

*IN THE SUPREME COURT*

Appeal from the Michigan Court of Appeals  
Wilder, PJ, and Cavanagh, Smolenski, Zahra, Fort Hood,  
Schuette, and Borello, JJ

REBECCA KIK and ROBERT KIK, Individually,  
and as Co-Personal Representatives of the ESTATE  
OF SHARON ANN LEELANI KIK,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

Supreme Court Case No. 132849

Court of Appeals Docket No. 256419

Lower Court (Chippewa County)  
Case No. 04-7213-NI

**DEFENDANTS-APPELLANTS' BRIEF ON APPEAL**

**\*\*\* ORAL ARGUMENT REQUESTED \*\*\***

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## INTRODUCTION

At the heart of this appeal is a straightforward question: does the term “bodily injury” in the motor vehicle exception to governmental immunity constitute a limitation on the types of claims for which immunity has been waived by the Legislature? Stated differently, where the immunity exception expressly states that “governmental agencies *shall be liable for bodily injury and property damage* resulting from the negligent operation . . . of a motor vehicle,” does this mean that the broad immunity conferred on governmental agencies is *not* waived for a claim which does not seek recovery for either bodily injury or property damage, such as a spouse’s claim for loss of consortium? Secondly, assuming that the statute’s use of the term “bodily injury” is to be given meaning, this appeal questions whether the language in the wrongful death act permitting a personal representative to recover damages for “loss of society and companionship” somehow trumps the limited waiver of immunity in the motor vehicle exception.

Defendants have appealed two separate Opinions of the Court of Appeals. First, defendants seek to appeal the November 15, 2006 published Opinion from Judges Murphy, Sawyer and O’Connell, holding that a wrongful death plaintiff suing a governmental agency under the motor vehicle exception to immunity may recover damages for loss of society and companionship of the decedent, irrespective of the “bodily injury” limitation that appears in the motor vehicle exception. Second, defendants seek to appeal the October 10, 2006 Opinion and Order of the special panel of the Court of Appeals, convened to resolve the conflict declared by the three-judge panel with an earlier published decision holding that in a suit for injuries that do *not* result in death, the “bodily injury” limitation in the motor vehicle exception precludes a spouse’s claim for loss of consortium.

Plaintiffs, individually and as co-personal representatives of the estate of their deceased child, filed suit against the defendants pursuant to the “motor vehicle exception” to governmental immunity, MCL 691.1405. The Complaint alleges that plaintiff Rebecca Kik was injured during a motor vehicle accident which occurred while she was being transported in an ambulance owned by the Defendant Township and operated by its employee. The Complaint claims that as a result of the accident, Rebecca Kik “sustain[ed] injuries which subsequently resulted in the premature birth and death” of her child. (Compl. at ¶ 5; Appx at 10a-11a). Although no model of clarity, a fair reading of the Complaint is that Rebecca and Robert Kik seek to recover both in their individual and representative capacities for bodily injuries and non-bodily injuries allegedly suffered by both Rebecca and her deceased child. (Compl. at ¶¶ 17, 23, 29, 31, 34; Appx at 14a-21a).

By denying the defendants’ motion for partial summary disposition, the lower courts ignored their obligation to give effect to the plain and unambiguous language of the governmental immunity statute, and to further afford the immunity exceptions the most narrow construction possible. Had they done so, then partial summary disposition would have been granted to the defendants on Robert Kik’s individual loss of consortium claim, as well as on the representative claims for loss of society and companionship.

**STATEMENT OF THE BASIS OF JURISDICTION**

The Chippewa County Circuit Court entered an Order denying partial summary disposition to the defendants on June 17, 2004. Defendants filed a timely Claim of Appeal. The Court of Appeals had jurisdiction pursuant to MCR 7.203(A)(1) and MCR 7.202(6)(a)(v). The Court of Appeals issued its Opinion and Order on November 15, 2005, affirming in part the denial of partial summary disposition to the defendants, and also reversing in part the denial of

summary disposition to the defendants (by declaring a conflict with an earlier decision of the Court of Appeals).

A special panel of the Court of Appeals was convened, and affirmed the denial of partial summary disposition to the defendants, thereby overruling the earlier Court of Appeals case with which the initial three-judge panel had declared a conflict. The special panel of the Court of Appeals issued its decision on October 10, 2006. Defendants filed a Motion for Reconsideration, which was denied on November 20, 2006.

Defendants filed a timely Application for Leave to Appeal in this Court on January 3, 2007. This Court granted leave to appeal on May 23, 2007.

Therefore, this Court has jurisdiction pursuant to MCR 7.301(A)(2).

#### **STATEMENT OF QUESTIONS INVOLVED**

**I. WHETHER THE PLAIN LANGUAGE OF THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY LIMITS THE POTENTIAL RECOVERY IN PERSONAL INJURY CLAIMS THAT DO NOT ARISE FROM WRONGFUL DEATH TO DAMAGES FOR BODILY INJURY AND PROPERTY DAMAGE. AS A RESULT, WHETHER ANY CLAIM THAT DOES NOT SEEK RECOVERY FOR BODILY INJURY OR PROPERTY DAMAGE, SUCH AS MR. KIK'S CLAIM FOR LOSS OF CONSORTIUM, IS BARRED BY IMMUNITY?**

Defendants-appellants say, "Yes."

Plaintiffs-appellees say, "No."

The Circuit Court said, "No."

The Court of Appeals three-judge panel said, "No."

The Court of Appeals special panel majority said, "No."

The Court of Appeals special panel dissent said, "Yes."

**II. WHETHER THE TERM “BODILY INJURY” IN THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY LIMITS THE PLAINTIFFS’ POTENTIAL RECOVERY IN THEIR WRONGFUL DEATH ACTION TO DAMAGES FOR “BODILY INJURY,” AND THUS PRECLUDES THEIR REPRESENTATIVE CLAIMS FOR NON-BODILY INJURIES, SUCH AS LOSS OF SOCIETY AND COMPANIONSHIP?**

Defendants-appellants say, “Yes.”

Plaintiffs-appellees say, “No.”

The Circuit Court said, “No.”

The Court of Appeals three-judge panel said, “No.”

The Court of Appeals special panel was not called upon to address the issue.

**III. WHETHER, 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 AGENCY AND OPERATED BY AN OFFICER, AGENT, OR EMPLOYEE OF THE GOVERNMENTAL AGENCY, 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)?**

Defendants-appellants say, “No.”

Plaintiffs-appellees say, “Yes.”

The Circuit Court did not address this issue.

The Court of Appeals three-judge panel said, “Yes.”

The Court of Appeals special panel was not called upon to address the issue.

## STATEMENT OF FACTS

### I. THE NATURE OF THE ACTION

According to the Complaint, on or about April 1, 2003, Rebecca Kik—approximately 22 weeks pregnant at the time—was en route to Lansing, Michigan, from Sault St. Marie, Michigan. (Compl. at ¶ 5; Appx at 10a-11a). She was traveling in a Kinross Charter Township ambulance operated by defendant Sbraccia. (Compl. at ¶ 5; Appx at 10a-11a). Robert Kik was not traveling in the ambulance. (Compl. at ¶ 5; Appx at 10a-11a).

A traffic accident occurred, allegedly resulting in personal injury to Rebecca Kik and, in turn, allegedly later causing the premature birth and death of Sharon Ann Leelani Kik.<sup>1</sup> (Compl. at ¶ 5; Appx at 10a-11a).

### II. PROCEDURAL HISTORY

Robert and Rebecca Kik, individually and as co-personal representatives of the Estate of Sharon Ann Leelani Kik, filed this suit against defendants. The Complaint alleges damages for

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<sup>1</sup> The first Court of Appeals panel noted in footnote 2 of its November 15, 2005 Opinion that “it is less than completely clear . . . that Sharon was, in fact, born alive and thereafter died.” The panel noted that the plaintiffs had opened an estate for the infant, but could find nothing in either the Complaint or plaintiffs’ brief that clearly states that the child was born alive, and how long the child lived after birth. *Id.* The panel also noted that the defendants consistently referred to Sharon as having been stillborn, suggesting that the child was not born alive, and that the trial court referred to Sharon as both an “unborn daughter” and as a “deceased infant.” Because the plaintiff had styled the claim as under the wrongful death act, and because Sharon’s estate is a named party, the Court interpreted the Complaint as alleging that Sharon was born alive and based its analysis on that fact. However, the Court expressly indicated that it did not intend to resolve any issue of whether the child was stillborn or born alive. For purposes of this Application, defendants agree with the Court of Appeals that because a wrongful death claim brought on behalf of Sharon’s estate is presently part of this action, that this Court may examine the effect that the wrongful death act has on the exceptions to governmental immunity. Defendants do not wish to concede, however, that Sharon was born alive, but respectfully submit that this issue presents a factual question which may be resolved through subsequent trial court proceedings.

direct bodily injury, as well as non-bodily injury—including Mr. Kik’s claim for loss of consortium arising solely out of the alleged physical injury to his wife.

Specifically, paragraph 13 of the Complaint alleges that Robert Kik and Rebecca Kik suffered damages individually and as co-personal representatives of the Estate of Sharon Ann Leelani Kik. In paragraph 17, plaintiffs clarify that they have suffered injuries and losses from, among other things, loss of love, support, income, maintenance and services, including affection, guidance, society and companionship, and severe mental disturbance caused by the loss of their daughter. In paragraph 23, plaintiffs allege again that they suffered conscious pain and suffering, as well as loss of love, support, income and services, including affection, guidance, society and companionship. In Count III, Plaintiffs Rebecca and Robert Kik allege that they suffered conscious pain and suffering and loss of love and support, income and services, including affection, guidance, society and companionship as a result of the death of their daughter in the accident. In Count IV, Rebecca Kik contends that she suffered emotional distress as a result of the accident and the death of her daughter. The same is alleged in Count V with respect to Robert Kik, noting that Robert Kik was not actually involved in the accident but that he was following the ambulance in another vehicle. (Compl. at ¶¶ 13, 17, 23, Count III & Count IV; Appx at 13a-21a).

Defendants moved for partial summary disposition based on immunity as to the plaintiffs’ claims for injuries other than bodily injury or property damage. The Circuit Court denied that motion in a written Opinion and Order dated June 17, 2004. (Appx at 35a-40a). Defendants then appealed as of right.

