

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
O'Connell, P.J., Sawyer and Murphy, J.J.

REBECCA KIK AND ROBERT KIK,
INDIVIDUALLY, AND AS CO-PERSONAL
REPRESENTATIVES OF THE ESTATE OF
SHARON ANN LEELANI KIK,

Supreme Court No. 132849

Plaintiffs-Appellees,

v

JOHN-CHRISTOPHER SBRACCIA, KINROSS
CHARTER TOWNSHIP EMS, AND KINROSS
CHARTER TOWNSHIP,

Court of Appeals No. 256419

Chippewa County Circuit
Court No. 04-7213-NI

Defendants-Appellants.

AND

DANIEL JOHN WESCHE and
BEVERLY WESCHE,

Supreme Court No. 129282

Plaintiffs-Appellants,

Court of Appeals No. 251641

v

MECOSTA COUNTY ROAD COMMISSION,

Defendant-Appellant.

Mecosta CC: 03-015556-NI

**BRIEF OF AMICUS ATTORNEY GENERAL MICHAEL A. COX IN SUPPORT OF
DEFENDANT-APPELLEE'S POSITION IN WESCHE V MECOSTA COUNTY ROAD
COMMISSION AND DEFENDANTS-APPELLANTS' POSITION IN KIK V SBRACCIA**

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Mark E. Donnelly (P39281)
Ann M. Sherman (P67762)
Assistant Attorneys General
Attorneys for Attorney General
Michael A. Cox
P.O. Box 30736
Lansing, Michigan 48909
(517) 373-6434

Dated: July 18, 2007

TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	3
INTRODUCTION	8
ARGUMENT	12
I. The plain language of MCL 691.1405 clearly and unequivocally bars claims for non-bodily injuries such as loss of consortium.	12
A. This Court must narrowly construe the exception to governmental immunity.	12
1. The history of the Governmental Tort Liability Act demonstrates that the Legislature did not intend the language of the exceptions to governmental immunity to be read expansively.	12
a. Since <i>Ross v Consumers Power</i> , this Court has clearly and consistently given a narrow interpretation to the exceptions.....	13
b. Where the plain language of the exception restricts liability, it need not expressly exclude specific types of damages.....	17
2. Under the plain and ordinary meaning of "bodily injury" in the motor vehicle exception, governmental agencies are liable only for bodily injury and property damage.....	18
a. The most narrow definition of "bodily injury" is physical damage to the person's body.....	19
b. The grammatical context of "bodily injury" indicates that a governmental agency assumes liability only for direct injury to the body.	19
3. Liability for bodily injury is not a threshold beyond which a loss of consortium claim is compensable.	20
a. The Legislature did not expressly include liability for any damage arising from bodily injury.....	21
b. The Legislature does not have to expressly exclude specific types of damages or actions already restricted by the plain language.	22
4. <i>Endykiewicz v State Highway Commission</i> does not support the conclusion that the language of the motor vehicle exception encompasses claims for loss of consortium.....	22
a. <i>Endykiewicz's</i> analysis of the highway exception is of limited value in analyzing the motor vehicle exception.....	23

b.	<i>Endykiewicz</i> should be further clarified or overruled because its governmental immunity analysis is outdated.....	25
II.	The Wrongful Death Act does not expand the motor vehicle exception's limited waiver of immunity.....	28
A.	The motor vehicle exception does not expressly expand the government's limited immunity for wrongful death actions.....	29
B.	Where the motor vehicle exception would have been a substantive limitation had the decedent survived and brought an action, it is also a substantive limitation on loss of consortium claims under the Wrongful Death Act.	29
1.	Beneficiaries can collect only the damages that the decedent could have collected had he survived.....	30
2.	The wrongful death action must be brought in the name of the decedent's personal representative, is a property right belonging to the decedent (not the beneficiary), and accrues at the time of the wrongful action.	31
3.	The wrongful death claim is not free from the decedent's arbitration or other employment agreements.	33
C.	The Wrongful Death Act accommodates the provisions of other statutes, including the limitations set forth in the Governmental Tort Liability Act.....	34
D.	The three-judge panel in <i>Kik I</i> erred in relying on the analysis in <i>Endykiewicz v State Highway Commission's</i> outdated interpretation of the Wrongful Death Act.	37
1.	The <i>Endykiewicz</i> Court ignored binding precedent when it defined a wrongful death action as a new action rather than an action of the decedent that "survives by law.".....	38
2.	<i>Endykiewicz</i> should be further clarified or overruled because its Wrongful Death Act analysis is incorrect and outdated.	39
III.	Even if a governmental officer, agent, or employee is potentially subject to personal liability for loss of consortium under 691.407(2), liability cannot attach unless a plaintiff first proves gross negligence that is "the proximate cause" of the plaintiff's injuries.....	39
A.	Gross negligence.....	40
B.	"The" proximate cause.....	41
	CONCLUSION.....	44

INDEX OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Ballard v Southwest Detroit Hosp,</i> 119 Mich App 814, 327; NW2d 370 (1982).....	33
<i>Breckon v Franklin Fuel Co,</i> 383 Mich 251; 174 NW2d 836 (1970).....	28, 31
<i>Carr v Gen'l Motors Corp,</i> 425 Mich 313; 389 NW2d 686 (1986).....	18
<i>Chandler v Muskegon County,</i> 467 Mich 315; 652 NW2d 244 (2002).....	14
<i>Chomic v United States,</i> 377 F3d 607 (CA 6, 2004).....	30
<i>Coleman v Kootsillas,</i> 456 Mich 615; 575 NW2d 527 (1998).....	16
<i>Comm'r of Ins v Arcilio,</i> 221 Mich App 54; 561 NW2d 412 (1997).....	32
<i>Cooper v Wade,</i> 461 Mich 1201; 597 NW2d 837 (1999).....	41
<i>Cooper v Washtenaw County,</i> 270 Mich App 506; 715 NW2d 908 (2006).....	42
<i>Costa v Cmty Emergency Med Servs,</i> 475 Mich 403; 716 NW2d 236 (2006).....	12, 42
<i>Crystal v Hubbard,</i> 414 Mich 297; 324 NW2d 869 (1982).....	28
<i>Curtis v Detroit,</i> 253 Mich App 555; 655 NW2d 791 (2002).....	42
<i>Dedes v Asch,</i> 446 Mich 99; 521 NW2d 488 (1994).....	14
<i>Donajkowski v Alpena Power Co,</i> 460 Mich 243; 596 NW2d 574 (1999).....	21

<i>Eide v Kelsey-Hayes Co,</i> 431 Mich 26; 427 NW2d 488 (1988).....	20
<i>Endykiewicz v State Highway Comm'n,</i> 414 Mich 377; 324 NW2d 755 (1982).....	passim
<i>Fiser v City of Ann Arbor,</i> 417 Mich 461; 339 NW2d 413 (1983).....	14
<i>Frontier Ins Co v Blaty,</i> 454 F3d 590 (CA 6, 2006).....	30
<i>Gregg v State Hwy Dep't,</i> 435 Mich 307; 458 NW2d 619 (1990).....	16
<i>Grimes v Mich DOT,</i> 475 Mich 72; 715 NW2d 275 (2006).....	16
<i>Grimm v Ford Motor Co,</i> 157 Mich App 633 (1986)	32
<i>Grubaugh v City of St Johns,</i> 384 Mich 165; 180 NW2d 778 (1970).....	27, 32
<i>Hadfield v Oakland Co Drain Comm'r,</i> 430 Mich 139; 422 NW2d 205 (1988).....	17
<i>Haque v Oakland Probate Judge,</i> 237 Mich App 295; 602 NW2d 622 (1999).....	30
<i>Hardy v County of Oakland,</i> 461 Mich 561; 607 NW2d 718 (2000).....	22, 34
<i>Hardy v Maxheimer,</i> 429 Mich 422; 416 NW2d 299 (1987).....	10, 30, 32, 38
<i>Hawkins v Reg'l Med Labs, PC,</i> 415 Mich 420; 329 NW2d 729 (1982).....	32
<i>Herbert v Cole,</i> 115 Mich App 452; 321 NW2d 388 (1982).....	31
<i>In re Thornton,</i> 192 Mich App 709; 481 NW2d 828 (1992).....	32
<i>Jenkins v Patel,</i> 471 Mich 158; 684 NW2d 346 (2004).....	35

<i>Johnson v Simongton,</i> 184 Mich App 186, 457 NW2d 129 (1990).....	33
<i>Kik v Sbraccia,</i> 268 Mich App 690; 708 NW2d 766 (2005).....	passim
<i>Kik v Sbraccia,</i> 272 Mich App 388; 726 NW2d 450 (2006).....	9, 23, 27, 39
<i>Kruger v White Lake Township,</i> 250 Mich App 622; 648 NW2d 660 (2002).....	42
<i>Lansing v Lansing Twp,</i> 356 Mich 641; 97 NW2d 804 (1959).....	18
<i>Love v City of Detroit,</i> 270 Mich App 563; 716 NW2d 604 (2006).....	42
<i>Mack v Detroit,</i> 467 Mich 186; 649 NW2d 47 (2002).....	12
<i>Maiden v Rozwood,</i> 461 Mich 109; 597 NW2d 817 (1999).....	40
<i>Maiuri v Sinacola Constr Co,</i> 382 Mich 391; 170 NW2d 27 (1969).....	passim
<i>Nawrocki v Macomb County Rd Comm,</i> 463 Mich 143; 615 NW2d 702 (2000).....	passim
<i>Neal v Wilkes,</i> 470 Mich 661; 685 NW2d 648 (2004).....	21
<i>Pagano v Dep't of State Highways,</i> 76 Mich App 569; 157 NW2d 172 (1977).....	36, 37
<i>Paige v City of Sterling Heights,</i> 476 Mich 495; 720 NW2d 219 (2006).....	42
<i>Pohutski v City of Allen Park,</i> 465 Mich 675; 641 NW2d 219 (2002).....	10, 16
<i>Reardon v Dep't of Mental Health,</i> 430 Mich 398; 424 NW2d 248 (1988).....	13, 15
<i>Renny v Michigan Dep't of Transp,</i> Michigan Supreme Court No. 131086 (July 11, 2007).....	15, 26

