception required by this Court's jurisprudence reveals that the "portion" must also be the *narrowest* portion of a roadway or thoroughfare designed for vehicular travel.[65] It follows that *all areas* outside of this *portion* of the highway must be excluded.[66]

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[62] *Mack, supra* at 195.

[63] *Nawrocki, supra*.

[64] *Braun, supra* 303 Mich at 457.

[65] *Mason*, 477 Mich at 137-138.

[66] *Mason, supra* at 137 (explaining that the reason the narrowest portion of travel lanes are included, and other contiguous and indeed integrated areas such as crosswalks, sidewalks, *other installations*, etc. are *excluded* is because the expectation is that only those areas constantly used by drivers for vehicular travel should be the limited area defining the term "highway"; all other excluded areas, while posing a risk to others, are not deemed to be areas with respect to which the governmental entity has a duty to keep free from actionable defects).

"Highway" within the meaning of the highway exception to governmental immunity is a legally defined term.[67] However, by virtue of this Court's interpretive principles applied to the GTLA, MCL 691.1401(c) as defined and applied in MCL 691.1402(1) has acquired a unique legal meaning. Where a term or phrase has acquired specific meaning through its usage in jurisprudence developed over time with respect to a particular and unique subject matter, the term or phrase is regarded as having acquired a particular legal meaning when discussed or considered in a similar case.[68]

Turning therefore to the phrase "vehicular travel", this Court has already ruled that even momentary vehicular travel on areas of the highway outside the improved portion, as, for example, on parallel parking spaces, is not sufficient to bring the area within the narrow confines of the limited portion of the highway *designed for vehicular travel*.[69]

Indeed, from *Grimes*, it is clear that the concept of "vehicular travel" is more properly understood in the context of the narrow scope of the definition of "highway", rather than considerations about the physical movements of a vehicle within a particular area, or even technical design specifications used on a particular part of a highway. Indeed, there are many areas outside of the "improved *portion*" of highways technically *designed for* vehicular travel. Yet, faithful adherence to the interpretive principles of the GTLA and the Legislature's narrowly confined waiver has led this Court to consistently reject attempts to expand the meaning of the

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[67] MCL 691.1401(c).

[68] See MCL 8.3a ("technical words and phrases, and such as may have acquired a peculiar meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning"); *People v Thompson*, 477 Mich 146, 152; 730 NW2d 708 (2007).

[69] *Grimes*, *supra* at 90.

term "highway" to encompass these areas outside the regularly traveled portion of the highway actually designed for vehicular travel.[70] If such expansion is to occur, it must be by legislative act.[71]

Indeed, as explained by this Court in *Ross*,[72] and, more recently in *Nawrocki*,[73] there is a distinct difference between those areas of a highway with respect to which a governmental entity may have a *duty* to maintain and repair, and those areas of a highway with respect to which a governmental entity may have an *actionable duty* in this regard; or, put another way, those areas with respect to which a failure of the government's duty to maintain and repair may give rise to liability (assuming, of course, all remaining elements of the tort necessary to prove the case can be established).[74] Thus, it makes perfect sense, when viewed from the proper orientation of the retained-unless-surrendered nature of the government's preexisting immunity, and the strict confines required by the Legislature of the government's waiver thereof, to restrict the definition of highway to such a degree.

Amicus curiae submit therefore, that even if the parallel parking space at issue in this case is "designed for vehicular travel", it does not follow that it falls within the improved "*traveled portion*" of that part of the highway designed for vehicular travel.[75] "Traveled portion" pertains directly, and solely to the constant and voluminous vehicular travel where actionable defects are

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[70] *Mason v Wayne County Bd of Comm'rs*, 447 Mich 130, 137-138; 523 NW2d 791 (1994).

[71] *Id*.

[72] 420 Mich. at 618-619.

[73] 463 Mich. at 157.

[74] *Id*. at 157.