After oral argument in the Court of Appeals, a panel consisting of Judge O’Connell, Judge Sawyer, and Judge Murphy, issued a published decision concluding:

1. That the exception to immunity for acts of gross negligence of a government employee does not contain any language waiving immunity for only bodily injury and property damage, and that therefore “loss of consortium type claims” may be recovered pursuant to the gross negligence exception of MCL 691.1407(2)(c). *Kik v Sbraccia*, 268 Mich App 690, 695-69; 708 NW2d 766 (2005) (“*Kik I*”).
2. That for claims which have “their roots in a wrongful death action,” the wrongful death act controls the damages which may be recovered, and specifically authorizes recovery for non-bodily injuries, such as loss of society and companionship of the deceased. In other words, the limited waiver of immunity contained in MCL 691.1405 does not limit the types of damages that may be recovered in a wrongful death action. *Kik I*, 268 Mich App at 697-707.
3. That for personal injury claims which do not arise from wrongful death, the earlier precedent of *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274; 705 NW2d 136 (2005), mandated the conclusion that Robert Kik’s claim for loss of consortium arising from the alleged physical injury to his wife were barred by the immunity statute. *Kik I*, 268 Mich at 707-712. However, the panel followed *Wesche* only because it was obligated to, and indicated that it would decide the issue differently were it not constrained. *Id.* at 707.

Because the Court of Appeals panel reached the third conclusion only because it was bound to do so, it invoked the special panel procedure of the Court of Appeals. MCR 7.215(J). On December 9, 2005, the Court entered an Order convening a special panel to resolve the declared conflict between *Kik I* and *Wesche*. After supplemental briefing and oral argument, the special panel issued an Opinion on October 10, 2006, in which a four-judge majority adopted the reasoning in Part III of the *Kik I* decision, and in the process overruled *Wesche*. *Kik v Sbraccia* (“*Kik II*”), 272 Mich App 388; 726 NW2d 450 (2006). (Appx at 54a-56a).

Three judges of the special panel, Judges Wilder, Schuette and Zahra dissented, agreeing with *Wesche* and expressing their view that the plain and unambiguous language of the motor vehicle exception, MCL 691.1405, which must be strictly construed, prohibited recovery for any injuries which are not bodily injury or property damage. Because loss of consortium is an independent cause of action belonging to the spouse of an injured person that compensates the

spouse for an injury that is neither bodily injury nor property damage, the dissenting judges would have concluded that the motor vehicle exception does not waive immunity from loss of consortium claims. *Kik II*, 272 Mich App at 392-393. (Appx at 55a-56a).

The four-judge majority denied the motion for reconsideration on November 20, 2006. (Appx at 57a). Again, Judges Wilder, Zahra and Schuette dissented. However, when the official report was released, the *Kik* special panel majority decision had been edited to state that *Wesche* was merely “overruled.”

## **ARGUMENT**

### **I. THE PLAIN LANGUAGE OF THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY LIMITS THE POTENTIAL RECOVERY IN PERSONAL INJURY CLAIMS THAT DO NOT ARISE FROM WRONGFUL DEATH TO DAMAGES FOR BODILY INJURY AND PROPERTY DAMAGE. ANY CLAIM THAT DOES NOT SEEK RECOVERY FOR BODILY INJURY OR PROPERTY DAMAGE, SUCH AS MR. KIK’S CLAIM FOR LOSS OF CONSORTIUM, IS THEREFORE BARRED BY IMMUNITY.**

#### **A. Standard of Review**

The trial court’s grant or denial of summary disposition is reviewed *de novo*. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002). The issues before this Court also present questions of statutory construction, which receive *de novo* review, as well. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

#### **B. Summary**

The plain and unambiguous language of the motor vehicle exception to governmental immunity—which waives according to its terms the broad grant of immunity provided to governmental agencies in MCL 691.1407(1)—makes a governmental agency liable for “bodily injury and property damage” resulting from the negligent operation of a government-owned vehicle. This waiver of immunity is simple and direct: the government is liable for bodily injury

and property damage when an automobile that it owns is operated negligently. Because the exception waives immunity only for “bodily injury and property damage,” it necessarily follows that immunity is not waived for any other type of injury. To hold otherwise would be judicial contortionism, and would not be narrowly construing the exception, as required.

Accepting that the language of the motor vehicle exception is a limited waiver of immunity, the question becomes whether that exception waives immunity for a spouse’s claim for loss of consortium. Based on the history and development of the loss of consortium action, two things are clear. First, it is an independent claim belonging to the spouse of a person who suffers bodily injury. Second, it does not seek to compensate the spouse for bodily injury, but rather only for injury to the marital relationship.

For the reasons elaborated in the following subsections, this Court must conclude that the motor vehicle exception does not waive governmental immunity as to Mr. Kik’s claims for loss of consortium arising from the alleged injury to his wife. The plain and unambiguous language of MCL 691.1405 waives governmental immunity only for “bodily injury and property damage” resulting from the negligent operation of a government-owned motor vehicle. Because the language of this immunity exception must be narrowly construed, the term “bodily injury” must be interpreted as a limitation on the types of injuries which are compensable. This limitation is supported by the *Black’s Law Dictionary* definition of “bodily injury.” Moreover, it is supported by case law from this state in the context of insurance coverage disputes.

The reasoning of the three-judge panel of the Court of Appeals, which was expressly adopted by a four-judge majority of the special panel, is flawed because the three-judge panel’s analysis does not give MCL 691.1405 its plain meaning, actually rewrites the statute by creating a “bodily injury” threshold, and incorrectly described loss of consortium as an element of

damages arising out of an injury, rather than its own independent, yet derivative cause of action belonging to the spouse.

**C. The Historical Roots and Development of Loss of Consortium**

At early common law, a husband's right to the consortium of his wife was well-established. Holbrook, *The change in the meaning of consortium*, 22 Mich L R 1, 2 (1923) (Appx at 58a-67a). The husband, having complete control over the wife's property, was entitled "to her custody, her services, and her conjugal affection; any interference with those rights, as by abduction of the wife, by injury to her (either intentional or negligent), or by adultery with her, gave rise to a right of action by the husband, based on the injury done to 'his interest in her.'" *Id.* (internal footnotes omitted); see also *Montgomery v Stephan*, 359 Mich 33, 36-41; 101 NW2d 227 (1960); *Burns v Van Laan*, 367 Mich 485, 499; 116 NW2d 873 (1962).

The wife had no corresponding rights to the consortium of her husband. Holbrook, *supra* at 2; see also *Burns*, 367 Mich at 499. There are two generally accepted reasons for this disparity in the early common law. First, from a substantive standpoint, the wife simply had no right that corresponded to the one possessed by her husband. Holbrook, *supra* at 2; see also *Montgomery*, 359 Mich at 39-42. Second, from a procedural standpoint, because the common law permitted a married woman to sue only when her husband was joined as a plaintiff, and because her husband was entitled to the proceeds of any suit brought by her and him, even if the wife had a right similar to her husband's, she would gain no benefit from the exercise of that right. Holbrook, *supra* at 2.

With the broad adoption by many states of the Married Women's Acts,<sup>2</sup> courts were compelled to decide between three alternatives: (1) whether the husband's common law cause of

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<sup>2</sup> Generally, the Married Women's Acts provided (1) that a wife may hold property as her own, free from control by her husband; (2) that a wife may sue in her own name without joining

action for loss of consortium had become obsolete; or (2) whether the wife now had an equal right to the services of her husband, which could be vindicated through her own action for loss of consortium; or (3) whether the historical roots of the action were to be ignored and the action was to be extended to both husband and wife on some generalized theory of equality. Lippman, *The breakdown of consortium*, 30 Columbia L R 651, 662 (1930). (Appx at 68a-91a). After Michigan adopted its version of the Married Women's Act, our courts adopted the first alternative, concluding that neither the husband nor the wife could sue at common law for loss of consortium resulting from the spouse's negligent injury by another. *Blair v Seitner Dry Goods Co*, 184 Mich 304, 314; 151 NW 724 (1915).

The law prohibiting either spouse from suing for loss of consortium remained unchanged until 1960. It was then that this Court decided *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960). There, this Court concluded that a wife may maintain a cause of action for loss of consortium of her husband. Specifically, Justice Smith, writing for a four-justice majority, rejected what he perceived as the historical basis for denying a cause of action for loss of consortium, concluding instead that the Married Women's Acts and "common constitutional provisions" have led to a revolutionary change in which legally the wife stands equal to the husband. *Montgomery*, 359 Mich at 49. Because this Court concluded that the reasons for the old rule prohibiting a wife's cause of action for loss of consortium were no longer applicable, the judge-invented rule was "herewith judge-destroyed." *Id.*

Subsequently, this Court has characterized an action for loss of consortium as an independent, separate claim belong to the spouse of the injured person, seeking to vindicate the spouse's own loss of society and companionship. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 29;

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her husband as a plaintiff, and may hold, as her own property, any proceeds from such a suit;

427 NW2d 488 (1988). It is not merely an “item of damages” of the injured person’s claim, but is a separate cause of action entirely. *Id.* The claim is considered derivative, but “only in the sense that it does not arise at all unless the other, impaired spouse has sustained some legally cognizable harm or injury.” *Id.*

In *Eide*, this Court confronted whether the spouse of a person with a viable Civil Rights Act (“CRA”) claim could bring his own action for loss of consortium, or whether that action was somehow not authorized by the CRA. This Court relied upon the nature of the loss of consortium claim to conclude that such claim was not a CRA claim at all, but was rather a claim at common law. *Id.* at 33-34; *see also, Burchett v RX Optical*, 232 Mich App 174, 178-179; 591 NW2d 652 (1999). As such, the question was not whether the CRA allowed recovery for loss of consortium, but whether anything in the CRA prevented the independent cause of action. *Eide*, 431 Mich at 29-30; *see also, Burchett*, 232 Mich App at 179.

#### **D. Governmental Immunity Fundamentals**

##### **1. Immunity Jurisprudence**

The Legislature has the power to create a right to recover damages for injuries received due to the negligence of public authorities. *See, e.g., Sziber v Stout*, 419 Mich 514; 358 NW2d 330 (1984) (discussing the highway exception to governmental immunity); *Burnham v Byron Twp*, 46 Mich 555; 9 NW 851 (1881) (same). Because this right is purely statutory, the Legislature has the power to modify, abridge, or even abolish that right by appropriate action. *Westgate v Adrian Twp*, 161 Mich 333; 126 NW 422 (1910). The Legislature can also attach to the right conferred any limitation it chooses. *Moulter v City of Grand Rapids*, 155 Mich 165; 118 NW 919 (1908) (overruled on other grounds in part by, *Grubaugh v City of St Johns*, 384

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(3) that a wife is entitled to her own earnings. *Holbrook, supra* at 4.