<i>Robinson v Detroit</i> , 462 Mich 439; 613 NW2d 307 (2000).....	passim
<i>Rogers v Detroit</i> , 457 Mich 125; 579 NW2d 840 (1998).....	14
<i>Ross v Consumers Power (On Rehearing)</i> , 420 Mich 567; 363 NW2d 641 (1984).....	11, 13
<i>Scheurman v Dep't of Transp</i> , 434 Mich 619; 456 NW2d 66 (1990).....	17, 26
<i>Sewell v Southfield Pub Schs</i> , 456 Mich 670; 576 NW2d 153 (1998).....	26
<i>Shinholster v Adams</i> , 471 Mich 540; 685 NW2d 275 (2004).....	36, 37
<i>Smith v Detroit</i> , 388 Mich 637; 202 NW2d 300 (1972).....	28, 31
<i>Washington v Jones</i> , 386 Mich 466; 192 NW2d 234 (1971).....	19
<i>Wesche v Mecosta County Rd Comm'n</i> , 267 Mich App 274; 705 NW2d 146 (2005).....	passim
<i>Westfall v Venton</i> , 1 Mich App 612, 137 NW2d 757 (1965).....	31
<i>Williams v Detroit</i> , 364 Mich 231; 111 NW2d 1 (1961).....	13
<i>Williamson v Dept of Mental Health</i> , 176 Mich App 752; 440 NW2d 97 (1989).....	26
<i>Wycko v Gnodtke</i> , 361 Mich 331; 105 NW2d 118 (1960).....	28
Statutes	
MCL 1407(2)(c).....	41
MCL 500.3135(1).....	21
MCL 600.1483.....	36
MCL 600.2169(1)(a).....	36
MCL 600.2912b.....	35

MCL 600.2912d.....	35
MCL 600.2921	29
MCL 600.2922(1)	29
MCL 600.2922(6)	8, 44
MCL 600.5852.....	38
MCL 600.5856(d)	35
MCL 601.1407	18
MCL 691.1402.....	15, 23, 24, 36
MCL 691.1405	passim
MCL 691.1406.....	15, 16
MCL 691.1407	passim
MCL 691.1407(1)	13
MCL 691.1407(2)	passim
MCL 691.1407(2)(c).....	8, 40
MCL 691.2922(2)	31
 Other Authorities	
American Heritage Dictionary of the English Language (1976).....	19
Black's Law Dictionary (6th ed 1990)	42
Black's Law Dictionary 764 (8th ed 1999)	42
Black's Law Dictionary 789 (7th ed 1999)	19
Governmental Tort Liability Act, MCL 691.1401 <i>et seq.</i>	passim
No-Fault Act, MCL 500.3135.....	34
Wrongful Death Act, MCL 600.2922.....	passim

INTRODUCTION

On May 23, 2007, this Court granted Plaintiffs' application for leave to appeal in *Wesche v Mecosta County Road Commission* (Docket No. 129282) on the following issue: whether MCL 691.1405's exception to governmental immunity permits the spouse of a person who sustains bodily injury as a result of the negligent operation of a motor vehicle owned by a governmental agency to recover damages for loss of consortium.

On the same day, this Court also granted Defendants' application for leave to appeal in *Kik v Sbraccia* (Docket No. 132849). The Court limited the issues to: 1) whether MCL 691.1405's exception to governmental immunity permits the spouse of a person who sustains bodily injury as a result of the negligent operation of a motor vehicle owned by a governmental agency to recover damages for loss of consortium; 2) whether MCL 691.1405, providing that governmental agencies "shall be liable for bodily injury and property damage resulting from the negligent operation . . . of a motor vehicle" owned by a governmental agency, limits the damages recoverable in a wrongful death action, as enumerated in MCL 600.2922(6); and, (3) in light of MCL 691.1405's waiver of governmental immunity for bodily injury and property damage resulting from the negligent operation of a motor vehicle owned by a governmental officer, agent, or employee of the governmental agency, whether a governmental officer, agent, or employee whose alleged gross negligence causes death or bodily injury is subject to personal liability for loss of consortium pursuant to MCL 691.1407(2)(c).

These issues arise from three separate Opinions of the Michigan Court of Appeals. The first is a published Opinion in *Wesche v Mecosta County Road Commission*, holding that loss of consortium damages are not recoverable under the motor vehicle exception.¹ The second is *Kik v Sbraccia (Kik I)*, wherein a unanimous panel opined that the motor vehicle exception to

¹ *Wesche v Mecosta County Rd Comm'n*, 267 Mich App 274; 705 NW2d 146 (2005).

immunity does not bar a wrongful death action where the plaintiff seeks to recover damages for loss of society and companionship of the decedent, but reversing the decision to permit Plaintiffs' loss of consortium claim because the Court was bound by its earlier decision in *Wesche*.² The third is an Opinion and Order of a special panel of the Court of Appeals, which was convened to resolve the conflict created by the *Kik I* and *Wesche* decisions.³ In a 4-3 Opinion, the conflict panel adopted the reasoning of Part III of the panel in *Kik I* without further analysis, and reversed Part III of the *Wesche* Opinion.⁴ The dissenting judges of the special panel would have adopted the reasoning in *Wesche*.⁵

The resolution of these important legal issues will have a significant effect on governmental agencies within this State. For this reason, the Attorney General for the State of Michigan sought amicus status at the application phase of these cases and has accepted the Court's invitation to further participate as amicus curiae in this consolidated case. Arguments I and III apply to the issues in both *Wesche* and *Kik*. Argument II applies to *Kik* only.

Governmental immunity, and more specifically, the statutory interpretation of the language of the exceptions to the Governmental Tort Liability Act (GTLA), is of vital importance to the State in its defense of State departments, agencies, and personnel. Governmental agencies and employees are regularly named as defendants in suits arising from motor vehicle accidents, and are often sued by the injured person's spouse for loss of consortium. A holding that consortium damages are recoverable under the motor vehicle exception, and that the wrongful death statute trumps the limitations provided by the plain language of the exception, would greatly expand the State's liability in these cases.

² *Kik v Sbraccia*, 268 Mich App 690, 695; 708 NW2d 766 (2005) (*Kik I*) (citing *Wesche*, 267 Mich App at 274).

³ *Kik v Sbraccia*, 272 Mich App 388; 726 NW2d 450 (2006) (*Kik II*).

⁴ *Kik II*, 272 Mich App at 391.

⁵ *Kik II*, 272 Mich App at 391 (Wilder, J., dissenting).

The statutory language of the motor vehicle exception does not demonstrate intent by the Legislature to waive governmental immunity for loss of consortium claims. Under the exception's plain language, a governmental agency is liable only for bodily injury and property damage. Loss of consortium claims do not involve bodily injury, and derive only from the spouse's injury rather than from physical harm to the body of the person injured by the governmental employee's negligence. The phrase "shall be liable for bodily injury and property damage" as contained in the motor vehicle exception also does not create a mere threshold beyond which a derivative claim may be brought or a plaintiff may otherwise recover for any damages flowing from bodily injury or property damage. Had the Legislature intended this result, it could have so indicated. Since it did not, however, courts may not speculate about whether this was the Legislature's unstated purpose.⁶

Assuming this Court agrees that the motor vehicle exception does not allow recovery for non-bodily injury, neither the plain language of the motor vehicle exception nor the plain language of the Wrongful Death Act expands the motor vehicle exception's limited waiver of immunity for bodily injury and property damage in a wrongful death action. According to this Court's jurisprudence, a claim under the Wrongful Death Act is that it is the underlying claim that would have belonged to the decedent if the decedent had survived.⁷ The decedent's claim "survives by law" and vests by statute in the wrongful death beneficiaries who are permitted to collect damages through the personal representative of the decedent's estate. The Wrongful Death Act does not, therefore, permit a beneficiary of a decedent's estate to collect greater damages than the decedent would have been permitted to recover had he survived. Whatever

⁶ *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (stating that courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature).

⁷ See *Hardy v Maxheimer*, 429 Mich 422, 339-40 n 17; 416 NW2d 299 (1987).

substantive limits on recovery the decedent would have encountered will also be encountered by the representative in the wrongful death action. Just as a decedent would have been prohibited from recovering damages for loss of consortium—a non-bodily injury—under the motor vehicle exception, so, too, are beneficiaries of the decedent's estate prohibited from recovering damages for loss of consortium through an action brought by a personal representative of the estate.

Allowing recovery for loss of consortium under the motor vehicle exception to governmental immunity, even if only in wrongful death actions, far exceeds the Legislative intent as embodied in the plain language of the exception and erodes this Court's mandate that exceptions to immunity be narrowly construed.⁸ Further, as a practical matter, removing the Legislature's intended—and clearly expressed—limitation on liability for the negligent operation of a government-owned motor vehicle will result in a significant cost to the taxpayers of Michigan.

Applying these same rules, it is clear that although MCL 691.1407(2) does not contain the same "bodily injury or property damage" limitation contained in § 1405, plaintiffs may not recover any damages of any kind under this provision without first proving gross negligence that is the proximate cause as defined and understood by the plain language of the statute and this Court's caselaw precedent.