[75] *Grimes, supra*.

most likely to cause the most damage.[76] Indeed, such a limitation was evident in this Court's opinion in *Grimes*, and would apply equally to "parallel parking spaces", even ones that are sometimes used as turning lanes.[77]

In essence, to faithfully adhere to the plain language of the statute, and strictly construe the Legislature's waiver, as this Court must, to be a "highway" within the meaning of the highway exception, the particular "portion" of the highway at issue must be both within the improved portion of the highway *and* designed for vehicular travel.[78] In *Grimes*, this Court concluded that the shoulder of the highway at issue was not "designed for vehicular travel", and it was not a "travel lane". "A shoulder may be capable of supporting some form of vehicular traffic, but it is not a travel lane and it is not 'designed for vehicular travel.'" A "parallel parking space", even one that doubles as a convenient turn lane, is not necessarily a "travel lane" even if it is "designed for [some] vehicular travel".[79]

It is beyond this Court's authority to expand or draw lines not clearly delineated as acceptable by the Legislature's waiver of the state's immunity through the GTLA.[80] Such "line drawing" is reserved exclusively to the Legislature, and, as this Court has noted it "is explicable on the ground that expanding the right to sue past a certain point does not prevent accidents, and amounts to nothing more than an expanded obligation to pay."[81] Indeed, this Court should preempt

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[76] *Id*. at 91.

[77] *Id*.

[78] *Id*. at 88.

[79] *Id*. at 90.

[80] *Mason, supra* at 138.

[81] *Id*.

the inevitable flood of litigation that will ensue if the Plaintiff's case is allowed to proceed as the Court of Appeals has held. Considering the nature of Plaintiff's injuries in the instant case, the manner in which the accident is alleged to have occurred and the defect from which it arose, there are innumerable other similar "defects" in government owned parking areas throughout the state of Michigan. The Court should carefully review the location and nature of the defect here and consider whether it should be an "actionable defect" under the highway exception. See MDOT's Brief, Appendix, 19a.

This Court should not create what amounts to an expansion of the government's waiver of immunity and should rather adhere to the principle interpreting the GTLA narrowly. Indeed, such expansion, whether from preexisting common-law constructs or expansive and new interpretations of the GTLA is prohibited as such cannot be "culled from the language of [the GTLA]."[82] To that extent, the Court of Appeals speculation that this Court's refusal in *Grimes* to give the term "travel" its broadest possible definition implied that this Court somehow might entertain more less expansive interpretations.[83]

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[82] *Li v Feldt*, 434 Mich 584, 602; 456 NW2d 55 (1990) (Griffin, J, concurring in part and dissenting in part). Justice Griffin's view that the *only* exceptions to the government's immunity were those found in the GTLA and the immunity of the state was retained by the GTLA without common-law exceptions was eventually affirmed by this Court in *Pohutski v City of Allen Park*, 465 Mich 675, 688; 641 NW2d 219 (2002).

[83] *Yono v MDOT (On Remand)*, 306 Mich App 671, 692; 858 NW2d 158 (2014).

II. THE TRIAL COURT SHOULD ALWAYS CONSIDER THE QUESTION OF A GOVERNMENT ENTITY'S IMMUNITY FROM SUIT AT THE OUTSET OF A CLAIM TO ENSURE THE JURISDICTIONAL LIMITS OF THE COURTS OVER ACTIONS AGAINST THE GOVERNMENT

A. Standard of Review

Challenges based upon interpretation, application and compliance with statutes and court rules are reviewed *de novo.*[84]

Amicus curiae respectfully suggests that resolution and analysis of the fourth issue the Court has asked the parties to address would necessarily subsume and resolve the second and third.[85] The burden is on Plaintiff to plead and prove her claim falls outside the statutory exception.[86] It is not incumbent on the government to produce affirmative evidence to the contrary until the former inquiry has been satisfied. This ensures the trial court reviewing a claim in avoidance of immunity that the government is not burdened with the expense and time required to litigate claims for which the government has not waived immunity from suit and liability.

B. Applicable Law

Governmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, which limits imposition of tort liability upon a governmental agency.[87] Under the GTLA, governmental agencies are immune from tort liability when engaged in a governmental function.[88] Immunity from tort liability is expressed in the broadest possible

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[84] *Douglas v. Allstate Ins. Co.*, 492 Mich. 241, 255-256; 821 NW2d 472 (2012)

[85] 497 Mich 1040; 863 NW2d 142 (2015).

[86] *Mack*, 467 Mich at 190 and n 18.

