

STATE OF MICHIGAN
IN THE SUPREME COURT

ROLAND KAISER, Personal Representative
of the Estate of MARION ROSE KAISER,
Deceased,

Plaintiff/Appellee

v.

JAMES ROBERT ALLEN, a/k/a
JAMES KROTZER.,

Defendant/Appellant

Supreme Court No. 133031
Court of Appeals No. 264000
Lower Court No. 03-003800-NI

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

Submitted By:

DEBRA A. GARLINGHOUSE (P56856)
Attorney for Amicus Curiae,
Michigan Association for Justice
3000 Town Center, Ste. 2510
Southfield, MI 48075
(248) 352-7777, Ex. 127

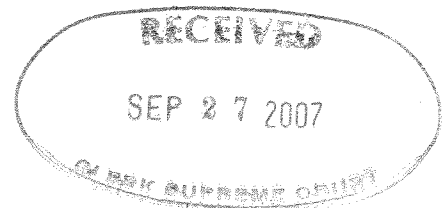


TABLE OF CONTENTS

INDEX OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE iv

BRIEF STATEMENT OF FACTS AND MATERIAL PROCEEDINGS 1

STANDARD OF REVIEW 2

ARGUMENT 3

I. A SET OFF FROM THE VERDICT AGAINST THE AT-FAULT
DRIVER WAS NOT PROPER, PER THE EXPRESS LANGUAGE
OF MCL 257.401

CONCLUSION 7

INDEX OF AUTHORITIES

Cases

<i>Altman v Meridian Twp</i> , 439 Mich 623, 635; 487 NW2d 155 (1992)	4
<i>Burton v Reed City Hosp Corp</i> , 471 Mich 745; 691 NW2d 424 (2005)	5
<i>Cameron v Auto Club Ins Ass'n</i> , 476 Mich 55, 65-66; 718 NW2d 784 (2006)	6
<i>DiBenedetto v West Shore Hosp</i> , 461 Mich 394, 402; 605 NW2d 300 (2000)	5
<i>Gerling v Konzern Allgemeine Versicherungs AG v Lawson</i> , 472 Mich 44, 49; 693 NW2d 149 (2005)	3
<i>Gladych v New Family Homes, Inc</i> , 468 Mich 594, 597; 664 NW2d 705 (2003)	5
<i>Haberl v Rose</i> , 570 NW2d 664, 225 Mich App 254 (1997)	5
<i>Hill v Sacka</i> , 256 Mich App 443; 666 NW2d 282 (2003)	3,6
<i>In re Brown</i> , 229 Mich App 496, 582 NW2d 530 (1998)	6
<i>Marbury v Madison</i> , 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803)	6
<i>Palo Group Foster Care, Inc v. Dep't of Social Services</i> , 228 Mich App 140, 577 NW 2d 200 (1998)	2,3
<i>People v Stone</i> , 463 Mich 558, 562; 621 NW2d 702 (2001)	4
<i>Spiek v Dep't of Transportation</i> , 456 Mich. 331, 337, 572 NW2d 201 (1998)	2,3
<i>Tryc v Michigan Veteran's Facility</i> , 451 Mich 129, 135; 545 NW2d 642 (1996)	4
<i>Wickens v Oakwood Healthcare System</i> , 465 Mich 53, 60; 631 NW2d 686 (2001)	4

Statues

MCL 257.401	<i>passim</i>
MCL 500.3101 et seq.	5
MCL 600.2957(1)	<i>passim</i>

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 1,700 attorneys, MAJ recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents important issues of law, the resolution of which are important to premises liability jurisprudence in this State, and will have a direct and substantial impact on MAJ members' clients who are injured and seek compensation through litigation.

BRIEF STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Amicus Curiae, Michigan Association for Justice, hereby adopts the facts as set forth in Plaintiff's Appellee's Brief on Appeal. The facts of this case are not in dispute by the parties.

On April 3, 2007, this Court invited MAJ to file this Brief as *amicus curiae* to address (1) the interrelationship between MCL 600.2957(1), which allocates liability "in direct proportion to the person's percentage of fault," and MCL 257.401(1), which imposes vicarious liability on a motor vehicle owner that is not based on the owner's fault; and (2) the effect, if any, of the jury's damage award against the defendant driver of \$100,000, which, accordingly to the jury verdict form, was "the total amount of damages suffered by the estate of Marion Rose Kaiser as a result of her death in this accident," in assessing the trial court's conclusion that the plaintiff would take nothing against the defendant vehicle owner arising from the subject accident.

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spiet v Dep't of Transportation*, 456 Mich. 331, 337, 572 NW2d 201 (1998).

Questions of law, such as the appropriate method and standard of review to be employed in a given situation, are likewise reviewed de novo. *Palo Group Foster Care, Inc v. Dep't of Social Services*, 228 Mich App 140, 577 NW 2d 200 (1998).