⁸ *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 593-595, 622; 363 NW2d 641 (1984).

ARGUMENT

I. **The plain language of MCL 691.1405 clearly and unequivocally bars claims for non-bodily injuries such as loss of consortium.**

Under the plain language of the motor vehicle exception, MCL 691.1405, a governmental agency is "liable for bodily injury and property damage" resulting from the negligent operation of a motor vehicle.⁹ The Legislature used words the plain meaning of which does not encompass recovery for non-bodily injury such as loss of consortium. The Legislature did not, therefore, waive its broad grant of immunity for common-law loss of consortium claims.

A. **This Court must narrowly construe the exception to governmental immunity.**

This Court has repeatedly observed that governmental immunity legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated differently."¹⁰

This Court has also observed that "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."¹¹

1. The history of the Governmental Tort Liability Act demonstrates that the Legislature did not intend the language of the exceptions to governmental immunity to be read expansively.

As this Court recently recognized in *Costa v Community Emergency Medical Services*, "the sequence of the judicial and legislative events" that form the backdrop of the Governmental Tort Liability Act (GTLA)¹² underscores "the primacy of governmental immunity."¹³ Governmental immunity is "'a characteristic of government" that was historically recognized at

⁹ MCL 691.1405.

¹⁰ *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (citation omitted).

¹¹ *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2002).

¹² Governmental Tort Liability Act, MCL 691.1401 *et seq.*

¹³ *Costa v Cmty Emergency Med Servs*, 475 Mich 403, 410 n 2; 716 NW2d 236 (2006) (quoting *Mack*, 467 Mich at 202).

common law until it was abrogated by this Court in *Williams v Detroit*.^{14 15} When the Legislature enacted the GTLA, it reinstated and preserved this characteristic.¹⁶

As a general rule, the GTLA provides that a governmental entity is immune from tort liability for actions that accrue while it is engaged in the performance of a governmental function.¹⁷ This immunity, however, is subject to five statutory exceptions, one of which is the motor vehicle exception at issue in both *Wesche v Mecosta County Road Commission* and *Kik v Sbraccia*.¹⁸ It is clear from the circumstances surrounding the enactment of the GTLA that the Legislature did not intend an expansive reading of the language of these exceptions.¹⁹

- a. Since *Ross v Consumers Power*, this Court has clearly and consistently given a narrow interpretation to the exceptions.

This Court in *Ross v Consumer Power* redefined the application of statutory immunity to governmental entities, codified in MCL 691.1407(1).²⁰ *Ross* established the basic principle that the immunity of governmental entities is broad but the exceptions are to be narrowly drawn.²¹ In *Nawrocki v Macomb County Road Commission*, this Court reaffirmed *Ross's* mandate of narrow construction and reiterated its purpose: to create a "cohesive, uniform, and workable set of rules which will readily define the injured party's rights and the governmental agency's liability."²²

Drawing on this basic principle, this Court has consistently interpreted the language of the five exceptions to governmental immunity quite narrowly. For example, in *Robinson v City*

¹⁴ *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961).

¹⁵ *Costa*, 475 Mich at 410 n 2 (citing *Mack*, 467 Mich at 202 n 18).

¹⁶ *Costa*, 475 Mich at 410 n 2 (citing *Mack*, 467 Mich at 202).

¹⁷ *Reardon v Dep't of Mental Health*, 430 Mich 398, 406-407; 424 NW2d 248 (1988) (citing MCL 691.1407; MSA 3.996(107)).

¹⁸ See *Ross*, 420 Mich at 593-595, 622.

¹⁹ See *Reardon*, 430 Mich at 409 (circumstances surrounding the enactment of the GLTA persuaded the court that the Legislature did not intend an expansive reading of the public building exception).

²⁰ *Ross*, 420 Mich at 591.

²¹ *Ross*, 420 Mich at 618.

²² *Nawrocki v Macomb County Rd Comm*, 463 Mich 143, 148-149; 615 NW2d 702 (2000).

of *Detroit*, this Court construed the phrase "resulting from" as used within the motor vehicle exception.²³ That exception imposed liability for a plaintiff's injuries "resulting from" the negligent operation of a government vehicle. The Court first noted that the motor vehicle exception must be narrowly construed. Applying the required narrow construction, the Court then held that a plaintiff's injuries did not "result from" the operation of a motor vehicle where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object.²⁴ This holding specifically overruled the Court's earlier holding in *Fiser v City of Ann Arbor*²⁵ that a police officer's pursuit of a fleeing vehicle could fall under the motor vehicle exception as the "negligent operation of a motor vehicle," even where the police vehicle had no physical contact with the fleeing car, another vehicle, or object.²⁶ Applying the same rule of narrow construction, the *Robinson* Court also rejected its earlier holding in *Rogers v Detroit*²⁷ that "negligent operation" of a motor vehicle encompasses not only the pursuit itself, but also a police officer's decision to commence the pursuit.²⁸ Likewise, the *Robinson* Court overruled *Dedes v Asch*²⁹ by distinguishing the Legislature's use of the word "the" rather than "a" and thus holding that the phrase "the proximate cause" as used in the employee provision of the GTLA, MCL 691.1407(2), means the "one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'"³⁰ In giving meaning to the

²³ *Robinson*, 462 Mich at 445-446.

²⁴ *Robinson*, 462 Mich at 445; see also *Chandler v Muskegon County*, 467 Mich 315; 652 NW2d 244 (2002).

²⁵ *Fiser v City of Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983).

²⁶ *Robinson*, 462 Mich at 445, 453.

²⁷ *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998).

²⁸ *Robinson*, 462 Mich at 445, 453, 457.

²⁹ *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), overruled by *Robinson*, 462 Mich at 439.

³⁰ *Robinson*, 462 Mich at 459-460.

specific language chosen by legislature, the court rejected the application of traditional tort law theories of causation.³¹

Other examples of the unequivocal application of this rule of narrow construction are found in the Court's interpretation of the public building exception, MCL 691.1406. Very recently, this Court in *Renny v Michigan Dept of Transportation* held that liability under the public building exception may not rest on a claim of defective design and may only be predicated on a failure to "repair and maintain" the building.³² Similarly, this Court in *Reardon v State* held that the government is liable for injuries caused by a dangerous or defective condition "of" the building but not for injuries "in" the building, the broader application previously given the exception.³³ The *Reardon* Court noted that the Legislature's use of the terms "repair" and "maintain," and its choice of the phrase "dangerous or defective condition of a public building"—specifically, its choice of the word "of" rather than "in"—indicated the Legislature's intent that the exception apply only where the physical condition of the building itself causes the injury.³⁴ The Court supported its conclusion by noting the "broad scope of governmental immunity and the concomitant narrowness of the exceptions."³⁵

Similarly, in *Nawrocki*, the Court interpreted the language of MCL 691.1402, the highway negligence exception, as creating only one exception to governmental tort immunity, that being the breach of the duty to repair and maintain public highways.³⁶ The Court rejected the invitation to create a second exception outside the duty to maintain and repair the highway.³⁷

³¹ *Robinson*, 462 Mich at 462.

³² *Renny v Michigan Dep't of Transp*, Michigan Supreme Court No. 131086 (July 11, 2007).

³³ *Reardon*, 430 Mich at 410.

³⁴ *Reardon*, 430 Mich at 409-410.

³⁵ *Reardon*, 430 Mich at 411.

³⁶ *Nawrocki*, 463 Mich at 160.

³⁷ *Nawrocki*, 463 Mich at 160.

Recently, in *Grimes v Michigan Department of Transportation*, this Court once again examined the language of the highway negligence exception, and extended the *Nawrocki* holding by overruling *Gregg v State Highway Department's*³⁸ conclusion that a shoulder is "designed for vehicular travel."³⁹ The Court noted that *Gregg's* holding was both internally inconsistent and appealed to inappropriate methods of statutory construction.⁴⁰ Consistent with the plain language of the highway exception and the applicable rules of statutory construction, the Court concluded that the Legislature limited the highway exception to the segment of the "improved portion of the highway" that is "designed for vehicular travel," which does not include the shoulder.⁴¹ In reaching this conclusion, the Court adopted a narrow view of the term "travel" that excludes the shoulder from the highway exception.⁴²

This Court has also applied a narrowing construction to the proprietary function exception, MCL 691.1406. For example, in *Coleman v Kootsillas*, the Court concluded that the fact that a governmental agency produces a pecuniary profit is not conclusive evidence of a proprietary function.⁴³ Rather, the Court determined that the intended purpose of the activity, whether a profit is actually generated, where the profit is deposited and how it is used, are important considerations in determining when a government unit is engaged in a proprietary function.⁴⁴

Finally, in *Pohutski v Allen Park*, this Court held that there are no common law exceptions to immunity.⁴⁵ In so doing, this Court overruled *Hadfield v Oakland County Drain*

³⁸ *Gregg v State Hwy Dep't*, 435 Mich 307; 458 NW2d 619 (1990).

³⁹ *Grimes v Mich DOT*, 475 Mich 72, 83; 715 NW2d 275 (2006).

⁴⁰ *Grimes*, 475 Mich at 83 (citing *Gregg*, 435 Mich at 307).

⁴¹ *Grimes*, 475 Mich at 89-90.

⁴² *Grimes*, 475 Mich at 90-91.

⁴³ *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

⁴⁴ *Coleman*, 456 Mich at 621-623.

⁴⁵ *Pohutski*, 465 Mich at 675.