[87] *Ross v Consumers Power Co*, 420 Mich 567, 621; 363 NW2d 641 (1984).

[88] MCL 691.1407(1); *Duffy v Dep't of Natural Resources*, 490 Mich 198, 207; 805 NW2d 399 (2011).

language – immunity is extended to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function.[89]

Michigan courts originally recognized that the state cannot be sued unless it consents to the jurisdiction of the courts.[90] An act of the Legislature conferring such jurisdiction is the only means by which the state agrees to submit itself to the judgment of the judicial branch.[91] Immunity from suit is an inherent characteristic of government.[92] The GTLA preserved the doctrine as it existed at common law.[93] A necessary predicate of this retained immunity is the lack of a court's jurisdiction over claims not perfected in strict compliance with the Legislature's *express*, but *limited*, waiver.[94]

Therefore, the immunity that was retained by the GTLA is jurisdictional.[95] "[T]he state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is

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[89] *Ross*, *supra* at 618.

[90] *Hastings*, 1 Doug at 236.

[91] *Dermont v Mayor of Detroit*, 4 Mich 435, 442-43 (1857), accord *City of Detroit v Blackeby*, 21 Mich 84, 113, 117 (1870) (Campbell, J.) (stating "there is no common law liability against towns and counties and they cannot be sued except by statute"), overruled in part by *Williams v City of Detroit*, 364 Mich 231; 111 NW2d 1 (1961), which was later limited by this Court in *McDowell v State Hwy Comm'r*, 365 Mich 268; 112 NW2d 491 (1961), and then completely disavowed by the Legislature's enactment of the GTLA, which restored sovereign immunity uniformly to all governmental entities. See also the discussion in *Odom v Wayne County*, 482 Mich 459, 467-68; 760 NW2d 217 (2008).

[92] *Mack v City of Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). See also *Ballard v Ypsilanti Township.*, 457 Mich 564, 567; 577 NW2d 890 (1998).

[93] *Id*. at 202, accord *Pohutski*, *supra* at 705 (by enacting the GTLA the Legislature retained the sovereign immunity that existed at common law in Michigan and extended that immunity to all other governmental entities encompassed within the act).

[94] *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193, 194; 261 NW2d 718 (1978), accord *Hastings*, *supra* at 236.

[95] *Ballard*, *supra* at 568, citing *Ross*, *supra* at 598.

waived only by legislative enactment".[96] The Legislature, not the judiciary, is the body that expresses the will of the sovereign, i.e., the People, and must therefore be the means by which subject-matter jurisdiction is conferred.[97]

Therefore, the highway exception is to be strictly construed and narrowly applied because when implicated, it vests the courts with the People's jealously guarded waiver of immunity and acquiescence to suit.[98] "The terms of the [government's] consent [in the highway exception] to be sued in any court define that court's jurisdiction to entertain the suit".[99]

"[A] 'central purpose' of governmental immunity is 'to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.'"[100] Thus, merely allowing governmental entities to assert immunity "while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to prepare [a] defense, would render illusory the immunity afforded by the [GTLA]."[101] Therefore, it is essential that motions for summary disposition based on the government's claim of immunity from suit be carefully considered.

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[96] *Id*. (emphasis added).

[97] *Hastings*, *supra*; *Greenfield Constr Co.*, *supra*; *Pohutski*, *supra*; *Odom*, *supra* at 477.

[98] *Nawrocki*, *supra* at 158. See also *Atkins v SMART*, 492 Mich 707, 714-15 and n 11; 822 NW2d 522 (2012), quoting *Moulter v Grand Rapids*, 155 Mich 165, 168-69; 118 NW 919 (1908) ("it being optional with the legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it can attach to the right conferred *any limitations it chose*") (emphasis added).

[99] *Braun v Wayne County*, 303 Mich 454, 458; 6 NW2d 744 (1942), citing *Manion v State Hwy Comm'r*, 303 Mich 1, 2; 5 NW2d 527 (1942), cert den'd *Manion v State of Michigan*, 317 US 677 (1942).

[100] *Costa*, 475 Mich. at 410.

[101] *Id*.

