2001-01

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

MICHAEL STANTON and
JOY STANTON,

Plaintiffs-Appellants,

v.

CITY OF BATTLE CREEK and
ALLAN MAYNARD HOWARD,

Defendants-Appellees.

Supreme Court Docket No. 115909

Court of Appeals No. 205614

Lower Court No. 96-002959-NP

BRIEF FOR THE MICHIGAN MUNICIPAL LEAGUE DEFENSE FUND AS AMICUS CURIAE SUPPORTING APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES III

STATEMENT OF THE BASIS OF JURISDICTION IN THE SUPREME COURT VI

STATEMENT OF QUESTIONS PRESENTED VII

STATEMENT OF THE CASE 1

INTRODUCTION 1

PROCEEDINGS BELOW 3

STANDARD OF REVIEW 7

ARGUMENT 7

I. "MOTOR VEHICLE" AS THAT TERM IS USED IN THE "MOTOR VEHICLE EXCEPTION" TO GOVERNMENTAL IMMUNITY, MCL 691.1405, CANNOT REASONABLY BE CONSTRUED TO INCLUDE A FORKLIFT OR OTHER CONSTRUCTION EQUIPMENT. 7

A. Because "Motor Vehicle" As That Term Is Used In § 1405 Of The Governmental Immunity Act Is Susceptible To More Than One Meaning, Judicial Construction Is Appropriate *7*

B. Under This State's Jurisprudence Regarding The Subject Of Governmental Immunity, The Narrower Meaning Of The Term "Motor Vehicle" As Set Forth In § 33 Of The Vehicle Code Must Also Apply To The "Motor Vehicle Exception" To Governmental Immunity *11*

C. Because The "Motor Vehicle Exception" To Governmental Immunity And The Owner's Liability Statute Of The Vehicle Code Relate To The Same Subject Matter, And To The Extent The No-Fault Insurance Act Also Relates To Owner Liability For Vehicular Negligence, The Three Statutes Must Be Construed Together To Establish A Cohesive Body Of Law With Respect To Owner Liability For Motor Vehicle Accidents *14*

D. The Term "Motor Vehicle" As Used In The "Motor Vehicle Exception" Must Be Read Narrowly To Exclude Forklifts In Order To Avoid Absurd Results *19*

II. IN LIGHT OF 1995 PA 140, *MULL v EQUITABLE LIFE ASSURANCE SOCIETY OF AMERICA*, 444 MICH 508; 510 NW2D 184 (1994) DOES NOT AFFECT THE ANSWER TO THE PREVIOUS QUESTION 21

A. The Expansive Interpretation of "Motor Vehicle" Adopted in Mull Should Not Apply to § 1405 .... *21*

B. 1995 PA 140 Applies Retroactively *24*

III. BECAUSE *MULL* NO LONGER HAS ANY EFFECT ON THE OUTCOME OF THIS CASE IN LIGHT OF 1995 PA 40 THE QUESTION OF WHETHER CERTAIN LANGUAGE IN *MULL* NOT AFFECTED BY 1995 PA 140 SHOULD BE DISAVOWED IS NOT NECESSARY FOR DECISION AND NEED NOT BE CONSIDERED BY THE COURT.......... 25

IV. A DECISION BY THIS COURT TO DISAVOW THE *MULL* INTERPRETATION OF "MOTOR VEHICLE" SHOULD NOT AFFECT THE OUTCOME IN THIS CASE.......... 31

V. THE MOTOR VEHICLE *EXCEPTION* TO GOVERNMENTAL IMMUNITY FOUND IN MCL 691.1405 DOES NOT CREATE A CAUSE OF ACTION; IT MERELY WAIVES THE IMMUNITY DEFENSE FOR OWNER LIABILITY CLAIMS WITHIN ITS DEFINED SCOPE.......... 31

CONCLUSION AND RELIEF REQUESTED.......... 37

TABLE OF AUTHORITIES

Page

CASES

Adrian School Dist v Mich Public School Employees Retirement System, 458 Mich 326; 582 NW2d 767 (1998) ... 13

Alex v Wildfong, 460 Mich 10; 594 NW2d 464 (1999) ... 15, 18, 20, 35, 36, 37

Calladine v Hyster Co, 115 Mich App 175; 399 NW2d 175 (1987) ... 26

Chandler v Dowell Schlumberger, Inc., 456 Mich 395; 572 NW2d 210 (1998) ... 8

Coleman v Kootsillas, 456 Mich 615; 575 NW2d 527 (1998) ... 2, 34

Energetics, Ltd v Whitmill, 442 Mich 38; 497 NW2d 497 (1993) ... 13

Frankenmuth Mutual Ins Co v Marlette Homes, Inc, 456 Mich 511; 573 NW2d 611 (1998) ... 11