Mich 165; 180 NW2d 778 (1970)). Whether the limitations imposed are reasonable or unreasonable are questions for the Legislature and not for the courts, *id.*, so long as a limitation on a vested right does not violate the Constitution, *Grubaugh v City of St Johns*, 384 Mich 165, 175; 180 NW2d 778 (1970), *abrogated on other grounds*, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41.

In Michigan, immunity for non-sovereign units of government is provided by statute in the Governmental Tort Liability Act (“GTLA”), MCL 691.1401, *et seq.* Section 7 of the GTLA confers sweeping immunity on governmental agencies performing governmental functions. MCL 691.1407(1). Where the governmental agency is performing a governmental function, the immunity under § 7 is as broad as possible—extending to all governmental agencies for all tort liability. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000) (consolidated with *Evens v Shiawassee Co Rd Comm’rs*).

The only exceptions to this broad grant of immunity are contained within the GTLA itself. *Id.* at 157 (“Although governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily created exceptions are legally compensable if breached.”). In *Nawrocki*, this Court stated that the purpose of its earlier opinion in *Ross v Consumers Power Co (on reh)*, 420 Mich 567; 363 NW2d 641 (1984), was 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.” *Id.* at 148-149. However, the *Nawrocki* Court commented that the failure to consistently follow *Ross* “has precipitated an exhausting line of confusing and contradictory decisions” which have created a “rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners.” Accordingly, the *Nawrocki* Court “return[ed] to a narrow construction of the

highway exception predicated upon a close examination of the statute’s plain language, rather than merely attempting to add still another layer of judicial gloss to those interpretations of the statute previously issued by [the Supreme Court] and the Court of Appeals.” *Id.* at 150.

The immunity granted to governmental agencies is broad, and the statutory exceptions must be narrowly construed. *Nawrocki*, 463 Mich at 158-159. Pertinent to this case, this Court has held that the motor vehicle exception to immunity, MCL 691.1405, must be given a narrow construction. *Chandler v County of Muskegon*, 467 Mich 315, 321; 652 NW2d 224 (2002); *Stanton v City of Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).

In reviewing questions of statutory construction, a court’s role is to discern the Legislature’s intent. *Id.* at 159. This is accomplished by examining the plain language of the statute, and providing words with a common and ordinary meaning. *Id.* This plain language requirement, combined with the narrow construction requirement, is perhaps best illustrated by this Court’s decision in *Stanton*. There, because the term “motor vehicle,” as used in MCL 691.1405, was not defined in the statute, this Court utilized various dictionaries to arrive at the term’s common and ordinary meaning. *Stanton*, 466 Mich at 617. More importantly for this case, the *Stanton* Court held that because immunity exceptions must be narrowly construed, where there are competing dictionary definitions only the narrowest one should be used. *Id.*

## **2. The History and Development of Statutory Governmental Immunity, and Particularly the Motor Vehicle Exception**

In addition to the nuts and bolts of post-*Nawrocki* immunity jurisprudence, an overview of the history of statutory governmental immunity in Michigan is helpful to fully understand the issues presented in this case. Between 1842 and 1939, any plaintiff wishing to assert a claim against the State of Michigan, including its agencies and institutions, was required to present the claim directly to the Legislature, or to the Board of State Auditors, which the Legislature had

created to “examine and adjust all claims against the State, not otherwise provided for by general laws.” Const 1850, art VIII, § 4. *See also* Baylor, Ronald E., *Governmental Immunity in Michigan*, § 3.2, 3-2, ICLE 2d ed (2005). Michigan’s general law did not expressly authorize personal injury claims against the State, and the Michigan Supreme Court generally refused to authorize personal injury claims against the State in the absence of a clear and specific legislative waiver of immunity. *See, e.g., Mead v Mich Public Service Comm*, 303 Mich 168; 5 NW2d 740 (1942); *see also* Baylor, *supra* at § 3.2, 3-2; Cooperrider, *The court, the legislature, and governmental tort liability in Michigan*, 72 Mich L R 187 (1973). (Appx at 113a-214a).

In 1939, the Legislature passed the Michigan Court of Claims Act, which conferred on the Court of Claims exclusive jurisdiction over all claims against the State in any of its forums. 1948 CL 691.108; *see also* Baylor, *supra* at § 3.2, 3-2. Although the Court of Claims Act waived the State’s liability from suit, it did not waive the State’s immunity from tort liability while engaged in a governmental function. *Manion v State*, 303 Mich 1; 5 NW2d 527, *cert den* 317 US 677 (1942).

In 1943, the Legislature amended the Court of Claims Act by creating a sweeping waiver of the State’s “immunity from liability for the torts of its officers and employees.” 1943 PA 237; *see also* Baylor, *supra*, § 3.2 at 3-3. However, as described by Professor Cooperrider in his often-cited article, the Legislature “flinched” and repealed its waiver of immunity in 1945. Cooperrider, *supra* at 249; *see also* Baylor, *supra*, § 3.2 at 3-3. In its place, the Legislature enacted a statute making political subdivisions of the state of Michigan liable “[i]n any civil action . . . to recover damages” only for the negligent operation by officers, agents, and employees of motor vehicles owned by the political subdivision, whether or not the political subdivision was engaged at the time of the operation of the motor vehicle “in a governmental

function.” 1945 PA 127, § 1 (MCL 691.151(1)); (Appx at 92a-93a), *see also* Baylor, § 3.2 at 3-3.

In 1964, the Legislature passed the Governmental Tort Liability Act, 1964 PA 170, codified at MCL 691.1401, *et seq.* For the first time, in MCL 691.1407, the Legislature affirmatively provided immunity to governmental agencies from tort liability from injuries arising out of the exercise or discharge of a governmental function. The 1964 Act contained three statutory exceptions to immunity: (1) negligent operation of motor vehicles; (2) defective highways; and (3) defective buildings. Baylor.

MCL 691.1405, which contains the motor vehicle exception to governmental immunity, has remained unchanged since 1964:

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 §§ 257.1 to 257.923 of the Compiled Laws of 1948.

MCL 691.1405. Notably, the language of this statute—which creates liability for “bodily injury and property damage”—is considerably more narrow than its predecessor MCL 691.151, which created liability “[i]n any civil suit . . . to recover damages . . . .”

E. **The Plain and Unambiguous Language of MCL 691.1405 Waives Governmental Immunity Only For “Bodily Injury and Property Damage” Resulting From the Negligent Operation of a Government-Owned Motor Vehicle. Because the Language of This Immunity Exception Must Be Narrowly Construed, the Term “Bodily Injury” Must Be Interpreted as a Limitation on the Types of Injuries Which Are Compensable**

The motor vehicle exception to governmental immunity makes a governmental agency “liable for bodily injury and property damage resulting from the negligent operation . . . of a motor vehicle of which the government agency is owner . . . .” MCL 691.1405. Because the GTLA does not define the term “bodily injury,” a court must give that term its common and

ordinary meaning. *Stanton*, 466 Mich at 617. As with the term “motor vehicle” in *Stanton*, the proper source of the “common and ordinary meaning” of “bodily injury” is a dictionary. Neither *Webster’s II: New College Dictionary* (1995) (Appx at 94a-96a) nor the *American Heritage Dictionary: Second College Edition* (1985) (Appx at 97a-99a) provide a definition for “bodily injury.” However, *Black’s Law Dictionary, 5<sup>th</sup> Ed* (1979), does contain a definition:

Bodily. Pertaining to or concerning the body; of or belonging to the body or the ***physical constitution***; not mental but ***corporeal*** . . . .

\* \* \*

Bodily injury. Generally refers ***only*** to injury to the body, or to sickness or disease contracted by the injured as a result of the injury. . . .

(Appx at 100a-101a) (emphases added).<sup>3</sup>

Case law from Michigan in the context of insurance coverage disputes confirms that this definition of “bodily injury” represents the common and ordinary meaning of that term. For example, in *Farm Bureau Mut Ins Co v Hoag*, 136 Mich App 326; 356 NW2d 630 (1984), the Court of Appeals needed to define the term “bodily injury” as it was used in a county’s insurance policy. The Court looked to authority from other jurisdictions which, “[a]s a general rule . . . have found the term ‘bodily injury’ to be unambiguous and understood to mean hurt or harm to the human body, contemplating actual physical harm or damage to a human body.” *Id.* at 334.

Similarly, in *State Farm Mut Auto Ins Co v Descheemaker*, 178 Mich App 729; 444 NW2d 153 (1989), the Court of Appeals addressed whether the wife and children of a person who sustained bodily injury in an automobile accident were entitled to an additional \$25,000 pursuant to the higher \$50,000 “per accident” liability coverage afforded by the at-fault driver’s

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<sup>3</sup> The more recent Eighth Edition of *Black’s Law Dictionary* contains a similarly narrow definition: “Physical damage to a person’s body. – Also termed *physical injury*.” (Appx at 102a-103a) (emphasis in original).

policy. To resolve this question, the Court was required to determine whether the wife and children's claims for loss of consortium, society and companionship constituted their own "bodily injuries" for purposes of the policy. The Court held:

First, the underlying policy defines a "bodily injury" as meaning "bodily injury to a person and sickness, disease or death which results from it." This definition of "bodily injury" has been found to be unambiguous and has been understood as contemplating "actual physical harm or damage to a human body." *Farm Bureau Mutual Ins. Co. of Michigan v. Hoag*, 136 Mich. App. 326, 334-335, 356 N.W.2d 630 (1984), and see *National Ben Franklin Ins. Co. of Michigan v. Harris*, 161 Mich. App. 86, 89, 409 N.W.2d 733 (1987). Nonphysical injuries, such as humiliation and mental anguish, that lack any physical manifestations do not constitute a "bodily injury." *Hoag*, supra, 136 Mich. App. at p. 335, 356 N.W.2d 630; *Harris*, supra, 161 Mich. App. at p. 89, 409 N.W.2d 733. Therefore, it follows that other nonphysical injuries, such as a loss of consortium, society and companionship, which lack any physical manifestations, are also not bodily injuries.

*Descheemaker*, 178 Mich App at 732.