*Commissioner*⁴⁶ and concluded that the plain language of the GTLA, specifically MCL 691.1407, does not permit a trespass-nuisance exception to governmental immunity.⁴⁷ The *Pohutski* Court's decision was guided by the principle of narrow construction.⁴⁸

- b. Where the plain language of the exception restricts liability, it need not expressly exclude specific types of damages.

As this Court recognized in *Scheurman v Board of County Road Commissioners*, the statutory exceptions do not stand alone, but rather, are a "part of the entire legislative scheme that defines and limits the liability of our governmental agencies."⁴⁹ An exception, while it may place limits on the government's immunity, does not necessarily place public and private tortfeasors on equal footing in the given area. Since the exceptions are to be narrowly drawn, "there must be strict compliance with the conditions and restrictions of the statute."⁵⁰ Courts cannot read into the statutory language an expansion that is not expressly stated within an exception to immunity. In other words, courts cannot expand the liability to which a governmental entity has consented.

Where the Legislature has already expressly stated the limits of the liability to which governmental agencies consent, courts cannot read the statute more expansively simply because the Legislature did not affirmatively exclude specific causes of action or liability for certain types of injuries. Requiring the Legislature to affirmatively exclude all damages and classes of persons it will not cover, rather than to include only the liability to which it will subject the governmental agency, ignores the starting place for governmental immunity analysis: the broad

⁴⁶ *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988) (holding that the recognition of the historic trespass-nuisance exception was required by the language of MCL 691.1407).

⁴⁷ *Pohutski*, 465 Mich at 690.

⁴⁸ *Pohutski*, 465 Mich at 689-90.

⁴⁹ *Scheurman v Dep't of Transp*, 434 Mich 619, 636-7; 456 NW2d 66 (1990).

⁵⁰ *Nawrocki*, 463 Mich at 158.

grant of immunity under the GTLA. The language of the motor vehicle exception to governmental immunity prohibits recovery for loss of consortium.

Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself.⁵¹ Where the unambiguous text plainly reflects the intent of the Legislature, this Court may not speculate about an unstated purpose.⁵² These rules of statutory construction are especially germane to the interpretation of the motor vehicle exception because Michigan strictly construes statutes imposing liability on the State in derogation of the common-law rule of sovereign immunity.⁵³

2. Under the plain and ordinary meaning of "bodily injury" in the motor vehicle exception, governmental agencies are liable only for bodily injury and property damage.

The motor vehicle exception to governmental immunity, MCL 691.1405, creates an exception to the otherwise broad grant of immunity conferred by MCL 691.1407⁵⁴:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation 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.

Although the Legislature did not define the term "bodily injury," the meaning of that term, as well as the grammatical significance of its placement within the exception, reveals that the language of the exception clearly and unambiguously limits liability to injury to the body.

⁵¹ *Carr v Gen'l Motors Corp*, 425 Mich 313, 317; 389 NW2d 686 (1986).

⁵² *Lansing v Lansing Twp*, 356 Mich 641, 649-650; 97 NW2d 804 (1959).

⁵³ See *Robinson*, 462 Mich at 459 (citing *Johnson v Bd of Co Comm'rs of Ontonagon Co*, 253 Mich 465; 235 NW 221 (1931)).

⁵⁴ MCL 691.1405; see also MCL 601.1407 (conferring the broadest immunity possible on governmental agencies performing governmental functions).

- a. The most narrow definition of "bodily injury" is physical damage to the person's body.

Under *Ross* and *Nawrocki*, this Court should employ the narrowest definition of "bodily injury." Black's Law Dictionary narrowly defines "bodily injury" as "physical damage to a person's body."⁵⁵ This definition limits the type of injury recoverable under the motor vehicle exception to physical damage to the body, thus excluding recovery for non-physical damage to the body. Narrowly construed, recovery is limited to direct physical damage to the body of the person injured as a result of the negligent operation of a motor vehicle. Notably, the *Kik I* panel did not disagree with *Wesche's* narrow definition of "bodily injury" as a physical injury. The panel also conceded that the term "loss of consortium" is not a physical injury.⁵⁶

- b. The grammatical context of "bodily injury" indicates that a governmental agency assumes liability only for direct injury to the body.

Even under a broader dictionary definition, the word "bodily" is an adjective meaning "[o]f, pertaining to, within, or exhibited by the body."⁵⁷ As an adjective, it qualifies or modifies the word injury.⁵⁸ "Bodily injury" is part of the prepositional phrase "for bodily injury and property damage. . . ," the word "for" being the preposition that relates the object—"injury"—to the word "liability. Under these commonly understood grammatical principles, the Legislature has limited its liability to injury of, or within, the body.

⁵⁵ Black's Law Dictionary 789 (7th ed 1999) (emphasis added).

⁵⁶ *Kik I*, 268 Mich App at 708-709; see also *Washington v Jones*, 386 Mich 466, 472; 192 NW2d 234 (1971) (citing *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960) (explaining that loss of consortium is loss of society, companionship, service, and all other incidents of the marriage relationship); 10 Am Jur Proof of Facts 2d 97 (defining "consortium" as the reciprocal rights and duties that exist between married persons).

⁵⁷ The American Heritage Dictionary of the English Language (1976).

⁵⁸ See *Robinson*, 462 Mich at 461-462 (referring to common grammar usage in our nation's classrooms in conducting a plain language analysis of the phrase "the proximate cause").

Accordingly, since a spouse's loss of consortium is neither physical injury to the body nor bodily injury to the person injured by the negligent operation of a government-owned motor vehicle, the motor vehicle exception does not contemplate loss of consortium claims. In other words, a spouse's loss of consortium claim involves neither the type of injury nor the class of persons to whom the motor vehicle exception applies.

3. Liability for bodily injury is not a threshold beyond which a loss of consortium claim is compensable.

The panel in *Kik I* concluded that "[o]nce such liability [bodily injury] is established, the statute [motor vehicle exception] is silent as to damages, meaning that the plaintiff may recover whatever damages arise from the bodily injury."⁵⁹ This erroneous conclusion treats the clear limitations of the exception as a mere threshold beyond which any damages arising from bodily injury are recoverable. Neither the plain language of the statute nor this Court's mandate that the exception be narrowly construed supports this illogical interpretation.

The motor vehicle exception does not allow for a separate cause of action that would allow for damages that are not physical damage to body of the person in question. The "liable for bodily injury and property damage" language is not a threshold for unlimited liability for derivative claims or any damages arising out of bodily injury or property damage; rather, it identifies a narrow type of liability. Under that narrow liability, a governmental agency would be liable only for physical damage to the body of the injured person, or damage to property.

Applying this limitation, a loss of consortium claim is not compensable under the motor vehicle exception. A claim for loss of consortium is one for loss of society and companionship.⁶⁰

As the Court of Appeals noted in *Wesche*, loss of consortium has been construed as a separate

⁵⁹ *Kik I*, 268 Mich App at 710.

⁶⁰ See *Eide v Kelsey-Hayes Co*, 431 Mich 26, 29; 427 NW2d 488 (1988).

cause of action in Michigan since at least 1960.⁶¹ *Wesche* also noted that damages for loss of consortium are derivative and that recovery is contingent upon the injured spouse's recovery of damages for the injury.⁶² In addition to the fact that claims for loss of consortium stand or fall with the primary claim, this Court has handled the interaction between loss of consortium claims and applicable statutory language by asking whether there is anything in the applicable act that would preclude this independent cause of action.⁶³ In the context of the motor vehicle exception, the restrictions expressed by the plain language of the exception preclude loss of consortium claims since the individual bringing the loss of consortium claim has suffered no bodily injury as a result of the negligent operation of a motor vehicle.

- a. The Legislature did not expressly include liability for any damage arising from bodily injury.

This Court has recognized that its focus must be on the words actually contained in the statute, as opposed to what is not, but possibly could have been, written into the statute.⁶⁴ Had the Legislature desired to create a threshold (bodily injury and property damage) beyond which damages are expansive, it could have done so. Statutes such as Michigan's no-fault act demonstrate that the Legislature knows how to expressly create a threshold for liability⁶⁵:

⁶¹ *Wesche*, 267 Mich App at 279 (citing *Wessels v Gardenway, Inc*, 263 Mich App 642, 648; 689 NW2d 526 (2004)); *Eide*, 431 Mich at 30 (recognizing loss of consortium as a separate cause of action).

⁶² *Wesche*, 267 Mich App at 279 (quoting *Berryman v K Mart Corp*, 193 Mich App 88, 94; 483 NW2d 642 (1992)).

⁶³ See, e.g., *Eide*, 431 Mich at 30 (holding that nothing in the Civil Rights Act precluded loss of consortium claim).

⁶⁴ *Neal v Wilkes*, 470 Mich 661, 665-66; 685 NW2d 648 (2004) (recognizing that "the language of the statute is the best source for determining legislative intent" and holding that had the Legislature meant to make vacant private land available for public use under the Recreational Land Use Act, MCL 324.73301, it could have used the words "vacant or undeveloped land of another," rather than the words "the lands of another"); *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999) ("sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not its silence").

⁶⁵ MCL 500.3135(1) (emphasis added).

A person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement.

By its plain language, the no-fault act—unlike the motor vehicle exception—expressly preserves "tort liability for non-economic loss" only if certain parameters for injury have been met.⁶⁶ In contrast, the motor vehicle exception limits liability to bodily injury. It does not make bodily injury a threshold that, once met, exposes governmental agencies to liability for other injuries.

- b. The Legislature does not have to expressly exclude specific types of damages or actions already restricted by the plain language.

