

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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Rebecca Kik, et al.,

Plaintiffs-Appellees,

v

John-Christopher Sbraccia, et al.,

Defendants-Appellants.

Supreme Court No. 132849  
Court of Appeals No. 256419  
Chippewa Co. Case No. 04-007213-NI

and

Daniel John Wesche, et al.,

Plaintiffs-Appellants,

v

Mecosta County Road Comm'n ,

Defendant-Appellee.

Supreme Court No. 129282  
Court of Appeals No. 251641  
Mecosta Co. Case No. 03-015556-NI

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**AMICUS CURIAE BRIEF OF THE  
MICHIGAN ASSOCIATION FOR JUSTICE,  
FORMERLY THE MICHIGAN TRIAL LAWYERS ASSOCIATION**

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### **Interest of Amicus Curiae**

This Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. MAJ consists of more than 2400 member attorneys and recognizes an obligation to assist this Court on important issues of law that would affect substantially the orderly administration of justice in the trial courts of this state. This Court has invited MAJ to file this amicus curiae Brief. MAJ supports the conclusion of the Court of Appeals in *Kik v. Sbraccia*, 272 Mich.App. 388; 726 N.W.2d 450 (2006), because it is the only interpretation supported by the language of the statute.

**Counter-Statement of Question Presented**

DID THE COURT OF APPEALS IN *KIK* PROPERLY ENFORCE THE PLAIN LANGUAGE OF MCL 691.1405, WHICH DESCRIBES WHEN LIABILITY ARISES AND DOES NOT LIMIT THE DAMAGES AVAILABLE IN AN ACTION UNDER THAT SECTION?

Amicus Curiae MTLA answers, “Yes.”

## Argument

### **THE PLAIN LANGUAGE OF MCL 691.1405 DESCRIBES WHEN LIABILITY ARISES AND DOES NOT LIMIT THE DAMAGES AVAILABLE IN AN ACTION UNDER THAT SECTION.**

As this Court has said on many occasions, the plain and unambiguous language of a statute controls. *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 483; 702 N.W.2d 539 (2005) (“Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.”). Statutory language must be given its plain meaning and courts must not rewrite statutory language. *Cameron v. Auto Club Ins. Ass'n*, 476 Mich. 55, 63; 718 N.W.2d 784 (2006)(“We believe this ruling was erroneous for the most uncomplicated reason; namely, that we must assume that the thing the Legislature wants is best understood by reading what it said.”); *Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521, 526; 697 N.W.2d 895 (2005)(“When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.”)(citation omitted); *Cruz v State Farm Mut Auto Ins Co*, 466 Mich. 588, 594; 648 N.W.2d 591 (2002)(“The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written.”)(citation omitted); MCL 8.3a (“All words and phrases shall be construed and understood

according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 N.W.2d 611 (1998). The first criterion in determining intent is the specific language of the statute. *In re MCI Telecommunications Complaint*, 460 Mich 396,411; 596 N.W.2d 164 (1999).

In reading the language of a statute, this Court must give effect to every word and must read the statutory language, not in isolation, but must look at the statute as a whole. *Macomb County Prosecuting Attorney v Murphy*, 464 Mich. 149, 159; 627 NW2d 247 (2001)(“Words, however, are given meaning by context or setting,” and “We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.”)(citations omitted); *Chabre v. Page*, 298 Mich. 278, 283; 299 N.W. 82 (1941)(“The rule is no less elementary that effect must be given, if possible, to every word, sentence, and section. To that end, the entire act must be read, and the interpretation to be given to a particular word in one section, arrived at after due consideration of every other section, so as to produce, if possible, a harmonious and

consistent enactment as a whole.”)(quoting *City of Grand Rapids v. Crocker*, 219 Mich. 178, 182, 189 N.W. 221 (1922)); *City of Manistee v. Employment Relations Com'n*, 168 Mich.App. 422; 425 N.W.2d 168 (1988); *Michigan Humane Soc. v. Natural Resources Com'n*, 158 Mich.App. 393, 401; 404 N.W.2d 757 (1987); see also *Apsey v. Memorial Hosp.*, 477 Mich. 120, 144-45; 730 N.W.2d 695 (2007)(Markman, J., dissenting).<sup>1</sup>

In this case, the Court of Appeals in *Kik* properly construed the plain language of the governmental immunity act in accordance with the principles set forth previously. The starting point is Section 7 of the act. MCL 691.1407 is entitled in part “Immunity from **tort liability**” and provides in relevant part: “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.” MCL 691.1407(1)(emphasis added). The plain language of the statute grants immunity from liability, except in certain circumstances. Nowhere

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<sup>1</sup>The governmental units and their amici assert that the grant of immunity in MCL 691.1407 is to be construed broadly and the exceptions narrowly. This judicial gloss over the years is not supported by the plain language of the statute and is contradictory to the pronouncements of this Court in recent years.

in the language of the statutes does it talk about damages or the measurement of damages.

The specific exception at issue here is found in MCL 691.1405: “Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.” Again, this section is worded in terms of liability and sets forth the circumstances in which liability arises. Liability occurs where there is “bodily injury” or “property damage” from “negligent operation” of a motor vehicle. Bodily injury and property damage are necessary prerequisites to liability. However, the language does not delineate limitations on the measurement of damages resulting from the liability. The plain language describes the liability situation and prerequisites. The plain language of MCL 691.1407, in describing immunity from tort liability, leaves the issue of damages and their measurement to traditional sources (*i.e.*, the common law of torts, as modified by specific statutes such as the Wrongful Death Act, MCL 600.2922).