In an unpublished opinion, two of the panel members who decided *Kik I* referred to the very same definition of "bodily injury" from the 5th edition of *Black's Law Dictionary* to conclude that "'bodily injury' generally 'refers only to injury to the body, or to sickness or disease contracted by the injured as a result of the injury.'" *DaimlerChrysler Corp v Professional Corporate Intelligence*, unpublished opinion per curiam of the Court of Appeals, decided December 22, 2005 (Docket Nos. 254107, 256290) (Murphy, PJ, Sawyer and Meter, JJ) (Appx at 104a-109a).

Numerous other jurisdictions adopt the same position that claims for loss of consortium do not qualify as "bodily injuries" for insurance policy purposes. See, e.g., *United Services Automobile Ass'n v Warner*, 64 Cal App 3d 957, 965 (Cal App 4 Dist 1977) ("[t]he fact that loss of consortium may have physical consequences does not convert the action into an action for bodily injury to the suffering spouse."); *Napier v Banks*, 224 NE2d 158, 162 (Ohio App 1967) ("a deprived spouse's reasoning that he has suffered damages to his property rights aside from

damages because of his wife's bodily injury is ingenious, but invalid"); *Lampton v United Services Auto Ass'n*, 835 P2d 532, 534 (Colo App 1992) ("A person who has lost the society, companionship, and services of his or her spouse has sustained a personal injury . . . . This loss, although tangible, real, and compensable, is not a bodily injury within the commonly accepted meaning of that term.").

Defendants' research has revealed only two cases from foreign jurisdictions addressing whether loss of consortium claims are barred by a "bodily injury" limitation in an immunity statute. In the first case, *Brenneman v Bd of Regents of the Univ of New Mexico*, 135 NM 68; 84 P3d 685 (Ct. App. NM 2003), the New Mexico Court of Appeals determined that loss of consortium damages were permissible under the New Mexico statute. However, the linchpin of the decision was the language of the statute, which waived sovereign immunity for "**liability for damages resulting from** bodily injury, wrongful death or property damage caused by the negligence of public employees . . . ." *Id.* at 69 (emphasis added). Thus, the New Mexico statute is easily distinguishable from the Michigan statute, which does not create liability for damages resulting from bodily injury, but instead makes the government liable for bodily injury and property damage.

In the second case, *Swafford v Chattanooga*, 743 SW2d 174 (Tenn App 1987), the Tennessee Court of Appeals addressed whether the Tennessee Governmental Tort Liability Act waived immunity for loss of consortium. The court cited two separate provisions of the Act. One, in setting the minimum limits of liability coverage under the Act, referred only to "bodily injury or death." *Id.* at 178-179. The other, which waived immunity for injury from unsafe streets and highways, stated that "immunity from suit of a governmental entity is removed for *any injury* caused by defective, unsafe, or dangerous condition . . . ." *Id.* at 179 (emphasis in

original). The court concluded that the latter waiver of immunity controlled, and therefore that loss of consortium could be recovered. *Id.* Again, as with the New Mexico case, the language of the statute controlled the issue, and the language of the Tennessee statute is, on its face, a much broader waiver of immunity than contained in the Michigan statute. It is worth noting that the clear implication in *Swafford* is that but for the broad waiver contained in the Tennessee highway statute, loss of consortium would not have fit the definition of a “bodily injury” as used elsewhere in the Act.

In summary, the language of Michigan’s motor vehicle exception is clear and unambiguous, and must be given its common and ordinary meaning. As recognized by the Court of Appeals in *Wesche v Mecosta Co Rd Comm*, 267 Mich App 274, 279-280; 705 NW2d 136 (2005) (overruled by *Kik II*) (Appx at 54a-56a), and repeated subsequently by a different panel in *Wilson v Lake Co Rd Comm*, unpublished opinion per curiam of the Court of Appeals, decided September 29, 2005, at \*2 (Docket No. 254183) (Saad, PJ, Jansen and Markey, JJ) (Appx at 110a-112a), the most plain and natural reading of the statute is that governmental agencies are liable only for bodily injury and property damage, assuming the remaining elements of the statutory cause of action are satisfied. *Id.* at \*2. This would mean that a governmental agency is liable for injuries to a person’s physical constitution, i.e., injuries inflicted on a person’s body, but not for less tangible injuries, such as those allegedly inflicted on a marital relationship.

Because the alleged loss of consortium suffered by Mr. Kik is neither his own bodily injury nor property damage, the plain language of the GTLA precludes recovery for these alleged losses. The term “loss of consortium,” although an amorphous concept, has been defined by this Court:

Loss of consortium technically means the loss of conjugal fellowship. However, it is legally recognized as including loss of society, companionship, service, and all other incidents of the marriage relationship.

*Washington v Jones*, 386 Mich 466, 472; 192 NW2d 234 (1971) (citing *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960); *Whitson v Whitely Poultry Co*, 11 Mich App 598; 162 NW2d 102 (1968)). By this definition, therefore, a claim for loss of consortium is a claim for injury inflicted on the “incidents of the marriage relationship.” It is a relational injury, not an injury to body or property. As such, it is simply not compensable pursuant to a narrow understanding of the common and ordinary meaning of the plain language of the motor vehicle exception.

**F. The Reasoning of the Three-Judge Panel of the Court of Appeals, Which Was Expressly Adopted By A Four-Judge Majority of the Special Panel, Is Flawed**

The four-judge majority of the Special Panel of the Court of Appeals adopted the analysis supplied by the three-judge panel which had declared the conflict with *Wesche*. Respectfully to the four-judge majority of the Special Panel, and also the underlying three-judge panel, they were wrong to overrule *Wesche*. Their analysis, and specifically their disagreement with *Wesche*, is unpersuasive because (1) it does not give the words used in MCL 691.1405 their plain and ordinary meaning, (2) it does not narrowly construe MCL 691.1405, (3) it does not appear to disagree with *Wesche*'s conclusion that loss of consortium is not a physical injury, (4) it inaccurately concludes, contrary to forty-five years of Michigan law, including two Supreme Court decisions, that loss of consortium is an “element” of damages, rather than an independent cause of action, (5) it incorrectly suggests that *Wesche* dealt with the damages that may be recovered by a person who suffers bodily injury, (6) it is contrary to a well reasoned unpublished decision of the Court of Appeals decided after *Wesche*, and (7) it fails to recognize that the

Legislature did, in fact, use words whose plain meaning specifically prohibits recovery for loss of consortium in motor vehicle exception cases.

1. **Wesche Properly Gives MCL 691.1405 Its Plain Meaning; the Analysis Proposed By the Three Judge Panel and Adopted By the Majority of the Special Panel In This Case Does Not**

*Wesche* correctly gives the terms of MCL 691.1405 their plain meaning. As recognized by *Wesche*, the primary rule of statutory interpretation is that a court must effect the intent of the Legislature. *Wesche*, 267 Mich App at 279. To do so, a court must first examine the statute’s language. *Id.* If that language is clear and unambiguous, the court assumes the Legislature intended its plain meaning, and the statute is enforced as written. *Id.*

a. **The Plain Meaning of § 1405 Is That Governmental Agencies Are Liable Only For Bodily Injury and Property Damage**

As already discussed in Section I(E), *supra*, the motor vehicle exception to governmental immunity, MCL 691.1405, creates an exception to the broad immunity conferred by MCL 691.1407 by expressly making governmental agencies liable only for bodily injury and property damage. *Wesche* recognized that fact and gave the plain words of the statute their common meaning, while at the same time adhering to this Court’s mandate to narrowly construe the immunity exceptions.

b. **The Reading of the Statute Proposed by the Panel In This Case Rewrites the Statute by Creating A “Bodily Injury” Threshold That Is Not Found in the Statute’s Plain Language**

In its analysis, the three-judge panel suggests that the “fundamental flaw” of *Wesche* is that “it confuses the concepts of liability and damages.” *Kik I*, 268 Mich App at 709. Rather, according to the panel, the statute should be read as creating broad liability for any type of damage when the negligent operation of a motor vehicle owned by the governmental agency

results in bodily injury or property damage. *Kik I*, 268 Mich App at 709-710. This analysis turns the “bodily injury” language in § 1405 into a threshold requirement similar to those found in other statutes not related to immunity.

This “threshold” interpretation is incorrect because it rewrites the statute to avoid giving its terms their plain meaning. For the panel to be correct, the statute would have to state:

Governmental agencies shall be liable for the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . when that negligence results in bodily injury and property damage.

Clearly, this is not how the statute is worded. In direct contrast, the statute states that “[g]overnmental agencies shall be liable for bodily injury and property damage” resulting from the negligent operation of a motor vehicle. MCL 691.1405. Defendants respectfully submit that there is only one way to read this language: as creating liability for a narrow class of injuries, namely those to the body and to property, to the exclusion of injuries that are not.

Moreover, our statutes are replete with examples of “liable for” language that does not create a “threshold” for liability, but instead specifically and narrowly defines the type of damages for which liability is created. *See, e.g.*, MCL 30.411 (making the state and its political subdivisions and employees, agents or representatives “not liable for personal injury or property damage” sustained by any person appointed as a member of disaster relief forces); MCL 46.30a(2) (making certain persons “liable for moneys paid to the [person appointed in violation of the section]”); MCL 125.996 (making certain manufacturers or dealers “liable for treble damages”); MCL 3.751(m) (making the Midwest Interstate Low-Level Radioactive Waste Commission “not liable for any costs associated with” an enumerated list of activities; MCL 10.123 (making the state “not . . . liable for removal or costs related to the removal” of consumer products from public display pursuant to MCL 10.122(1)(a)). This list of citations is but a very

small sampling of the statutes in our law which use the term “liable for,” and defendants respectfully suggest that an exhaustive collection of each would be futile. Rather, as is demonstrated by these statutes, it is common for the term “liable for” to be used as a means of identifying a specific and narrow type of liability, rather than, as the three-judge panel here suggested, a threshold for unlimited liability.

Comparison of the language in § 1405 to another statute which unequivocally does create a liability “threshold” exposes the flaw in this panel’s reasoning. Michigan’s No-Fault Act contains a well known and heavily litigated threshold over which a plaintiff must cross before gaining entitlement to noneconomic damages. MCL 500.3135(1). That statute states: “A person remains *subject to tort liability* for noneconomic 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 body function, or permanent serious disfigurement.” *Id.* (Emphases added).