Exclusion of each specific kind of injury—such as loss of consortium—is unnecessary where the plain language limits liability to bodily injury. Loss of consortium is not injury to the body of the person in question. Therefore, it would have been superfluous for the Legislature to have added specific language stating that governmental agencies are not liable for any claims arising out of bodily injury, including loss of consortium claims. Simply because the exception does not specifically exclude certain categories of damages does not mean it permits recovery of those damages. Placing on the Legislature the onus of having to expressly exclude every type of liability that is not covered, in addition to clearly expressing the liability that is covered, contravenes the mandate that the exception be narrowly construed.

4. Endykiewicz v State Highway Commission does not support the conclusion that the language of the motor vehicle exception encompasses claims for loss of consortium.

Plaintiffs in *Wesche* rely heavily on this Court's holding in *Endykiewicz v State Highway Commission*⁶⁷ to support their claim that the motor vehicle exception encompasses claims for

⁶⁶ See *Hardy v County of Oakland*, 461 Mich 561, 565; 607 NW2d 718 (2000).

⁶⁷ *Endykiewicz v State Highway Comm'n*, 414 Mich 377; 324 NW2d 755 (1982).

loss of consortium. Likewise, the panel in *Kik I* cited and relied heavily on the analysis and holding in *Endykiewicz*, an analysis adopted by the specially convened panel in *Kik II*. Plaintiffs and the *Kik* panels erred in relying on *Endykiewicz*. *Endykiewicz* held the plaintiff could recover damages for loss of society and companionship under the highway negligence exception because that exception was ambiguous and therefore did not need to be narrowly construed.⁶⁸ Despite the Court's recognition that the language of the highway negligence exception "appear[ed] to limit the class of persons who might seek recovery to persons who have actually sustained injury to person or property," it read the exception as including damages for loss of companionship and society by "one who has not suffered actual injury, but who nevertheless has the right to maintain a suit to remedy wrongs occasioned by highway defects."⁶⁹ In other words, the *Endykiewicz* Court went way beyond the language of the statute when it read the highway exception as an expansive provision defining the liability of a governmental agency, and expanded both the class of persons and the class of injuries encompassed by the exception.⁷⁰

a. *Endykiewicz's* analysis of the highway exception is of limited value in analyzing the motor vehicle exception.

As an initial matter, the *Endykiewicz* Court began its analysis of this exception by identifying its "pertinent language" as "[any] person sustaining bodily injury or damage * * * may recover the damages suffered by him."⁷¹ This language misleadingly truncates the phrase "bodily injury or damage to his property" to "bodily injury or damage," excluding words that support the interpretation that damages can be recovered only by the party who has suffered the actual injury.

⁶⁸ *Endykiewicz*, 414 Mich at 386.

⁶⁹ *Endykiewicz*, 414 Mich at 386.

⁷⁰ *Endykiewicz*, 414 Mich at 387.

⁷¹ *Endykiewicz*, 414 Mich at 385 (quoting MCL 691.1402).

The *Endykiewicz* analysis is also of limited value because the language of the highway exception differs from that of the motor vehicle exception. The language of the motor vehicle exception does not mirror that of the highway exception at issue in *Endykiewicz*. The highway exception, MCL 691.1402, states in part⁷²:

A person sustaining bodily injury or damage to his 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.

In addition to referring to “bodily injury,” the highway negligence exception indicates that a person "sustaining bodily injury or damage to his property. . . may recover the damages suffered by him.” The plain language of the highway exception does not directly link "bodily injury" to liability.

In contrast, when it crafted the motor vehicle exception, the Legislature expressly linked liability to "bodily injury," and those words are express words of limitation: "liable for bodily injury and property damage." This language limits damages in accordance with the liability to which the government has consented. The motor vehicle exception restricts recovery to direct physical damage to the body of the person injured and direct physical damage to property, and courts must strictly comply with these statutory conditions and restrictions.⁷³ Even if, however, this Court does not agree that the above-quoted language of the motor vehicle exception creates express words of limitation, Legislative silence regarding damages would not be tantamount to recovery for any type of damages and every type of claim, including loss of consortium. That would be an expansive interpretation rather than the narrow interpretation mandated by *Ross* and *Nawrocki*.

⁷² MCL 691.1402(1).

⁷³ *Nawrocki*, 463 Mich at 156.

Additionally, the *Endykiewicz* Court held that the language of the highway exception was ambiguous and, therefore, that the Court could depart from a restrictive interpretation of the language and consider the Legislature's intent to provide a remedy for those wronged by the government's failure to maintain its highways.⁷⁴ Apart from the fact that even ambiguous language in an immunity exception may not be broadly construed under *Ross* or *Nawrocki*, the motor vehicle exception shows no hint of ambiguity. Its plain language clearly limits liability both in terms of the scope of damages and the intended class of persons who may recover. Section 1405 is not silent as to damages because damages flow directly from liability, and the statutory language already contains express words of limitation as to damages: "liability for bodily injury and property damage." Where, as in § 1405, liability is limited, damages are necessarily limited in accordance with that limitation on liability. When narrowly construed, damages would not be greater than the liability to which the government has consented.

- b. *Endykiewicz* should be further clarified or overruled because its governmental immunity analysis is outdated.

The *Endykiewicz* Court's analysis of liability under the highway negligence exception stems from the outdated conclusion that exceptions to immunity may be broadly construed.⁷⁵ For example, in analyzing that exception to governmental immunity, *Endykiewicz* erroneously placed on the Legislature the onus of having to expressly exclude certain types of damage where it had already clearly restricted those damages by limiting liability⁷⁶:

Had the Legislature intended to prohibit the recovery of consequential or incidental damages which arise directly from the infliction of injury to person or property at the hands of the government, it would have affirmatively done so in specific language, utilizing express words of limitation, much as it did with

⁷⁴ *Endykiewicz*, 414 Mich at 388-389.

⁷⁵ *Endykiewicz* also presents outdated conclusions regarding the interplay between the exception and the Wrongful Death Act, as discussed in Issue II of this brief.

⁷⁶ *Endykiewicz*, 414 Mich at 389.

respect to other restrictions on liability contained in [the Governmental Tort Liability Act].

Interpreting legislative silence regarding damages as tantamount to recovery for any type of damages, including claims for loss of consortium, is clearly an expansive interpretation rather than the narrow interpretation mandated by *Ross* and *Nawrocki*.

Admittedly, this Court in *Scheurman v Department of Transportation* already modified *Endykiewicz* to the extent that *Endykiewicz* broadly construed the immunity statute.⁷⁷ But while *Scheurman* recognized that immunity exceptions must be construed narrowly, it did not go far enough because it failed to clarify how a narrow reading of the exception would have altered the Court's analysis and conclusions. Similarly, the *Kik* panels should have factored in how *Endykiewicz's* fundamental flaw of broad construction was fatal to its analysis of both the highway negligence exception and the interplay between the exception and the Wrongful Death Act.

The clearer course for those who rely on existing precedent to understand the state of the law, would have been to overrule rather than to limit *Endykiewicz*. This Court recently demonstrated the wisdom of overruling cases that conflict with a narrow construction of the exceptions to governmental immunity. After holding in *Renny v Michigan Department of Transportation* that design defects do not fall within the public building exception, this Court overruled *Sewell v Southfield Public Schools*⁷⁸ and *Williamson v Department of Mental Health*,⁷⁹ cases previously holding that design defects fall within the public building exception. In contrast, because this Court did not choose to overrule *Endykiewicz*, lower courts—such as the

⁷⁷ *Scheurman*, 434 Mich at 628 n 18.

⁷⁸ *Sewell v Southfield Pub Schs*, 456 Mich 670; 576 NW2d 153 (1998), overruled, *Renny*, Michigan Supreme Court No. 131086, slip opinion, pp 18-19.

⁷⁹ *Williamson v Dept of Mental Health*, 176 Mich App 752; 440 NW2d 97 (1989), overruled, *Renny*, Michigan Supreme Court No. 131086, slip opinion, p 16.

circuit court in *Kik*, the three-judge panel in *Kik I*, and the majority of the special panel in *Kik II*—continue to cite the *Endykiewicz* holding without recognizing that its fundamental flaw (broad construction of an immunity exception) calls into question the remainder of the Court's analysis.

Endykiewicz can also be criticized for not adequately considering the cost to the public fisc.⁸⁰ The public fisc will be severely hurt if governmental agencies become liable for a broad range of damages not contemplated by the Legislature when it drafted the clear language of the motor vehicle exception and the Wrongful Death Act. Cost to the public is one of the most significant reasons both for governmental immunity and for the narrowest possible construction of the exceptions to that immunity.

In short, when the plain language of the motor vehicle exception is given its ordinary and commonly understood meaning, and is narrowly construed in keeping with this Court's clear and consistent application of *Ross*, it does not encompass loss of consortium claims. Loss of consortium is not a bodily injury and is only an independent action brought by the spouse for physical damage to another individual's—the injured individual's—body.⁸¹ Therefore, the spouse of a person who sustains bodily injury as a result of the negligent operation of a motor vehicle owned by a governmental agency may not recover damages for loss of consortium. Whether this limitation is reasonable or unreasonable is a question for the Legislature and not for the courts.⁸²

⁸⁰ *Endykiewicz*, 414 Mich at 381-82.

⁸¹ *Wessels*, 263 Mich App at 648 (stating that a claim of loss of consortium is derivative, with recovery "contingent upon the injured spouse's recovery of damages for the injury").

⁸² See *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970) (stating that absent unconstitutionality, the reasonableness or unreasonableness of limitations imposed by statute are questions for the Legislature, not the courts).