It follows from the GTLA's protective structure that a plaintiff must "allege facts justifying the application of an exception to governmental immunity".[102] Further, if a plaintiff alleges that governmental immunity *does not apply*, the burden is on the plaintiff to proffer material facts to the contrary.[103] Indeed, the burden is on plaintiff at the outset to both *plead* and *prove* facts in avoidance of immunity.[104]

In *Mack*, this Court addressed the question of "whether government immunity is an affirmative defense or a characteristic of government so that a plaintiff must plead in avoidance of it."[105] This question was key, because if governmental immunity pled as a defense to a claim pursuant to MCR 2.116(C)(7) is merely an affirmative defense, then a failure to plead it in a first responsive pleading could be deemed a *waiver* of the defense of immunity. A *waiver* would effectively allow the court to exercise jurisdiction over the government and consider the merits of the claim against it. If, on the other hand, immunity is not an "affirmative defense" then the governmental entity does not waive the defense at the initial pleading stage and the court could not simply proceed to address the merits of the underlying claim.

In *Mack*, this Court reasoned governmental immunity was an inherent characteristic of government. Therefore, immunity from suit did not have to be asserted and plead as an affirmative defense. Key to this Court's holding in *Mack* was the understanding that "to plead a cause of action against the state or its agencies, the plaintiff must plead *and prove facts* in avoidance of

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[102] *Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001); *Mack*, *supra* at 203, 204.

[103] *Mack*, *supra* at 204, 205.

[104] *Id*. at 199.

[105] *Id*. at 193.

immunity."[106] In order to determine whether one has both *pleaded* and *proven facts* in avoidance of immunity, it must be determined, in advance, whether the suit against the government can be prosecuted further. After all, governmental immunity provides immunity from suit, not just liability.[107] Immunity from suit is as important a defense as defending against liability judgments because defending a suit is as costly and potentially even more detrimental to the efficient operation and functioning of government.[108] To defend a suit against the government the governmental entity must divert costly resources to investigation of the claim and defense of its merits.[109]

Thus, the Court in *Mack* recognized the import of the GTLA's statement "except as otherwise provided *in this act*, a governmental agency is *immune from tort liability*…."[110] This language confirms the Court's holding: governmental immunity preexists, is inherent, and applies where the governmental entity is involved in the discharge of a governmental function.[111]

Therefore, the failure to raise the defense under MCR 2.116(C)(7) or in general terms in the statement of affirmative defenses is immaterial because the government is already immune from suit.[112] It is equally irrelevant whether the government, at the outset, has produced

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[106] *Id*. at 199, quoting *McCann v State of Michigan, Dep't of Mental Health*, 398 Mich 65, 77, n 1; 247 NW2d 521 (1976) (emphasis added).

[107] *Costa, supra* at 409-10, citing *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) and *Mack, supra* at 203, n 18.

[108] *Mack, supra*.

[109] *Id*. at 195, 198-203.

[110] *Id.*

[111] *Id.*

[112] *Id.*

affirmative evidence to demonstrate that the defense of immunity applies. The motion for judgment on immunity grounds is all that is initially required, and even then, because of the jurisdictional nature of immunity, a failure to assert the defense is not a waiver, at least in the context of addressing the governmental entity's defense.[113]

This is the reason it should not be sufficient to simply allege facts sufficient to implicate an exception in pleading a cause of action in avoidance of the government's inherent immunity from suit. If this were the case, the whole point of immunity, which includes immunity from suit, not just liability, would be lost.[114] "[R]equiring the plaintiff to bear the burden of pleading in avoidance of governmental immunity is also consistent with a central purpose of governmental immunity, that is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity."[115]

C. Analysis

The essence of the Court of Appeals ruling places the burden on the government to put forth evidence at the outset that it can disprove plaintiff's case. The relevant part of the Court of Appeals analysis was as follows:

> If the [governmental entity] properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant has immunity, the burden shifts to the nonmoving party to present evidence that establishes *a question of fact* as to whether the movant is entitled to immunity as a matter of law. [citing *Kincaid v Cardwell*, 300 Mich

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[113] *Cf.* Mack, *supra* at 195-205 (discussing inherent characteristic of governmental *entity* immunity), with *Odom v Wayne County*, 482 Mich 459, 479; 760 NW2d 217 (2008) (stating, in *dicta*, that with respect to an individual governmental employee's claim of immunity, the burden *is* initially on the individual asserting immunity).