The wording of this statute—which is very different from the wording of MCL 691.1405—demonstrates that the Legislature knows how to create a threshold of liability when it so desires. Section 3135 is worded differently than the motor vehicle exception in that it does not make “a person liable for death, serious impairment of bodily function, or permanent serious disfigurement” that is caused by someone’s negligence. If it did, then it would be worded similarly to MCL 691.1405, and it would be clear that the “serious impairment” language is not a mere threshold, but is a direct limitation on the types of damages for which a person may be liable. Rather, unlike the motor vehicle exception, § 3135 preserves “tort liability for noneconomic loss” only if a certain level and type of injury has been sustained.

There is an additional significant and perhaps unintended aspect created by the three-judge panel’s analysis that is worthy of mention. If it is true that the words “bodily injury *and*

property damage” create a threshold for recovery of unlimited types of damages, then the use of the conjunctive term “and” **will bar any recovery whatsoever** in a case where the plaintiff has suffered one, but not the other, type of damage. In *Auto Owners Ins Co v Stenberg Bros*, 227 Mich App 45; 575 NW2d 79 (1997), this Court discussed the use of conjunctive and disjunctive terms in a statute, and how each should be interpreted:

The word "or" generally refers to a choice or alternative between two or more things. *Root v Ins. Co of North America*, 214 Mich. App. 106, 109, 542 N.W.2d 318 (1995). "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments." *Id.*, quoting *Esperance v Chesterfield Twp.*, 89 Mich. App. 456, 460-461, 280 N.W.2d 559 (1979). **However, the words are not interchangeable and their strict meaning "should be followed when their accurate reading does not render the sense dubious" and there is no clear legislative intent to have the words or clauses read in the conjunctive. *Id.***

*Id.* (Emphasis added).

In this case, for example, because the conjunctive term “and” is used in an immunity exception and therefore must be given its strictest and most narrow meaning, it must necessarily be limited to requiring both types of injuries before a cause of action is created. *Cf. Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000) (concluding that use of the term “the” with respect to proximate cause in the gross negligence exception for governmental employees, MCL 691.1407(2), has a singularizing and particularizing effect, and thus refers to the one most immediate, efficient and direct cause of an injury). The importance of the conjunctive term is undermined, however, if the language of the statute does not create a minimum threshold over which a plaintiff must cross, but rather merely creates liability for certain categories of injuries.

### c. Conclusion

In summary, the statute’s plain language, which must be narrowly construed and given its common and ordinary meaning, makes a governmental agency “liable for bodily injury and property damage.” MCL 691.1405. There is only way to interpret this language: it is an express

limitation on the types of injuries for which liability is created. Nothing in the plain language of this statute supports the three-judge panel’s conclusion that it creates a “bodily injury” threshold. The lower courts’ disagreement with *Wesche* is simply not supported by the plain language of the statute. Rather, the interpretation of the statute offered in *Wesche* and *Wilson* should have prevailed.

2. **Wesche Properly Gives MCL 691.1405 A Strict and Narrow Construction; the Analysis Proposed By the Three-Judge Panel and Adopted By the Majority of the Special Panel In This Case Does Not**

The reading of the motor vehicle exception proposed by the three-judge panel and adopted by the majority of the special panel here—which turns the “bodily injury” language into a threshold for recovering unlimited types of damages—does not construe the motor vehicle exception narrowly. To the contrary, as even the three-judge panel admits, *Kik I*, 268 Mich App at 708-709, it gives the statute a broader reading than the one proffered in *Wesche*. The panel admittedly broadens the liability created by the motor vehicle exception by giving an expansive reading to the types of injuries for which recovery can be made, and by expanding the class of persons who can recover beyond those who suffer bodily injury. *Kik I*, 268 Mich App at 708-709. Of course, the panel suggests that its broader reading is supported by the statutory language, but this is simply not true, as discussed at length in Section I(C), *supra*.

Rather, the three dissenting judges on the special panel had it exactly right when they expressed their view that because the immunity exceptions must be narrowly construed, and because a claim for loss of consortium is an independent action, a spouse asserting the claim must show his or her own bodily injury or property damage before the claim implicates the motor vehicle exception. *Kik II*, 272 Mich App. at 392-393. (Appx at 55a-56a). This position

cannot be seriously disputed in light of *Eide, supra*, where this Court held that a loss of consortium claim is an independent common law cause of action. *Eide*, 431 Mich at 33-34.

3. **The Three-Judge Panel Did Not Disagree With *Wesche*'s Narrow Definition of the Term "Bodily Injury"**

The three-judge panel here did *not* disagree with *Wesche*'s narrow definition of the term "bodily injury," and specifically conceded that loss of consortium is not a physical injury. *Kik I*, 268 Mich App at 708-709. Having made that concession, only an act of statutory construction contortionism—i.e., creating the bodily injury threshold from language that, on its face, does not create a threshold—could avoid the conclusion that immunity has not been waived for common law loss of consortium claims. It is respectfully submitted that the lower courts here could not disagree with *Wesche*'s definition of "bodily injury" because *Wesche* gave that term a properly narrow and strict reading. The flaw in the lower courts' analysis came in their misguided efforts to avoid the direct implication of that definition.

4. **The Three-Judge Panel's Opinion Inaccurately Describes Loss of Consortium As An Element of Damages Arising Out of An Injury. To the Contrary, It Is an Independent (Yet Derivative) Cause of Action Belonging To the Spouse**

In explaining their disagreement with the *Wesche* decision, the three-judge panel described loss of consortium as a "category" of damages which arise from an injury. *Kik I*, 268 Mich App at 710. This is simply not the law in Michigan. Rather, as recognized in *Wesche*, loss of consortium is a separate cause of action belonging to the spouse. *Wesche*, 267 Mich App at 279 (citing *Wessels v Garden Way, Inc*, 263 Mich App 642, 648; 689 NW2d 526 (2004)).<sup>4</sup> It has been afforded that status since at least 1960. *Id.*

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<sup>4</sup> Judge O'Connell, who sat on this three-judge panel, filed a partial dissent in *Wessels*, expressing his view that "loss of consortium is not a separate, independent cause of action. Loss

The panel's incorrect observation is directly tied to its conclusion that the motor vehicle exception creates a "bodily injury" threshold. As discussed in Section I(F)(1)(b), *supra*, the three-judge panel here concluded that if a plaintiff, such as Mrs. Kik, can cross a bodily injury threshold, then that plaintiff is entitled to recover for all damages "arising from" that bodily injury. *Kik I*, 268 Mich App at 710. According to the panel, Mr. Kik's claim for loss of consortium is "one such category of those damages." *Kik I*, 268 Mich App at 710.

This analysis is simply not defensible given the independent status that Michigan law affords to a claim for loss of consortium. It is not a "category of damages," nor is it an "element of damages arising out of an injury." It is an independent (yet derivative) cause of action belonging to the spouse. That it is derivative means only that the spouse is not permitted to assert such a claim if the primary claim fails for some reason. *Fultz v Union-Commerce Associates*, 470 Mich 460, 461; 683 NW2d 587 (2004).

As a practical matter, even assuming for argument's sake that the three-judge panel is correct that § 1405 creates a "threshold" for liability above which any and all damages can be recovered, it does not change the fact that any person attempting to assert an independent cause of action must cross that threshold. If that threshold is "bodily injury," as the panel suggests it is,

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of consortium is a derivative cause of action. Only one injury occurs and, therefore, the total damages relate to the one injury. Loss of consortium, physical impairment, disfigurement, mental anguish, emotional distress, humiliation, and other nonpecuniary losses all relate to a single injury and, therefore, are not independent, separate causes of action." *Wessels*, 263 Mich App at 655. Judge O'Connell's view, however, was contrary to the majority opinion in that case, which held expressly that loss of consortium has been an independent cause of action in this state since at least 1960. *Id.* at 648. Equally importantly, Judge O'Connell's view was contrary to this Court's decision in *Eide*, 431 Mich at 489. Respectfully to the three-judge panel in this case, their analysis relies heavily on the incorrect belief that loss of consortium is merely an element of damages belonging to the person who suffers bodily injury. In this sense, they appear to disagree more with *Wessels*, *Eide* and forty-five years of Michigan law than they do with *Wesche*.

then a spouse asserting a claim for loss of consortium must show that the claim is one for “bodily injury.” As discussed in Section I(E), *supra*, that cannot be the case for loss of consortium.

Nor is it possible for the physically injured person—in this case Mrs. Kik—to maintain an action on her husband’s behalf for loss of consortium, or to include her husband’s loss of consortium as an element of her own damages. In other words, even assuming that the panel is correct that § 1405 creates a “bodily injury threshold,” Mr. Kik could not cross that threshold because his claim for loss of consortium is not a “bodily injury” as that term is commonly understood. The only way for Mr. Kik to recover his loss of consortium would be if his independent cause of action was treated as an “element of damages” of Mrs. Kik’s bodily injury.

Viewed in this light, the true rub to the three-judge panel’s analysis is two-fold. First, it creates a bodily injury “threshold” for liability under the motor vehicle exception, which as discussed above, is not supported by the plain language of the statute. Second, it overturns forty-five years of Michigan jurisprudence—including the two Supreme Court decisions in *Eide*, 431 Mich at 30 (“loss of consortium is a separate cause of action”) and *Montgomery*, 359 Mich at 49—by holding that a claim for loss of consortium is not an independent cause of action, but is rather a mere “element of damages” to a bodily injury claim. Respectfully, this outcome cannot be allowed to stand.

##### **5. The Three-Judge Panel’s Analysis of the “Ultimate Effect” of *Wesche* Is Incorrect**

In its opinion, the three-judge panel offered its assessment of the “ultimate effect of the holding in *Wesche*,” (*Kik I*, 268 Mich App at 709), suggesting that:

the only compensation which may be awarded under MCL 691.1405 is for the actual physical injury itself. That is, for example, if a person were to lose a limb in an automobile accident caused by a government employee negligently operating a government-owned motor vehicle, *Wesche* would decree and that the victim could recover the value of the lost limb, because that is a “bodily injury,” but could recover nothing for the pain and suffering or impaired earning ability

that might be occasioned from the loss of the limb because those would represent ‘other damages deriving from the . . . injury.’

*Id.* at 9.

Reviewing *Wesche*, however, it is very difficult to determine how the panel arrived at this assessment. *Wesche* involved a claim by a motorist who was rear-ended on a public highway by a Gradall operated by a road commission employee.<sup>5</sup> In addition to the claim for bodily injury asserted by plaintiff Daniel Wesche, his spouse, who was not present at the time of the accident, asserted a claim for loss of consortium. Section III of the *Wesche* decision, which discussed whether the spouse could assert her loss of consortium claim, did not involve any part of Daniel Wesche’s claim. That decision did not address whether *his* claim was limited in any way, and it did not discuss any of the ways in which his claim for “bodily injury” could be measured. There is simply no basis in *Wesche* to support the panel’s doomsday prophesy of its “ultimate effect.”