This distinction between liability and damages (indeed, the distinction between “injury” and damages) is rooted in our jurisprudence. In *Universal Underwriters Ins.*

*Co. v. Kneeland*, 464 Mich. 491; 628 N.W.2d 491(2001), Justice Corrigan recognized this long-held distinction:

The general term “damages” could refer to any harm caused to a third party's person or property, *i.e.*, it could reach damages for which no-fault insurance coverage is mandatory. *See, e.g.*, M.C.L. § 500.3107, 500.3121. A shift of liability to that extent might contravene the no-fault act. Cf. *State Farm v. Enterprise Leasing*, 452 Mich. 25, 36, 549 N.W.2d 345 (1996).

Another reasonable interpretation of the contract is available, however. Black's Law Dictionary (6th ed.) defines “damages” as “[a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered a loss, detriment, or injury, whether to his person, property, or rights....” The parties may reasonably have intended to limit the meaning of the word “damages” to losses for which a legal right of recovery is available.

464 Mich. at 496-97 (footnote omitted); *Ferguson v. Pioneer State Mutual Insurance Company*, 273 Mich.App. 47; 731 N.W.2d 94 (2006)(citing *Universal Underwriters, supra*); *Duronio v. Merck & Co., Inc.*, 2006 WL 1628516, \*4 (Mich.App., June 13, 2006)(unpublished per curiam)(“The word ‘damage’ is defined in Random House Webster's College Dictionary (1997) as ‘injury or harm that reduces value, usefulness, etc.’, while ‘damages’ refers to ‘the estimated money equivalent for loss or injury sustained.’”).

The distinction is set forth in other contexts as well, including the bifurcation of trials between liability portions and damages portions. MCR 2.505(B)(“For convenience or to avoid prejudice, or when separate trials will be conducive to

expedition and economy, the court may order a separate trial of one or more claims, cross-claims, counterclaims, third-party claims, or issues.”); *Dekker v. Lubbehusen*, 114 Mich.App. 270; 318 N.W.2d 653 (1982); *Heritage Broadcasting Co. v. Wilson Communications, Inc.*, 170 Mich.App. 812; 428 N.W.2d 784 (1988); *Merkur Steel Supply Inc. v. City of Detroit*, 261 Mich.App. 116; 680 N.W.2d 485 (2004); *Village Green of Lansing v. Board of Water and Light*, 145 Mich.App. 379; 377 N.W.2d 401 (1985); *Jones v. East Lansing-Meridian Water and Sewer Authority*, 98 Mich.App. 104, 110-111; 296 N.W.2d 202 (1980).

The distinction is recognized in the Model Civil Jury Instructions (separate set of instructions on negligence and damages) and in insurance policies. *Hawkeye-Security Ins. Co. v. Vector Const. Co.*, 185 Mich.App. 369, 373; 460 N.W.2d 329 (1990)(“[Comprehensive general liability coverage] includes coverage for all sums which Vector becomes legally obligated to pay as damages arising from bodily injury or property damage “caused by an occurrence.”).

The argument advanced by the governmental units and their *amici* distorts the plain language of the statute at issue and would add limiting language that is not present. The language provides that there is liability for bodily injury from negligent motor vehicle operation. There is no question in these cases that bodily injuries occurred. There is nothing in the statute that says only those who suffer bodily injury

may recover damages. There is nothing in the statute that says traditional tort measurements of damages (whether common law, statutory, or both) are inapplicable.<sup>2</sup>

The Legislature knows how to specify a limitation on available damages, such as the medical malpractice caps. *See* MCL 600.1483. In this case, the addition by the judiciary of language regarding damages would constitute an improper usurpation of legislative authority. Such a result would run counter to this Court's decision in *Jenkins v. Patel*, 471 Mich. 158; 684 N.W.2d 346 (2004), and the principles set forth therein. In that case, this Court recognized that a medical malpractice claim can include loss of society and companionship under the Wrongful Death Act, under a statute that specifically limited available damages. The statute at issue here contains no such limiting language. The notion that the types of damages specified in the Wrongful Death Act are not available under MCL 691.1405 would render the statutes meaningless and allow governmental units immunity where they cause the ultimate bodily injury, *i.e.*, death. The plain language of the statutes does not support such an interpretation.

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<sup>2</sup>Indeed, the governmental units and their *amici* cannot explain what measurement of damages would be used. Under their logic, pain and suffering, economic losses, etc. would not be recoverable because they are not "bodily injury" itself. This makes no logical sense and renders the statutory language useless.

**Conclusion**

For all the aforementioned reasons, MAJ urges this Court to affirm in *Kik* and to reverse in *Wesche* on the loss of consortium issue.

Respectfully submitted,



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Dated:        October 3, 2007

**PROOF OF SERVICE**

Two copies of the foregoing Amicus Curiae Brief of the Michigan Association for Justice and this Proof were served on October 3, 2007 by first class mail, postage prepaid, on each of the following (and sent via email as well):

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