II. The Wrongful Death Act does not expand the motor vehicle exception's limited waiver of immunity.

The Wrongful Death Act, MCL 600.2922, is an amalgamation of the remedies previously existing under the wrongful death and survival acts.⁸³ It arose in response to difficulties under the previous acts as to the remedy if death resulted but was not known to have been instantaneous. Now, where the injuries result in death, survival and wrongful death actions are brought under the Wrongful Death Act.⁸⁴ Although the question of whether the Wrongful Death Act allows for recovery for loss of consortium and other non-pecuniary loss has had a somewhat tortured history,⁸⁵ it is clear that the measure of damages in wrongful death cases includes loss of society and companionship.⁸⁶ A claim for loss of society and companionship under the Wrongful Death Act addresses compensation not for bodily injury but for the destruction of family relationships that results when one family member dies.⁸⁷

A wrongful death claim, however, is subject to the same underlying obstacles that any plaintiff would encounter—and therefore that the decedent would have encountered had he survived—in a case not involving injuries that resulted in death. One of these obstacles is governmental immunity. The Wrongful Death Act does not permit the personal representative of an estate to bring a claim and recover damages on behalf of the estate's beneficiaries where the GTLA contains no express waiver of immunity.

⁸³ *Maiuri v Sinacola Constr Co*, 382 Mich 391, 394-395; 170 NW2d 27 (1969).

⁸⁴ *Maiuri*, 382 Mich at 394-395.

⁸⁵ See *Wycko v Gnodtke*, 361 Mich 331; 105 NW2d 118 (1960) (allowing recovery beyond pecuniary loss); *Breckon v Franklin Fuel Co*, 383 Mich 251, 281; 174 NW2d 836 (1970) (overruling *Wycko* and limiting recovery to pecuniary loss); *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972) (overruling *Breckon* and holding that loss of society and companionship are recoverable under the wrongful death act).

⁸⁶ *Smith*, 388 Mich at 649 (overruling *Breckon* and adopting Justice Adams' dissent which clarifies that the measure of damages in wrongful death cases includes loss of society and companionship).

⁸⁷ *Crystal v Hubbard*, 414 Mich 297, 326; 324 NW2d 869 (1982), superseded by statute on other grounds.

A. **The motor vehicle exception does not expressly expand the government's limited immunity for wrongful death actions.**

In *Nawrocki*, this Court recognized that the only exceptions to the broad grant of immunity conferred by § 1407 are contained within the GTLA itself.⁸⁸ In other words, if an exception does not expressly waive immunity for wrongful death actions, the exception extends only as far as the limitations on immunity expressed by its plain language. The motor vehicle exception does not contain any language that further expands the government's liability beyond bodily injury or property damage. Rather, the plain language limits the type of injury to physical injury. Narrow construction of the exception limits the class of persons to those who suffered direct physical injury because of the negligent operation of a motor vehicle.

B. **Where the motor vehicle exception would have been a substantive limitation had the decedent survived and brought an action, it is also a substantive limitation on loss of consortium claims under the Wrongful Death Act.**

MCL 600.2921 states that the Wrongful Death Act is the exclusive vehicle by which actions on claims for injuries which result in death shall be prosecuted⁸⁹:

All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section [section 2922]. . .

The plain and unambiguous language of MCL 600.2922(1) makes clear that the basis for a wrongful death claim by a personal representative of the estate of the deceased is the decedent's entitlement to maintain an action and recover damages⁹⁰:

Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be

⁸⁸ See *Nawrocki*, 463 Mich at 156-157.

⁸⁹ MCL 600.2921.

⁹⁰ MCL 600.2922(1) (emphasis added).

liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a

1. Beneficiaries can collect only the damages that the decedent could have collected had he survived.

In 1987, this Court in *Hardy v Maxheimer* clarified that a wrongful death action is not created at the time of death, but rather, "survives by law" and "vests" in those who suffer a loss through the death.⁹¹ *Hardy* held that "[t]he act clearly provides not that death creates a cause of action, but that death does not extinguish an otherwise valid cause of action."⁹² Recent Sixth Circuit cases have recognized that the *Hardy* analysis now controls the measure of damages in wrongful death actions.⁹³

Even prior to *Hardy*, in *Maiuri v Sinacola Construction Company*, this Court concluded that the cause of action granted to the personal representative of a decedent's estate by the Wrongful Death Act is a derivative one in that the personal representative "stands in the shoes of the decedent" and is therefore required to show that the decedent could have maintained the action if death had not ensued.⁹⁴ The Court noted that the language of the statute requiring that the decedent must have been able to maintain the action, "if death had not ensued," has remained in the Act throughout its history, dating back to 1848.⁹⁵

⁹¹ *Hardy v Maxheimer*, 429 Mich 422, 339-440 n 17; 416 NW2d 299 (1987).

⁹² *Hardy*, 429 Mich at 440.

⁹³ *Frontier Ins Co v Blaty*, 454 F3d 590, 599-600 (CA 6, 2006) (recognizing that for purposes of assessing damages, the personal representative of the deceased stands in the deceased's shoes); *Chomic v United States*, 377 F3d 607, 611 (CA 6, 2004), cert denied, 544 US 948; 125 S Ct 1693; 161 L Ed 2d 524 (2005) (recognizing that the measure of damages in wrongful death action are controlled by Michigan law, and citing the holding of *Hardy v Maxheimer*).

⁹⁴ *Maiuri*, 382 Mich at 396; see also *Haque v Oakland Probate Judge*, 237 Mich App 295, 302; 602 NW2d 622 (1999).

⁹⁵ *Maiuri*, 382 Mich at 394-95 n 3 (citations omitted).

The three-judge panel in *Kik I* ignored both *Hardy* and *Maiuri* in failing to consider whether the GTLA would have placed a limitation on the underlying cause of action and instead concluding that "the wrongful death act controls the damages which may be recovered."⁹⁶

2. The wrongful death action must be brought in the name of the decedent's personal representative, is a property right belonging to the decedent (not the beneficiary), and accrues at the time of the wrongful action.

Hardy's holding that a wrongful death action "survives by law" is supported by § 2922(2), which requires that all actions shall be brought by and in the names of the personal representatives of the deceased.⁹⁷ This language is mandatory.⁹⁸

Section 2922(2) has been held to bar a widow from suing in her own right,⁹⁹ even where this limitation on the statutory cause of action creates a seeming injustice. This Court has explained the distinction between a wife's ability to recover for her spouse's injury and the limitations on her ability to recover for his death¹⁰⁰:

[In] the case of death rather than injury, the wrongful death act was held to encompass the damages a wife might recover. She does not have a separate cause of action against a tortfeasor who kills her husband as she does against the one who injured him.

The same reasoning applies to a child or a parent.¹⁰¹ Neither a child nor a parent may maintain an independent cause of action for the loss of services due to the wrongful death of his parent;

⁹⁶ *Kik I*, 268 Mich App at 700.

⁹⁷ MCL 691.2922(2).

⁹⁸ *Maiuri*, 382 Mich at 393.

⁹⁹ *Maiuri*, 382 Mich at 396 (surviving spouse may not institute a separate action for consortium); see also *Westfall v Venton*, 1 Mich App 612, 137 NW2d 757 (1965)).

¹⁰⁰ *Smith*, 388 Mich at 649 (adopting the dissenting opinion in *Breckon*, 383 Mich at 289, Adams, J., dissenting, citing *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960)).

¹⁰¹ *Maiuri*, 382 Mich at 396; *Herbert v Cole*, 115 Mich App 452, 457-458; 321 NW2d 388 (1982).

such an action may be brought only by a personal representative under the wrongful death statute.¹⁰²

That a wrongful death action survives by law is further bolstered by the fact that the cause of action under the Wrongful Death Act accrues on the date of the wrongful act.¹⁰³ An accrued right of action has long been considered a vested property right.¹⁰⁴ When death is not instantaneous, the claim vests in the decedent at the time of the wrongful act.¹⁰⁵ Where death is instantaneous, the decedent's claim survives the decedent's death and vests in those who suffer a loss through the death.¹⁰⁶ In essence, the decedent's cause of action under the wrongful death act is a "chose in action" and the personal representative's cause of action granted by the wrongful death act is only derivative of this underlying "chose in action."¹⁰⁷ For this reason, the statute of limitations applicable to the underlying tort theory must be applied to the plaintiff's claim.¹⁰⁸

¹⁰² *Maiuri*, 382 Mich at 396; *Herbert*, 115 Mich App at 457-458.

¹⁰³ *Hawkins v Reg'l Med Labs, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982) (cause of action vests, if at all, in the decedent on the date of the alleged wrongful act).

¹⁰⁴ *Hawkins*, 415 Mich at 436 (the mere fact that the legislative scheme requires that suits for tortious conduct resulting in death be filtered through the wrongful death act does not change the character of such actions except to expand the elements of damage available and a plaintiff has a "fully vested cause of action," if at all, at the time of the alleged wrongful act); *Grubaugh v City of St Johns*, 384 Mich 165, 170; 180 NW2d 778 (1970) (Kavanagh, J.) ("It is axiomatic that the constitutional provision of due process extends to protect that 'property' construed to be a vested right and that generally an accrued right of action is a vested property right which may not be arbitrarily impinged.").

¹⁰⁵ *Hawkins*, 415 at 436.

¹⁰⁶ *Hardy*, 429 Mich at 439-440.

¹⁰⁷ See *In re Thornton*, 192 Mich App 709, 712-714; 481 NW2d 828 (1992) (while the proceeds of a medical malpractice, wrongful death suit did not exist at the time of the decedent's death, the underlying "chose in action" did so that the proceeds could be distributed under the terms of the decedent's will); *Comm'r of Ins v Arcilio*, 221 Mich App 54, 64; 561 NW2d 412 (1997) (a tort claim is a "chose in action" that is an asset).