**6. Shortly After *Wesche*, a Separate Panel of the Court of Appeals Reached the Same Conclusion**

Shortly after *Wesche* was decided, a second panel of the Court of Appeals reached the same conclusion. In *Wilson v Lake Co Rd Comm*, unpublished opinion *per curiam* of the Court of Appeals, decided September 29, 2005 (Docket No. 254183), the Court of Appeals again addressed whether a spouse’s claim for loss of consortium was barred by the motor vehicle exception. (Appx at 110a-112a). In that case, plaintiff Robert Wilson alleged that his back was injured while standing in his driveway when he was struck by a plume of snow allegedly thrown from a road commission snowplow. His spouse, who was not present at the time of the accident, asserted her own claim for loss of consortium. The Court of Appeals, through Judges Saad, Jansen and Markey, concluded that the spouse’s claim was barred by the statute.

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<sup>5</sup> A Gradall is a type of excavator commonly used in road construction projects.

Specifically, the Court of Appeals discussed *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982), and a case which had relied upon it, *Longworth v Mich Dep't of Hwys & Transp*, 110 Mich App 771; 315 NW2d 135 (1982). The Court distinguished *Longworth* on the basis that it was no longer binding as it was issued prior to November 1, 1990, and that furthermore the Supreme Court had rejected its rationale in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000). The panel distinguished *Endykiewicz* on the basis that it involved a wrongful death claim (subject to additional statutory language that is not relevant outside of a wrongful death case) and that it had been expressly modified by *Scheurman v Dep't of Transp*, 434 Mich 619, 628 n18; 46 NW2d 66 (1990), to the extent that *Endykiewicz* had refused to strictly construe the immunity statute. According to the Court of Appeals, the requirement to apply a narrow construction to the motor vehicle exception means that it “imposes liability for bodily injury or property damage, not other non-bodily injuries.” *Wilson*, at \*2.

Defendants respectfully submit that the conclusion in *Wilson*, which agrees with *Wesche* without mentioning it, is correct.

7. **The Observation That If the Legislature Had Intended To Prohibit Recovery for Loss of Consortium, It Would Have Done So In Specific Language Is Incorrect**

The three-judge panel suggests that if the Legislature had intended to prohibit the recovery for loss of consortium, it would have affirmatively done so in specific language. *Kik I*, 268 Mich App at 708-709. This argument misses the point that by affirmatively making governmental agencies “liable for bodily injury and property damage,” the Legislature did use specific language of limitation. The panel’s argument contains the same flaw as the *Endykiewicz* case that it cites: both fail to construe the exception to immunity narrowly. *See, e.g., Scheurman*

v *Dep't of Transp*, 434 Mich 619, 628 n18; 46 NW2d 66 (1990) (modifying *Endykiewicz* to the extent that it did not narrowly construe the immunity statutes).

Moreover, as discussed in Section I(F)(1)(b), *supra*, there are many examples of statutes which use the term “liable for” to define a narrow and specific type of damages. For example, MCL 46.30a(2) makes certain persons “liable for moneys paid to the [person appointed in violation of the section].” It is nonsensical to think that a statute such as this, because it does not expressly prohibit other categories of damages, permits recovery of those damages as well.

### G. Conclusion

For the reasons and authorities discussed above, it is evident that the lower court’s decisions permitting the spouse of an injured person to recover for loss of consortium pursuant to the motor vehicle exception are erroneous and must be reversed.

## II. THE PLAIN LANGUAGE OF THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY CREATES LIABILITY FOR BODILY INJURY AND PROPERTY DAMAGE, AND DOES NOT CREATE LIABILITY FOR NON-BODILY INJURIES, SUCH AS FOR LOSS OF SOCIETY AND COMPANIONSHIP, EVEN THOUGH THOSE DAMAGES ARE EXPRESSLY AUTHORIZED BY THE WRONGFUL DEATH ACT.

### A. Standard of Review

The trial court’s grant or denial of summary disposition is reviewed *de novo*. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002). The issues before this Court also present questions of statutory construction, which receive *de novo* review, as well. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

### B. Summary

The authorities supporting the conclusion that the term “bodily injury and property damage” in the motor vehicle exception constitutes a limited waiver of immunity, as discussed in Argument Section I, *supra*, are impressive. Assuming that this Court agrees, this case presents

the additional question whether the language of the wrongful death act, presently codified at MCL 600.2922, somehow constitutes an additional waiver of immunity beyond that contained in the immunity statute. Defendants contend that the wrongful death act cannot and does not permit the personal representative of an estate to assert claims and recover damages on behalf of the estate's beneficiaries for which there has been no express statutory waiver of immunity within the GTLA.

Wrongful death litigation in Michigan extends back to the mid-1800s. It takes no great legal imagination to understand that through the course of 160 years, legal precedents—and the reasons underpinning them—can change many times over. This is certainly true of wrongful death litigation. However, the most current version of the wrongful death act—as construed by this Court—establishes that a wrongful death claim is nothing more than the underlying claim that would have belonged to the decedent had he or she not died, which survives by law, and which vests by statute in the wrongful death beneficiaries who are permitted to collect damages. *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987).

Shedding this light on the wrongful death cause of action makes clear that if the underlying cause of action is substantively limited in some way (such as by a limited waiver of governmental immunity, or by statutory damage caps), then that limitation would carry through to the wrongful death action. For the reasons discussed in this section, defendants submit that the wrongful death act should not be construed so as to permit a beneficiary of the decedent's estate to collect damages that the beneficiary would not have been permitted to recover if the decedent had survived. Stated differently, the wrongful death act should not be construed so as to expand the limited waiver of the government's immunity contained in the motor vehicle exception. To the contrary, if a wrongful death claim is asserted, it must be made subject to the

same underlying immunity obstacles that any plaintiff would encounter in a case which does not involve injuries resulting in death.

The case relied upon by the three-judge panel, *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982), no longer represents a valid view of either the GLTA, or the wrongful death act.

Moreover, to construe the wrongful death act in the manner proposed by the three-judge panel would violate the Title-Object Clause of the Michigan Constitution.

### C. History of the Wrongful Death Act

There was no cause of action at common law for wrongful death. *Hyatt v Adams*, 16 Mich 180 (1867).

In 1848, the Michigan Legislature undertook to create such a cause of action when it enacted Michigan's version of England's Lord Campbell's Act. *Breckon v Franklin Fuel Co*, 383 Mich 251, 281; 174 NW2d 836 (1970) (Justice Adams dissenting).<sup>6</sup> The original 1848 Act did not treat the damages recovered as an asset of the decedent's estate. *Id.* To the contrary, the Act stated that any amount recovered "shall be for the Exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property, left by persons dying intestate . . . ." Act No. 38, Laws of Michigan 1848; *see also Breckon*, 383 Mich at 281.

In 1873, the Legislature amended the Act to provide that any amount recovered in a death action "shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property, left by persons dying intestate . . . ." *Breckon*, 383 Mich at

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<sup>6</sup> Justice Adams' dissent was adopted in 1972 by a majority of the Supreme Court, which in the same decision overturned the *Breckon* majority opinion. *Smith v City of Detroit*, 388 Mich 637; 202 NW2d 300 (1972).

281. This amendment was subsequently interpreted in *Findlay v Chicago & Grand Trunk R Co*, 106 Mich 700; 64 NW 732 (1895), as meaning that any damages recovered in a death action constituted an asset of the estate of the deceased.

This view of the death act was controverted in *In Re Oldman's Estate*, 264 Mich 32; 249 NW 471 (1933), where Justice Wiest wrote:

If the administrator has recovery against claimant, such is not in behalf of the estate, but for distribution to persons suffering pecuniary injury resulting from such death.

*In Re Oldman's Estate*, 264 Mich at 37.

However, *In Re Oldman's Estate* was undermined in *In Re Venneman's Estate*, 286 Mich 368; 282 NW 180 (1938), where the Court determined that damages recovered under the death act were to be distributed among the beneficiaries not according to the damage suffered by each, but rather according to the proportions fixed by the statute of descent and distribution. *Id. See also Breckon*, 383 Mich at 282.

In 1939, the Legislature enacted substantial changes to the death act. Perhaps foremost, the causes of action under the death act and the survival act were merged. Justice Adams, dissenting in *Breckon*, summarized the legislative changes to the 1939 amendments to the death act as consisting of four major events:

1. The death act was expanded to include not only death of a person but also injuries resulting in death (eliminating the requirement of instantaneous death for maintaining a death act action).
2. The amended death act required that all actions for death or injuries resulting in death be brought only under the act (eliminating any common law remedies that may have existed and combining the survival act and death act causes of action).
3. Language was added to the amended death act specifying items for which recovery could be had, such as medical, hospital, funeral, and burial expenses, and reasonable compensation for pain and suffering. Further, the statute for the first time required the trial

court to advise the probate court by written opinion as to the amount of the recovery for pecuniary loss suffered by the surviving spouse and all of the next of kin, and also the proportion of such total pecuniary loss suffered by the surviving spouse and each of the next of kin as demonstrated by the evidence at trial. This had the effect of transforming the character of the personal representative to that of a trustee or fiduciary acting on behalf of individual claimants suffering pecuniary injury. This personal representative was in no position to represent the various claimants except to lend his name in his official capacity so as to bring together in one action multiple claims.

4. A new section was added to the act which repealed the survival act to the extent that it was inconsistent with the provisions of the amended death act.

*Breckon*, 383 Mich at 284-286 (J. Adams dissenting).

Despite that the 1939 amendment to the wrongful death act, subsequent courts continued to struggle with the nature of the new cause of action. *See, e.g., Wycko v Gnodtke*, 361 Mich 331; 105 NW2d 118 (1960) (abolishing limitation of recovery to pecuniary loss); *Burns v Van Laan*, 367 Mich 485; 116 NW2d 873 (1962) (equally divided Court on pecuniary damage limitation); *Breckon*, 383 Mich at 257 (collecting conflicting precedent and overruling *Wycko*); *Smith v City of Detroit*, 388 Mich 637; 202 NW2d 300 (1972) (overruling *Breckon*).