[114] *Mack, supra* at 203, n 18.

[115] *Id.*

> App 513,] 537, n 6[; 834 NW2d 122 (2013)]. If the trial court determines that there is a question of fact as to whether the movant has immunity, the court must deny the motion. *Dextrom[v. Wexford County*, 287 Mich App [406,] 431[; 789 NW2d 211 (2010)].[116]

The last three sentences create a pleading requirement contrary to this Court's decision in *Mack*.[117] And, because the Court of Appeals concluded the parallel parking area was a "highway" within the meaning of the highway exception, it declined to fully address this incorrectly stated standard. This pronounced "standard" must be corrected.

If a claimant asserts a cause of action against the government, and pleads all the necessary facts to bring the claim within the exception, is it sufficient to survive a motion for summary disposition under MCR 2.116(C)(7)? In such a case, without more, the claimant has not both *plead* and *proved* the case against the government, as required by this Court's decision in *Mack*.[118] On the other hand, the government's motion does not offer anything other than its stated immunity from suit. Under the Court of Appeals standard, the movant, i.e., the government, "as with a motion under MCR 2.116(C)(10)…bears the *initial* burden to show that [it] is entitled to immunity as a matter of law."[119] If this is the standard applied, then the government will not have met its burden and the suit will be allowed to proceed. This is no small detail considering the volume of cases the government must defend.

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[116] *Yono v MDOT (On Remand)*, 306 Mich App 671, 679-680; 858 NW2d 128 (2014) (emphasis added).

[117] *Mack*, *supra* at 193-203 and n 18 (2002).

[118] *Mack*, *supra*.

[119] *Yono*, *supra* at 679, quoting *Kincaid v Caldwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

The jurisdictional view of governmental immunity adhered to in Michigan requires that for a circuit court to even have jurisdiction over the government, the case itself (the underlying facts of the case) must *establish* that the claim against the government can go forward under one of the legislative exceptions to immunity in the GTLA.[120] As this Court has recognized: "the state, as creator of the courts, [is] not subject to them *or their jurisdiction*" and "[t]his immunity is waived only by legislative enactment".[121]

Such consent comes only in the form of the narrowly applied exceptions to that immunity in the GTLA. Only when the claimant pleads that the facts fall within an exception and proves those facts exist is there evidence of a *waiver* of the inherent and preexisting immunity granted by law.[122] And, later, this Court made clear that, at least with respect to actions against governmental entities, the burden to both *plead* and *prove* the case falls within an exception is on the claimant.[123]

Here, while recognizing the conflict of opinions in this area, the Court of Appeals conflated the MCR 2.116(C)(7) standard with the "genuine issue of material fact" standard of MCR 2.116(C)(10), as if there was no difference in application of these two court rules. This conflation resulted in the conclusion that a pleaded, but not necessarily proved, claim against the government is sufficient to survive the summary disposition. The Court of Appeals concluded:

> Because [MDOT] did not present any admissible evidence to rebut [Plaintiff's] allegations that the area of the highway at issue was part

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[120] *Greenfield Construction Co v State Highway Dep't*, 402 Mich 172, 194; 261 NW2d 718 (1978) (stating that "it is well settled that the circuit court is without jurisdiction to entertain an action against the State of Michigan unless that jurisdiction shall have been acquired by legislative consent). See also *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984) and *Manion v State Highway Comm'r*, 303 Mich 1; 5 NW2d 527 (1942).

[121] *Ballard*, 457 Mich at 568.

[122] *Mack*, *supra* at 200-02.

[123] *Odom*, 482 Mich at 478-79.