¹⁰⁸ *Hawkins*, 415 Mich at 437 (applying products liability statute of limitation to plaintiff's claim); see also *Grimm v Ford Motor Co*, 157 Mich App 633, 637 (1986).

Similarly, for purposes of determining venue, a cause of action under the Wrongful Death Act accrues at the time of the fatal injury, not necessarily when the resultant death occurs.¹⁰⁹

3. The wrongful death claim is not free from the decedent's arbitration or other employment agreements.

Although the Wrongful Death Act allows the decedent's personal representative to bring an action to recover damages for the loss of society and companionship, the personal representative is nevertheless bound by any limitations that might have been placed on an action by the decedent, including agreements made by the decedent. For example, an otherwise valid contract is generally binding on a deceased party's personal representative.¹¹⁰ Similarly, this Court has held that where the deceased had executed a valid release of liability to the defendant railroad owner for potential injuries while riding the defendants' motor car on the railroad, the deceased would not have had a cause of action had he survived the injuries, and for this reason his widow and child also could not bring a wrongful death action.¹¹¹

In *Maiuri*, a wrongful death action by parents against their son's employer when he was killed in a work-related accident, this Court held that where the decedent's death is the result of an injury arising out of the course of his employment, the estate is bound, as the decedent would have been, to the exclusive remedy provision of the workers' compensation act, and the personal representative will be prevented from maintaining a separate wrongful death action.¹¹² As the

¹⁰⁹ *Johnson v Simongton*, 184 Mich App 186, 457 NW2d 129 (1990), app denied 437 Mich 922, 469 NW2d 283 (1991).

¹¹⁰ *Ballard v Southwest Detroit Hosp*, 119 Mich App 814, 327; NW2d 370 (1982), later proceeding at 417 Mich 986; 334 NW2d 374 (1983).

¹¹¹ *Maiuri*, 382 Mich at 395 (citing *Mehegan v Boyne City, G & A R Co*, 178 Mich 694; 141 NW 905 (1913)).

¹¹² *Maiuri*, 382 Mich at 393-395.

Court explained, a wrongful death action brought by a proper plaintiff is derivative in that the personal representative of the deceased "stands in [the decedent's] shoes."¹¹³

As caselaw demonstrates, the relevant inquiry is whether the decedent would have been entitled to bring the action himself. Just as contractual obligations and workers' compensation provisions can limit recovery under the Wrongful Death Act, so, too, can governmental immunity defeat a loss of consortium claim under the Act.

C. The Wrongful Death Act accommodates the provisions of other statutes, including the limitations set forth in the Governmental Tort Liability Act.

Plaintiffs in *Kik* argue that the Wrongful Death Act trumps the Governmental Tort Liability Act. Nothing in the plain language of either the Wrongful Death Act or the motor vehicle exception indicates that this is so.

When there is an apparent conflict between statutes that govern an action, this Court looks first to the plain language of the statutes.¹¹⁴ In *Hardy v County of Oakland*, for example, the Court resolved an apparent conflict between the No-Fault Act, MCL 500.3135, and the motor vehicle exception. Section 3135(1) provides that a plaintiff must have suffered death, serious impairment of body function, or permanent serious disfigurement in order to maintain an action for non-economic tort damages, while the motor vehicle exception establishes liability for bodily injury and property damage caused by the negligent operation of a motor vehicle without requiring serious impairment.¹¹⁵ Looking to the plain language of both statutes, this Court noted that § 3135(2)'s language "Notwithstanding any other provision of law . . ." dictated that the

¹¹³ *Maiuri*, 382 Mich at 396.

¹¹⁴ *Hardy v County of Oakland*, 461 Mich 561, 565; 607 NW2d 718 (2000).

¹¹⁵ *Hardy*, 461 Mich at 565.

"serious impairment" restriction of the No-Fault Act further defined the "bodily injury" language of the immunity statute.¹¹⁶ Significantly, the narrower of the two statutes controlled.

In contrast to the No-Fault Act discussed in *Hardy*, the plain language of the Wrongful Death Act does not trump all other statutes that may be involved in a wrongful death action. Nor does it expressly or impliedly either waive the broad grant of immunity provided in the GTLA or expand the limited liability provided by the plain language of the motor vehicle exception. Absent plain language in the Wrongful Death Act indicating that the Wrongful Death Act provisions trump other statutory provisions, the motor vehicle exception is the narrower of the two statutes. Therefore, as in *Hardy*, its plain language should prevail, especially given this Court's mandate that governmental immunity exceptions be narrowly construed.

Moreover, this Court has made clear that the Wrongful Death Act is not the only act that is applicable in a wrongful death action.¹¹⁷ In *Jenkins v Patel*, for example, this Court held that the medical malpractice statute of limitations, MCL 600.5838a, applies to wrongful death actions where the underlying claim is medical malpractice. The Court reasoned that "in all actions brought under the wrongful death statute, the limitations period will be governed by the provision applicable to the liability theory of the underlying wrongful act."¹¹⁸ Additionally, actions brought under the Wrongful Death Act "accrue as provided by the statutory provisions governing the underlying liability theory"¹¹⁹ *Jenkins* also applied the medical malpractice notice of intent requirement of MCL 600.2912b, the medical malpractice tolling provision of MCL 600.5856(d), the medical malpractice affidavit of merit requirement of MCL 600.2912d,

¹¹⁶ *Hardy*, 461 Mich at 565-566.

¹¹⁷ *Jenkins v Patel*, 471 Mich 158, 164-165; 684 NW2d 346 (2004).

¹¹⁸ *Jenkins*, 471 Mich at 164-165 (citing *Hawkins*, 415 Mich at 436; *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004)).

¹¹⁹ *Jenkins*, 471 Mich at 165.

and the medical malpractice expert witness qualification requirements of MCL 600.2169(1)(a), to wrongful death actions.¹²⁰

Relying on its holding in *Jenkins*, this Court in *Shinholster v Adams* also held that the medical malpractice non-economic damages cap of MCL 600.1483 applies to a wrongful death action.¹²¹ The Court supported its holding with a textural analysis of both § 1483 and the Wrongful Death Act, MCL 691.2922(1), (2), and (6), as well as an analysis of the interplay between the two statutes.¹²² Notably, the majority held that the general damage cap of the Wrongful Death Act yielded to the higher damage cap of § 1483, in part, because the plain language of § 1483 provides that the lower tier applies "unless, as a result of a defendant's negligence," one or more enumerated exceptions applies and the higher damages cap tier therefore applies.¹²³ The majority emphasize that the Court could not merely presume that the Legislature must have intended to exclude death from the exceptions giving rise to application of the higher cap, and in doing so, overlook the express directive of § 2922(6)—that the jury may award "reasonable compensation" for a decedent's conscious pain and suffering.¹²⁴

Applying similar reasoning in analyzing the relationship between the Wrongful Death Act and the highway exception to governmental immunity, MCL 691.1402, the Michigan Court of Appeals in *Pagano v Department of State Highways* held that the language in the wrongful death statute does not create a substantive cause of action differing from that permitted by the highway liability statute.¹²⁵ The *Pagano* Court explained that the language of § 2922(1)—"All actions for such death, or injuries resulting in death, shall be brought only under this section"—

¹²⁰ *Jenkins*, 471 Mich at 164-164 (internal citations omitted).

¹²¹ *Shinholster v Adams*, 471 Mich 540, 559; 685 NW2d 275 (2004).

¹²² *Shinholster*, 471 Mich at 562, 564.

¹²³ See *Shinholster*, 471 Mich at 562-563 (quoting § 1483) (emphasis added).

¹²⁴ See *Shinholster*, 471 Mich at 564-565.

¹²⁵ *Pagano v Dep't of State Highways*, 76 Mich App 569, 574; 157 NW2d 172 (1977).

was intended to clarify law concerning survival actions and wrongful death actions and to make it clear that only one such action could be brought,¹²⁶ not to prevent the substantive limitations of other acts.

The three-judge panel in *Kik I* erred by ignoring this relevant case law precedent and concluding that "once the injured person dies and the action becomes an action under the Wrongful Death Act, the Wrongful Death Act controls the damages which may be recovered."¹²⁷ While the plain language of the Wrongful Death Act indicates that all wrongful death actions are to be brought under the Act, it does not indicate that the Act trumps more specific provisions in other statutes. Nor did the Legislature, by the plain language of the motor vehicle exception, indicate that liability under the exception is expanded beyond "bodily injury and property damage" in the context of a wrongful death action. Absent these indicators and applying reasoning of *Jenkins* and *Shinholster*, the more specific restrictions of the motor vehicle exception prohibit recovery in a wrongful death action for non-bodily injury occurring as a result of a defendant's negligent operation of a motor vehicle.

D. The three-judge panel in *Kik I* erred in relying on the analysis in *Endykiewicz v State Highway Commission's* outdated interpretation of the Wrongful Death Act.

The *Endykiewicz* Court held that a wrongful death action is a new action rather than an action of the decedent that "survives by law."

¹²⁶ *Pagano*, 76 Mich App at 574.

¹²⁷ *Kik I*, 268 Mich App at 700.

1. The *Endykiewicz* Court ignored binding precedent when it defined a wrongful death action as a new action rather than an action of the decedent that "survives by law."