In 1987, this Court decided *Hardy v Maxheimer*, 429 Mich 422; 416 NW2d 299 (1987). There, the issue was whether the tolling provision of MCL 600.5852 applies to wrongful death cases in which death occurs instantaneously. This Court held that the savings provision of MCL 600.5852 does toll the statute of limitations in both survival-type actions and death-type actions brought under MCL 600.2922. *Hardy*, 429 Mich at 425.

To support its decision, this Court turned to the history of the wrongful death act. The Court noted that the amended wrongful death statute “makes no distinction between deaths which occur instantaneously or non-instantaneously.” *Hardy*, 429 Mich at 433. Given the unambiguous and unqualified language of MCL 600.2921 that “[a]ll actions and claims survive

death,” this Court concluded that there is no discernable basis for finding that an action for wrongful death, whether instantaneous or not, does not survive by law like any other cause of action. This Court summarized its holding:

Thus, a “death” action (i.e., where the death is “instantaneous”) like any other cause of action under the Revised Judicature Act may be said to “survive by law” for purposes of M.C.L. § 600.5852; M.S.A. § 27A.5852. The claim “survives” the decedent’s death to vest in those who suffer a loss through the death—it “survives” to those who are entitled to claim damages under the Wrongful Death Act.

*Hardy*, 429 Mich at 439-440.

In footnote 17, the Court responded to the dissent’s criticism “that a wrongful death action is not the same action as one for the underlying wrongful conduct” by disagreeing. To the contrary, the majority concluded 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.” *Hardy*, 429 Mich at 440 n17. In the Court’s words:

We, therefore, believe that since 1846, the law in Michigan has evolved to the point where it may now be held that the right to recovery for wrongful death “survives by law.” Consequently, a wrongful death action will no longer be regarded as one created at the time of death, but as one that “survives by law.”

*Hardy*, 429 Mich at 440.

Although it was decided before *Hardy*, the Court of Appeals decision in *McNitt v Citco Drilling Co*, 60 Mich App 81; 230 NW2d 318 (1975), reaches essentially the same result. There, the issue was whether the trial judge should have rendered inadmissible the results of a blood test for alcoholic content of decedent’s blood in a civil action by the decedent’s personal representative against the owner and driver of the other vehicle that was involved in a fatal accident. Examining the language of MCL 600.2922, the Court concluded that “the personal representative of the deceased who asserts a cause of action on behalf of a deceased stands in the

deceased's place for all purposes incident to the enforcement of that claim, including rights and privileges personal to the deceased in his lifetime." *McNitt*, 60 Mich App at 88.

Currently, the wrongful death act states, in pertinent part:

Sec. 2922. (1) Whenever the death of a person , injuries resulting in death, or death as described in section 2922a [FN1] 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 liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased . Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased's spouse.

(c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

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(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while

conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. . . .

MCL 600.2922.

**D. The Motor Vehicle Exception Contains An Express Limitation On the Types of Claims For Which Immunity Has Been Waived. The Wrongful Death Act Does Not Expand That Limited Waiver of Immunity.**

In Part II of its November 15, 2005 decision, the Court of Appeals three-judge panel concluded that because the because the wrongful death act, MCL 600.2922, itself purports to allow a personal representative to recover damages for the loss of society and companionship of the deceased, that any bar to recovering those damages contained in the Governmental Tort Liability Act does not apply.

However, as outlined in Section II(C) above, the history of the wrongful death act and its interpretive case law, leading to the *Hardy* decision, mandates a different result. The current view of the wrongful death act is that the death does *not* create a new cause of action belonging to the beneficiaries of the estate, but that it merely permits a decedent's claim to survive the death, and also permits the personal representative to prosecute that cause of action. *Hardy*, 429 Mich at 439-440; *Allstate Ins Co v Muszynski*, 253 Mich App 138, 142; 655 NW2d 260 (2002); *McNitt*, 60 Mich App at 88. It naturally follows that where the underlying cause of action would have been limited in some respect by governmental immunity, so too, is the wrongful death action limited.<sup>7</sup>

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<sup>7</sup> Failing to recognize this fundamental notion would lead to strange and untenable results. For instance, if the immunity obstacle does not affect a wrongful death action in the same manner that it would affect an action for personal injury not resulting in death, then it would follow that a personal representative of an estate could maintain a valid wrongful death cause of action against a governmental agency based upon its failure to erect appropriate traffic signals at an intersection, or for its failure to design a highway with adequate sight distance. *Cf. Nawrocki*,

Recently, this Court has discussed the effect of the wrongful death act, and specifically its enumeration of damage items, on causes of action that have “built in” limitations on damages. By analogy, this discussion is relevant here. In *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), this Court considered whether the statutory damage caps in a medical malpractice action apply where a wrongful death is alleged. This Court held that the caps do apply, stating that “the wrongful death act is not the only act that is pertinent in a wrongful death action.” *Id.* at 165. Rather, according to the Court, the wrongful death act merely expands the cause of action to allow the plaintiff to recover the damages that could otherwise have been recovered only by the decedent, had he or she survived. *Id.* at 165-166 (citing *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982)). Necessarily, then, if a category of damages is limited—or precluded altogether—by the underlying cause of action, then the wrongful death act does nothing to bring it back.

In this case, the purported cause of action against the Township and its EMS is solely provided by the MCL 691.1405 motor vehicle exception to governmental immunity. That exception defines who may recover, and severely limits the types of damages allowable. The plain language of the motor vehicle exception, which authorizes recovery for “bodily injury,” does not encompass non-bodily injury or derivative damages. Equally importantly, nothing in the plain language of the Wrongful Death Act can be interpreted as an express waiver of the immunity provided in the Act. Nor, based on its nature as a cause of action belonging to the decedent, and for which the personal representative must prove the case that the decedent could have proved herself if alive, could the wrongful death act in any other way alter or waive the immunity provided to the government. Stated differently, the procedural device that allows a

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*supra*; *Hanson v Mecosta Co Rd Comm*, 465 Mich 492; 638 NW2d 396 (2002) (eliminating all

wrongful death case to be prosecuted by the personal representative of an estate does not alter the elements of, or the limitations on, the cause of action that accrued to the decedent. In this case, that cause of action is uniformly subject to the restrictions and limitations of the motor vehicle exception, which does not permit recovery for anything but the “bodily injury” of the person allegedly harmed by the accident.

**E. The Three-Judge Panel’s Reliance on *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982) Is Flawed. *Endykiewicz’s* View Of The Immunity Statutes Has Been Repeatedly Rejected. Moreover, *Endykiewicz’s* View Of The Wrongful Death Act Was Rejected in *Hardy v Maxheimer*.**

To support its decision, the three-judge panel cited and relied upon this Court’s earlier decision in *Endykiewicz v State Hwy Comm*, 414 Mich 377; 324 NW2d 755 (1982). There, this Court, after concluding that the plain language of the highway exception to immunity did *not* need to be narrowly construed, decided that in a highway exception action, a plaintiff could recover damages for loss of society and companionship. By citing and relying extensively upon *Endykiewicz*, the three-judge panel (and the majority of the special panel) have committed to separate and very serious errors.

First, as far as it construes the immunity exceptions, there is no question that *Endykiewicz* would have supported the plaintiff’s position when it was decided. However, subsequently the case’s immunity precedent has been both expressly and impliedly rejected by this Court, and it can no longer be viewed as viable. Second, the three-judge panel here quoted from *Endykiewicz* at length to frame its discussion of the meaning of the wrongful death act. However, the portion quoted recites a pre-*Hardy* understanding of the wrongful death act that did not survive the *Hardy* decision. To the extent that lower courts continue to rely upon *Endykiewicz’s* flawed

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highway liability claims excepting those predicated upon “repair” or “maintenance”).

logic regarding the immunity exceptions, only this Court can act to correct that error. Equally importantly, this Court must intervene to undo the reliance on *Endykiewicz's* pre-*Hardy* understanding of the wrongful death act, lest the Court of Appeals decision here be relied upon by the bench and bar in lieu of *Hardy*.

1. ***Endykiewicz's* View of the Immunity Exceptions Has Been Rejected**

The conclusion in *Endykiewicz* that the immunity exceptions need not be narrowly construed has been rejected and is no longer good law. First, in *Scheurman v Dep't of Transp*, 434 Mich 619, 628 n18; 456 NW2d 66 (1990), this Court admitted that it had erred in construing the immunity statute in *Endykiewicz*. Specifically, the Court stated:

*Endykiewicz* interprets the damage sentence of the statute which provides, “[a]ny person sustaining bodily injury or damage to his property . . . may recover the damages suffered by him . . .”. The Court said that this sentence was ambiguous, therefore, it should not be interpreted to limit a plaintiff’s damages. Thus, the dispositive issue in the case centered on the amount of damages after liability had attached. It offers no insight as to the interpretation of the standard of liability imposed on a governmental unit . . . . At the time the Governmental Immunity Act became effective, the State was still shielded by sovereign immunity. ***Thus, the Court should have strictly construed the immunity act.*** To this limited extent, we modify *Endykiewicz*.

*Id.* at n18 (emphasis added). This Court itself has therefore held that *Endykiewicz* is fundamentally flawed, and has refused to repeat the *Endykiewicz* application of the immunity statute.

More recently, this Court’s decisions in *Nawrocki, supra, Hanson v Mecosta Co Rd Comm*, 465 Mich 492; 638 NW2d 396 (2002) (eliminating all highway liability claims excepting those predicated upon “repair” or “maintenance”), and *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) (holding that there are no common law exceptions to immunity), have made very clear how narrowly the immunity exceptions must be construed: there is simply no room for creative interpretation.

Critically, it was this “loose” interpretation of the immunity exception that allowed the *Endykiewicz* Court to circumvent the clear import of the exception’s “bodily injury” limitation.

In the Court’s own words:

Although the language of M.C.L. § 691.1402; M.S.A. § 3.996(102), by its terms, does appear to limit the class of persons who might seek recovery to persons who have actually sustained injury to person or property, a restrictive interpretation has not always been accorded this language.

*Endykiewicz*, 414 Mich at 386. Thus, the Court admits that the most natural and plain reading of the exception is that its language is a limited waiver of immunity. Only through the Court’s willingness to broadly construe the exception was it able to overcome the obstacle of its plain language.