ARGUMENT

I. A SET OFF FROM THE VERDICT AGAINST THE AT-FAULT DRIVER IS NOT PROPER, PER THE EXPRESS LANGUAGE OF MCL 257.401

A. Standard of Review

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spiek, supra*. Questions of law, such as the appropriate method and standard of review to be employed in a given situation, are likewise reviewed de novo. *Palo, supra*.

B. Discussion

Before statutory enactments in 1995, defendants in personal injury actions were jointly and severally liable. *Gerling v Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149 (2005). Then, the injured party could either sue all tortfeasors jointly or could sue any individual tortfeasor severally, and each individual tortfeasor was liable for the entire judgment, although the injured party was entitled to full compensation only once. *Id.*

Through the enactment of MCL 600.2957, however, the state legislatively adopted a comparative fault system for apportioning damages award in a personal injury action, meaning that liability for each defendant is several¹ and each defendant is liable for only his percentage of fault. This statute reveals a legislative intent to allocate liability according to the relative **fault** of **all persons contributing to the accrual of a plaintiff's damages**. *Hill v Sacka*, 256 Mich App 443; 666 NW2d 282 (2003). The statute provides, in pertinent part, as follows:

¹ Joint and several liability remains in some instances, including medical malpractice actions and cases where the defendant's act or omission constitutes certain crimes.

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

In this case, however, the plaintiff's complaint alleged common law motor vehicle negligence on the part of defendant Allen, and owner liability, pursuant to MCL 257.401, as to the settling defendant, Keidel. **The owner liability statute is not premised upon fault by the owner**, and provides, in pertinent part, as follows:

This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family.

In reading and analyzing statutes, we must first recall this Court's clearly enunciated rules of statutory interpretation. As stated in *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001):

"The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. Tryc v Michigan Veteran's Facility, 451 Mich 129, 135; 545 NW2d 642 (1996). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. People v Stone, 463 Mich 558, 562; 621 NW2d 702 (2001). In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. Altman v Meridian Twp, 439 Mich 623, 635; 487 NW2d 155 (1992)."

As further emphasized in *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003):

“When interpreting statutes, our obligation is to discern and give effect to the Legislature’s intent as expressed in the statutory language. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). If the language is unambiguous, “we presume that the Legislature intended the meaning clearly expressed - - - no further judicial construction is required or permitted, and the statute must be enforced as written.” *Id.*

Moreover, the use of the word shall in a statute indicates that it is a mandatory and imperative directive. *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).

Public policy underlying owner liability statute is to ensure financial responsibility for those injured as result of negligent operation of motor vehicles. *Haberl v Rose*, 570 NW2d 664, 225 Mich App 254 (1997). This goes hand in hand with the spirit of the No-Fault Act, to wit MCL 500.3101 et seq, which requires the owner or registrant of a motor vehicle to purchase an automobile insurance policy that provides, among other coverage, residual liability insurance.

However, per the express language at the beginning of MCL 257.401, the legislature clearly intended to preserve the injured’s person’s right to pursue damages against the at-fault driver, by beginning the statute with

“This section **shall not be construed to limit** the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant.” (Emphasis added).

In choosing the words “shall not be construed to limit,” the legislature specifically and expressly reserved the injured person’s right to pursue damages against the at-fault driver irrespective of whether a claim for damages is asserted against the owner under the owner liability statute. To the extent that this statute may conflict with the allocation of fault statute, the owner liability

statute is more specific to the subject matter than the general allocation of fault statute and is thus controlling. *In re Brown*, 229 Mich App 496, 582 NW2d 530 (1998); *Hill, supra* ².

This Court has declared that the power to establish the statutory law is exclusively a legislative power:

“It is the legislators who establish the statutory law because the legislative power is exclusively theirs. We cannot revise, amend, deconstruct, or ignore their product and still be true to our responsibilities that give our branch only the judicial power. By what theory can we not recognize these undeniable constitutional truths? The only one is that we have the raw power, because we rule after they have enacted, to refuse to honor the bargain they struck. This is an indefensible position whose illegitimacy was classically outlined by Chief Justice Marshall in the celebrated case of *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), which has been the lodestar for generations of judges in questions of statutory construction: ours is to declare what the law is, not what it ought to be.”

Cameron v Auto Club Ins Ass'n, 476 Mich 55, 65-66; 718 NW2d 784 (2006).

Allowing a common law set off from the jury verdict against the at-fault driver, in the amount previously tendered via settlement by the owner of the vehicle, would indeed limit the plaintiff's right to pursue damages against the at-fault driver. In fact, it eliminated the plaintiff's recovery against the at-fault driver altogether, **contrary to the express language of MCL 257.401**. For this reason, the Court of Appeals was correct in holding that the set off was not proper.

² The Court of Appeals ruled that the allocation of fault statute was not applicable because dog bite liability is without fault on the part of the owner.

CONCLUSION

Amicus Curiae Michigan Association for Justice respectfully request that this Honorable Court adopt the legal principles suggested in this Amicus Brief.

Respectfully submitted,



Debra A. Garlinghouse (P56856)
Attorney for Amicus Curiae MAJ
3000 Town Center, Ste. 2510
Southfield, MI 48075
(248) 352-7777

Dated: September 26, 2007