The *Endykiewicz* characterization of a wrongful death action conflicts with the holdings in both *Hardy v Maxheimer*,¹²⁸ which postdates *Endykiewicz*, and *Maiuri*,¹²⁹ which was binding precedent at the time of the *Endykiewicz* decision. *Endykiewicz* cites *Lincoln v Detroit & M R Co* for the proposition that "a wrongful death action" exists not as 'a cause of action which survives' the decedent, but as 'a new action' that can be brought "not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute."¹³⁰ But five years later in 1987, this Court in *Hardy*, in deciding whether the tolling provision of MCL 600.5852 applies to wrongful death cases in which death occurs instantaneously, clarified that the right to recovery for wrongful death "survives by law."¹³¹

Even prior to *Hardy*, this Court in *Maiuri*, while it characterized a wrongful death action as a "new cause of action," clarified that "[a]s a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries."¹³² Thus, *Maiuri* made clear that a personal representative of the deceased's estate may bring a claim only for damages the decedent might have received had he survived. All the limitations on the underlying cause of action are logically and necessarily limitations on the wrongful death action. *Endykiewicz* ignored this

¹²⁸ *Hardy*, 429 Mich at 440.

¹²⁹ *Maiuri*, 382 Mich at 391.

¹³⁰ *Endykiewicz*, 414 Mich at 386-387 (quoting *Lincoln v Detroit & M R Co*, 179 Mich 189, 195-196; 146 NW405 (1914)).

¹³¹ *Hardy*, 429 Mich at 440.

¹³² *Maiuri*, 382 Mich at 395 (citing RJA § 2922(1) (emphasis added)).

comprehensive reasoning and, instead, cited *Maiuri* only for the proposition that supported the *Endykiewicz* analysis.

To hold as it did, the *Kik I* panel obviously did not adequately consider *Maiuri* or *Hardy*, but rather, relied exclusively on *Endykiewicz*'s outdated understanding of the nature of the Wrongful Death Act in developing its framework for understanding the interplay between the Wrongful Death Act and the motor vehicle exception. Simply put, the *Kik I* panel erred in relying on the *Endykiewicz* Court's conclusion that a wrongful death action is a new action rather than an action of the decedent that "survives by law."

2. *Endykiewicz* should be further clarified or overruled because its Wrongful Death Act analysis is incorrect and outdated.

In light of *Maiuri*, and particularly in light of this Court's more recent wrongful death analysis in *Hardy*, this Court should further clarify or overrule *Endykiewicz*. As with *Endykiewicz*'s erroneous analysis with regard to the exceptions to governmental immunity, lower courts such as the circuit court in *Kik*, the three-judge panel in *Kik I*, and the majority of the special panel in *Kik II*, continue to cite *Endykiewicz*'s outdated wrongful death analysis.

III. Even if a governmental officer, agent, or employee is potentially subject to personal liability for loss of consortium under 691.407(2), liability cannot attach unless a plaintiff first proves gross negligence that is "the proximate cause" of the plaintiff's injuries.

Although MCL 691.1407(2) does not contain the same "bodily injury or property damage" limitation contained in § 1405, plaintiffs may not recover any damages of whatever nature under § 1407(2) without first proving gross negligence that is the proximate cause as defined and understood by the plain language of the statute and this Court's caselaw precedent. This requirement is not waived or otherwise affected by the Wrongful Death Act.

Section 1407(2)(c) specifically provides that lower level governmental employees are immune from liability unless the following are met¹³³:

- (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
- (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
- (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Therefore, a governmental officer, agent, or employee is not subject to personal liability for loss of consortium—or any other damages—unless the plaintiff can prove the defendant was 1) grossly negligent; and, 2) his or her actions were the proximate cause of the plaintiff's bodily injury or death.

A. Gross negligence

The plain language of §1407(7)(2) defines the "gross negligence" referred to in § 1407(2)(c) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."¹³⁴ It is well-established by this Court that "evidence of ordinary negligence does not create a material question of fact concerning gross negligence . . . To hold otherwise would create a jury question premised on something less than the statutory standard."¹³⁵ As demonstrated by this Court's holdings, gross negligence presents a high hurdle for plaintiffs to overcome.

¹³³ MCL 691.1407(2)(c) (emphasis added).

¹³⁴ MCL 691.1407(7)(a).

¹³⁵ *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

B. "The" proximate cause

Even if a plaintiff can prove gross negligence, he or she must plead and prove that the defendant's grossly negligent conduct was the proximate cause of an injury.¹³⁶

In *Robinson v City of Detroit*, the Supreme Court held that individual police officers were entitled to immunity because their actions were not "the proximate cause" of the plaintiff's injuries.¹³⁷ *Robinson* and its companion *Cooper v Wade*¹³⁸ involved claims that individual police officers' pursuits of fleeing vehicles amounted to gross negligence. The Court held that pursuing officers did indeed owe duties to innocent passengers in pursued vehicles. It held as a matter of law, however, that the pursuit was not "the" proximate cause of the flight and that the pursuing officers were therefore immune¹³⁹:

[W]e conclude the individual police officers are immune from liability because their actions were not "the proximate cause" of the plaintiffs' injuries. Thus, we overrule *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994), and hold that the phrase "the proximate cause" as used in the employee provision of the governmental immunity act, MCL 691.1407(2); MSA 3.996(107)(2), means the one most immediate, efficient, and direct cause preceding an injury, not "a proximate cause." Because the conduct of the individual police officers in these cases were not "the proximate cause," i.e., the one most immediate, efficient, and direct cause, of the passengers' injuries, the officers are entitled to governmental immunity.

The Court further stated¹⁴⁰:

As to subsection (c), in *Dedes*, supra at 107, this Court effectively interpreted "the proximate cause" in subsection (c) to mean "a proximate cause." The Court further explained that "the" proximate cause does not mean "sole" proximate cause. [Internal citation omitted]. We overrule *Dedes* to the extent that it interpreted the phrase "the proximate cause" in subdivision (c) to mean "a proximate cause." The Legislature's use of the definite article "the" clearly

¹³⁶ MCL 1407(2)(c).

¹³⁷ *Robinson*, 462 Mich at 445-46.

¹³⁸ *Cooper v Wade*, 461 Mich 1201; 597 NW2d 837 (1999).

¹³⁹ *Robinson*, 462 Mich at 445 (emphasis added).

¹⁴⁰ *Robinson*, 462 Mich at 458 (emphasis added).

evinces intent to focus on one cause. The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury.

The *Robinson* court's definition of the phrase "the proximate cause" as the "one most immediate, efficient and direct cause preceding the injury" [emphasis added] clearly evinces the court's intent that in order for a cause to be the proximate cause it must meet all the conditions set forth in the definition. It must be the one cause that is the most immediate and the most direct and the most efficient. If it does not meet all of those conditions it cannot be the proximate cause.

The term "direct cause" is defined in *Black's Law Dictionary* as "[t]hat which sets in motion a train of events which brings about result without intervention of any force operating or working actively from new and independent source."¹⁴¹ "Immediate" is defined in *Black's* as "[o]ccurring without delay; instant. Not separated by other persons or things. Having a direct impact; without an intervening agency."¹⁴² "Efficient cause" is defined in *Black's* as "[t]he working cause; that cause which produces effects or results. An intervening cause, which produces results that would not have come to pass except for its interposition, and for which, therefore the person who set in motion the original chain of causes is not responsible."¹⁴³

Since *Robinson*, this Court and the Michigan Court of Appeals have consistently applied the *Robinson* Court's definition of "the proximate cause" and its understanding of the meaning of gross negligence as defined by the GTLA, to all claims under § 1407(2).¹⁴⁴ The Wrongful Death

¹⁴¹ *Black's Law Dictionary* (6th ed 1990) (emphasis added).

¹⁴² *Black's Law Dictionary* 764 (8th ed 1999) (emphasis added).

¹⁴³ *Black's Law Dictionary* (6th ed 1990) (emphasis added).

¹⁴⁴ See, e.g., *Costa*, 475 Mich at 412. Accord *Paige v City of Sterling Heights*, 476 Mich 495, 507; 720 NW2d 219 (2006); *Curtis v Detroit*, 253 Mich App 555; 655 NW2d 791 (2002); *Kruger v White Lake Township*, 250 Mich App 622, 626-627; 648 NW2d 660 (2002); *Cooper v Washtenaw County*, 270 Mich App 506, 510; 715 NW2d 908 (2006); *Love v City of Detroit*, 270 Mich App 563; 716 NW2d 604 (2006).

Act should not be construed as altering or lessening this burden in any way, either in claims that are brought against a governmental officer, agent, or employee arising out of the use of a motor vehicle, or in any other claims.

CONCLUSION

The plain language of the motor vehicle exception, MCL 691.1405, limits recovery to bodily injury and property damages, and does not encompass claims for loss of consortium. This express and limited waiver of immunity is not expanded by the language of the Wrongful Death Act. Any other interpretation of the motor vehicle exception, and the interplay between the exception, or the Wrongful Death Act, would expand the scope of the exception beyond its clear and unambiguous language and abrogate this Court's own mandate that exceptions to immunity be narrowly construed.

WHEREFORE, Amicus Curiae Attorney General Michael A. Cox respectfully urges this Honorable Court to affirm the Court of Appeals' holding in *Wesche v Mecosta County Road Commission* that the motor vehicle exception, MCL 691.1405, does not apply to loss of consortium claims, and to reverse the lower court decisions in *Kik v Sbraccia* that the motor vehicle exception does not limit the damages recoverable in a wrongful death action, as enumerated in MCL 600.2922(6).

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Mark E. Donnelly (P39281)
Ann M. Sherman (P67762)
Assistant Attorneys General
Attorneys for Attorney General
Michael A. Cox
P.O. Box 30736
Lansing, Michigan 48909
(517) 373-6434

Dated: July 18, 2007