> of the improved portion of the highway designed for vehicular travel, [MDOT] failed to establish that it was entitled to summary disposition under MCR 2.116(C)(7). Indeed, as we noted in our prior opinion, the only admissible evidence submitted by the parties actually supported an inference that the lanes at issue were in-fact designed for vehicular travel. See *Yono*, 299 Mich App at 114. Because [MDOT] failed to contradict [Plaintiff's] allegations by presenting evidence sufficient to establish that the area of M-22 at issue here fell outside of the improved portion of the highway designed for vehicular travel, the trial court did not err when it denied the Department's motion for summary disposition under MCR 2.116(C)(7).[124]

This turns the government's inherent immunity on its head. Now, rather than the government being immune from *suit*, the government is being required to prove it is *not immune*. If this is the standard, then any well-pled allegation in a complaint setting forth the parameters of a statutory exception to immunity and factual allegations that the exception is satisfied will survive a motion for summary disposition on grounds of "immunity granted by law" under MCR 2.116(C)(7). This does nothing to preserve the inherent characteristic of governmental immunity from suit.[125]

The trial court should decide the question of whether an exception to immunity applies "as a matter of law". If the trial court rules an exception does not apply, the Court of Appeals has immediate and *de novo* reviewing authority over the case to check the merits of the trial court's decision per MCR 7.202(6)(a)(v), thereby preserving the jurisdictional principle of governmental immunity from unnecessary erosion, and, at the same time, insulating, to the greatest extent possible, the government *from suit*, as well as from liability.[126]

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[124] The Court of Appeals provides a rather cryptic footnote here, stating: "Nothing in this opinion should be understood to preclude the Department from making a properly supported motion for summary disposition at some later point."

[125] *Mack*, *supra*.

[126] MCR 7.202(6)(a)(v). See also *Walsh v Taylor*, 263 Mich App 618, 622-24; 689 NW2d 506 (2004) (stating if an appeal of right on the legal issue of whether an exception to immunity applies

Otherwise, trial courts have the discretion to allow a case to proceed against the government, or to at least prolong the government's involvement, necessarily increasing its expenditure of resources and time. In the context of actions against the government, while requiring the government to counterpoise the plaintiff's offerings may seem insignificant, application of this rule to the sheer volume of litigation likely to be spawned against the government if (1) the defect in the instant case is allowed to be deemed an "actionable defect", and (2) the government is required to factually proffer proof that the plaintiff's claim does not fall within the exception results in "death by a thousand cuts" for the governmental entities.[127] This is inconsistent with the jurisdictional view of governmental immunity and contrary to established case law, which preserves the government's preexisting and inherent immunity from suit and liability in all but a small number of cases.

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was not always available to the governmental entity "the claim of immunity could be 'effectively lost' when a plaintiff's allegations in avoidance of immunity were 'erroneously permitted to go to trial'"). This Court later affirmed this reasoning in *Watts v Nevils, et al*, 477 Mich 856, 856; 720 NW2d 755 (2006).

[127] A phrase derived from the Chinese term "*lingchi*" an archaic and particularly brutal form of execution of criminals in China. See https://en.wikipedia.org/wiki/Lingchi.

CONCLUSION

The Court of Appeals incorrectly ruled the alleged defect in the parallel parking space was an "actionable defect" under the highway exception by concluding the parallel parking space was a "highway" within the meaning of the exception. The Court of Appeals also erred by concluding the burden was on the government to prove that the "highway exception" did not apply, and that it was therefore immune from suit.

The Legislature has provided a specific definition of highway in the GTLA. By the very nature of the inherent immunity of the government from suit absent *legislative* exceptions to the contrary, only the Legislature can expand the definition of a term in the GTLA. Thus, the judiciary must strictly construe that definition to remain faithful to its duty to narrowly construe the exceptions to the government's preexisting immunity in a given case.[128] The parallel parking area in this case is, by the plain language of the exception and this Court's interpretation, *without* the improved *portion* of the highway designed for vehicular travel. On this basis, the Plaintiff's case was not stated.

Therefore, *amicus curiae* submit the decision by the Court of Appeals is contrary to the jurisdictional principle of governmental entity immunity, contrary to this Court's jurisprudence applying the proper standards when reviewing a claim against a governmental entity, and creates a pleading standard that facilitates rather than mitigates litigation against the government.

Only this Court can expand the government's immunity from suit by interpreting and applying the GTLA. And, the Court's authority in this regard is limited by the jurisdictional

[128] *Hastings*, *supra*, 1 Doug at 236.

principle of governmental immunity. Judicial constructs that broaden an exception to immunity are prohibited by the very nature of the preexisting and inherent immunity enjoyed by the state.[129]

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[129] *Grimes*, 475 Mich at 89-90.