*Endykiewicz*’s flawed analysis is a throwback to the pre-*Ross* days of immunity jurisprudence and severely cuts against this Court’s recent precedents re-establishing *Ross* as the preeminent immunity case. Its outdated and superseded rationale has no place in a Court of Appeals decision issued in 2005. It is only this Court, however, that can expressly and unequivocally overrule *Endykiewicz*.<sup>8</sup>

## 2. ***Endykiewicz*’s View of the Wrongful Death Act Has Been Rejected**

The three-judge panel’s decision quotes and length from *Endykiewicz* regarding the nature of the wrongful death act. Specifically, the opinion quotes pages 386-387 of the *Endykiewicz* decision, containing its own internal quotation of a 1914 case holding that “[a]n

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<sup>8</sup> In two recent cases this Court has expressly overruled earlier precedent that was inconsistent with *Ross v Consumers Power Co (on reh)*, 420 Mich 567; 363 NW2d 641 (1984). See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (overruling *Hobbs v Dep’t of State Hwys*, 398 Mich 90; 247 NW2d 754 (1976) and applying the decision retroactively); *Renny v Michigan Dep’t of Transp*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (July 11, 2007) (overruling *Sewell v Southfield Pub Schools*, 456 Mich 670; 576 NW2d 153 (1998), and noting that *Ross* “fundamentally altered the way we construe the governmental immunity statute).

action for wrongful death exists not as ‘a cause of action which survives’ the decedent, but as ‘a new action \* \* \* which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute.’” *Kik I*, 268 Mich App at 699-700 (quoting *Endykiewicz*, 414 Mich at 386-387 (quoting *Lincoln v Detroit & M R Co*, 179 Mich 189, 195-196; 146 NW 405 (1914)). Relying on *Endykiewicz* and *Lincoln*, the three-judge panel here concluded 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.” *Kik I*, at 700.

In light of *Hardy*, 429 Mich at 439-440, however, there is no doubt that *Endykiewicz*, *Lincoln*, and all other similar cases construing the wrongful death statute have no precedential value. As recently as July 24, 2006, the United States Court of Appeals for the Sixth Circuit cited *Hardy* as constituting the definitive interpretation of the Michigan wrongful death act. *Frontier Ins Co v Blaty*, 454 F3d 590 (6<sup>th</sup> Cir. 2006). The federal court further specifically noted that under *Hardy*, the proper focus is on “the underlying wrong which caused the death,” and that the wrongful death statute is “a derivative one whereby the personal representative of the deceased stands in the latter’s shoes.”” *Frontier Ins Co*, 454 F3d at 600 (quoting *Hardy, supra*).

At the very least, then, the three-judge panel’s reliance in this case on *Endykiewicz* and *Lincoln* to conclude that the wrongful death act controls the damages that the beneficiaries of an estate are entitled to recover, irrespective of any limitation on the underlying cause of action, is dubious. If the lower court had relied upon the valid precedent of *Hardy*, it would have been forced to conclude that because the personal representative stands in the shoes of the decedent, any limitations on the underlying cause of action also apply to the wrongful death action.

F. **Construing the Wrongful Death Act as a Further Waiver of Immunity Beyond That Expressly Contained in the GTLA Exceptions Would Violate the Title-Object Clause of the Michigan Constitution**

In addition to violating settled rules of statutory interpretation, construing the wrongful death act as permitting recovery for anything more than the “bodily injury” of the person allegedly harmed would violate the Title-Object Clause of the Michigan Constitution. The Court of Appeals three-judge panel addressed this argument, commenting that “it might well be a valid syllogism if it were not based upon a false premise, namely that we read the wrongful death act as modifying the immunity granted under MCL 691.1405.” *Kik I* at 706. According to the lower court, however, the immunity statutes control “when” the government is liable, but not for “what” it is liable. *Id.* Stated differently, the panel rejected the Title-Object Clause argument on the basis of its conclusion that the “bodily injury” language merely creates a threshold for liability, and that once the threshold is crossed, that language does not conflict with the wrongful death act’s more expansive list of damages that may be recovered. *Id.* Respectfully to the lower court, it erred in rejecting the Title-Object Clause argument.

The Title-Object Clause provides, in pertinent part: “No law shall embrace more than one object, which shall be expressed in its title.” Const 1963, art 4, § 24. Summarized, this provision requires that (1) a law must not embrace more than one object, and (2) the object of the law must be expressed in its title. *Pohutski*; 465 Mich at 690-691. Its limitation “ensures that legislators and the public receive proper notice of legislative content and prevents deceit and subterfuge.” *Id.* at 691. The “object” of a law is defined as its general purpose or aim. *Id.* If a law contains diverse subjects that have no necessary connection, it violates the Title-Object Clause. *Id.*

The wrongful death act is contained within the Revised Judicature Act (“RJA”), MCL 600.1, *et seq.* The title of the RJA states:

AN ACT to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act; and to repeal acts and parts of acts.

1961 PA 236, as amended by 1974 PA 52, § 1, Imd. Eff. March 26, 1974; 1999 PA 239, Imd. Eff. Dec. 28, 1999.

Nothing in this language suggests that any portion of the RJA waives governmental immunity, or otherwise overrides the very limited liability established within the GTLA. Rather, by encompassing “organization and jurisdiction of the courts,” “forms and attributes of civil claims,” “the time” within which claims must be brought, and “pleading, evidence, practice and procedure,” the purpose of the RJA is to codify the organization of the court system, and further to establish procedures by which courts and litigants must operate. The wrongful death statute is consistent with this purpose because it provides a form or procedure to litigate a claim on behalf of a decedent’s estate that the decedent could have litigated for himself or herself had death not occurred. *See Hardy*, 429 Mich at 307. In contrast, absolutely nothing within the title of the RJA hints that its provisions, including the wrongful death statute, could constitute a waiver of the governmental immunity provided within the Act.

By analogy, in *Klinke v Mitsubishi Motors Corp*, 458 Mich 582; 581 NW2d 272 (1998), a two-justice plurality noted that Michigan’s safety belt statute—which limited to 5% under certain circumstances the damages attributable to a plaintiff for failing to wear a safety belt—could not constitutionally be applied to product liability actions. In other words, in the context of

a product liability case, a defendant manufacturer would be allowed to argue that up to 100% of the damages should be attributable to the plaintiff for failing to wear a safety belt. The plurality opinion, written by Justice Weaver, reasoned that because the safety belt statute was part of the Michigan Vehicle Code, there must be some indication within the title of the Vehicle Code that it was meant to, or could possibly affect, the liability of a product manufacturer. *Id.* at 589-592. Because there was no such language within the title, the plurality concluded that application of the safety belt statute to a product manufacturer would be unconstitutional. *Id.*

In the same way that application of the safety belt statute to a product manufacturer would have violated the Title-Object Clause, applying the wrongful death act to override the GTLA by further waiving the governmental immunity of townships would violate the Clause. There is nothing in the title of the RJA to suggest that it is anything more than a series of statutes concerned with court jurisdiction, organization and procedure. Certainly, there is nothing to provide notice that its reach could be as ambitious as a waiver of governmental immunity.

Respectfully to the three-judge panel here, the rejection of the Title-Object Clause argument should suffer the same fate as the panel's decision to twist the language of 691.1405 into a bodily injury threshold.

**III. 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 AGENCY AND OPERATED BY AN OFFICER, AGENT, OR EMPLOYEE OF THE GOVERNMENTAL AGENCY, A GOVERNMENTAL OFFICER, AGENT, OR EMPLOYEE WHOSE ALLEGED GROSS NEGLIGENCE CAUSES DEATH OR BODILY INJURY IS NOT SUBJECT TO PERSONAL LIABILITY FOR LOSS OF CONSORTIUM PURSUANT TO MCL 691.1407(2)(c)**

**A. Standard of Review**

The trial court's grant or denial of summary disposition is reviewed de novo. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002). The issues before this Court also present questions of statutory construction, which receive *de novo* review, as well. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

**B. A Governmental Officer, Agent, or Employee Whose Alleged Gross Negligence Causes Death or Bodily Injury Is Not Subject To Personal Liability For Loss of Consortium Pursuant to MCL 691.1407(2)(c)**

MCL 691.1407(2) creates limited immunity from tort liability for governmental employees. That provision states:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(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.

MCL 691.1407(2).

Admittedly, there is no “bodily injury” limitation in this statute, as there is in the motor vehicle exception. However, Michigan courts have held that if a government agency is immune from tort liability, then the agency’s officials and employees are also immune. For example, in *Rose v Mackie*, 22 Mich App 463; 177 NW2d 633 (1970), the Court granted the individual highway commissioner summary disposition on the negligence count against him, concluding that “since the state is immune from liability for negligence, the defendant as highway commissioner is also immune.” *Rose*, 22 Mich App at 466.

Similarly, Michigan courts have held that the duty of an agency official is no greater than the statutory duty imposed on that agency. In *Reese v Wayne County*, 193 Mich App 215, 218-19; 483 NW2d 671 (1992), in the context of a negligent snow removal claim, the Court of Appeals held that the defense of governmental immunity cannot be circumvented by suing individual government employees:

If the government has no obligation to act, then certainly its employees have no obligation to act on its behalf. It would be nonsensical to conclude that Wayne County has no duty to remove a natural accumulation of ice, yet find that its employees do have such a duty. To accept plaintiff's theory would be to effectively abandon the natural accumulation doctrine, because if the county as a political entity failed to remove a natural accumulation of ice and snow, it will always be true that individual employees of the county also failed to remove a natural accumulation of ice and snow. Thus, liability would be imposed through the governmental employees rather than directly on the governmental entity itself.

Indeed, if plaintiff's position were adopted, the only way the county could ultimately avoid liability would be to completely abandon its snow-removal program. If no employee has the authority, responsibility, or equipment to remove snow, then there could be no gross negligence for failing to do so. This would clearly be an undesirable result.

*Reese*, 193 Mich App at 219. In the motor vehicle context, just as in *Reese*, it will always be true that if a governmental employee operates a governmentally owned motor vehicle negligently, MCL 691.1405 will be implicated. In other words, a claim against an individual governmental employee for gross negligence in the operation of a motor vehicle will necessarily also involve a § 1405 claim against the governmental agency directly. If governmental employees may be held liable for loss of consortium, then liability for loss of consortium—which is precluded by § 1405—will be imposed on governmental agencies through their employees. As in *Reese*, this would be an undesirable result.

**RELIEF REQUESTED**

WHEREFORE, for the foregoing reasons and authorities, defendants respectfully request that this Court REVERSE the decisions of the Court of Appeals and the trial court denying partial summary disposition to the defendants. Alternatively, defendants respectfully request that this Court GRANT peremptory relief and reverse the lower courts. Defendants respectfully request any additional relief deemed necessary.

DATED: July 18, 2007

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