Gordon Sel-Way Inc v Spence Bros, Inc, 438 Mich 488; 475 NW2d 704 (1991) ... 10

Haliw v Sterling Heights, 464 Mich 297; 627 NW2d 581 (2001) ... 11, 33

Hardy v Oakland County, 461 Mich 561; 607 NW2d 718 (2000) ... 7, 17, 35

Haverman v Bd of County Rd Commissioners for Kent County, 356 Mich 11; 96 NW2d 153 (1959) ... 10, 18, 36

Johnson v City of Detroit, 457 Mich 695; 579 NW2d 895 (1998) ... 33

Jones v Cloverdale Equipiment, 165 Mich App 511; 419 NW2d 11 (1987) ... 26

Kerbersky v NMU, 458 Mich 525; 582 NW2d 828 (1998) ... 1, 34

Klinke v Mitsubishi Motors Corp, 458 Mich 582; 581 NW2d 272 (1998) ... 34

Long v IRS, 742 F2d 1173 (CA 9 1984) ... 24

Lorencz v Ford Motor Co., 439 Mich 370; 483 NW2d 844 (1992) ... 8

Malcolm v East Detroit, 437 Mich 132; 468 NW2d 479 (1991) ... 15

Mull v Equitable Life Assurance Society of America, 444 Mich 508; 510 NW2d 184 (1994) ... 2, 3, 4, 9, 13, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 37

Nation v WDE Electric Co, 454 Mich 489; 563 NW2d 233 (1997) ... 12, 13

Nawrocki v Macomb County Road Commission, 463 Mich 143; 615 NW2d 702 (2000) ... 1, 3, 7, 12, 19, 20, 21

Omne Financial v Shacks, Inc, 460 Mich 305; 596 NW2d 591 (1999) ... 9, 14, 19

People v Graves, 458 Mich 476; 581 NW2d 229 (1998) ... 28

People v Izarrara-Placante, 246 Mich App 490; 633 NW2d 18 (2001) ... 14

People v Lukity, 460 Mich 484; 596 NW2d 607 (1999) ... 29

Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000) 1, 11, 12, 28, 29, 34, 35

Romein v General Motors, 436 Mich 515; 462 NW2d 555 (1990) ... 24

Ross v Consumers Power Co, 420 Mich 567; 363 NW2d 641 (1984) 1, 11
Seese v Bethlehem Steel Co, 168 F2d 58 (CA 4 1948) 24
Serinto v Borman Food Services, 380 Mich 637; 158 NW2d 485 (1968) 18
Sewell v Southfield Schools, 456 Mich 670; 576 NW2d 153 (1998) 2
Shallal v Catholic Social Services of Wayne Co., 455 Mich 604; 566 NW2d 571 (1997) 8
Stanton v Battle Creek, 237 Mich App 366; 603 NW2d 285 (1999) 3, 4, 5
Stowers v Wolodzko, 386 Mich 119; 191 NW2d 355 (1971) 25
Sun Valley Foods v Ward, 460 Mich 230; 596 NW2d 119 (1999) 9
Taxpayers United for Michigan Constitution, Inc v Detroit, 196 Mich App 463; 493 NW2d 463 (1992), lv den 443 Mich 884; 508 NW2d 403 (1993) 24
Vargo v Sauer, 457 Mich 79; 576 NW2d 656 (1998) 2, 34
Walen v Dept of Corrections, 443 Mich 240; 505 NW2d 519 (1993) 12
Yaldo v North Point Insurance Co, 457 Mich 341; 578 NW2d 276 (1988) 8

STATUTES

1915 PA 302 36
1945 PA 127 36
1995 PA 140 .... i, ii, vii, 2, 4, 9, 12, 13, 15, 19, 22, 23, 25, 28, 29, 30, 31, 32, 37
MCL 257.1 .... 2, 4, 9, 21, 23, 31, 36
MCL 257.216 .... 16, 26, 27
MCL 257.33 .... 2, 4, 8, 16, 19, 22, 24
MCL 257.37 .... 4, 10, 16
MCL 257.401 .... 2, 5, 14, 15, 16, 17, 18, 21, 35, 38
MCL 257.62 16
MCL 257.685 26
MCL 257.697 26
MCL 257.698 26
MCL 257.708 26
MCL 333.20701 15
MCL 500.3101 .... 11, 14, 15, 16, 26, 27, 31
MCL 500.3135 .... 15, 17, 27
MCL 691.1401 .... 1, 32
MCL 691.14051, 2, 4, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 21, 23, 24, 27, 28, 30, 31, 32, 33, 34, 35, 3
MCL 691.1406 32
MCL 691.1407 .... 1, 34, 35
MCL 691.141 36

MCL 691.1412 36
MCL 691.1413 32
MCL 691.151 10

OTHER AUTHORITIES

Baylor, Governmental Immunity in Michigan (ICLE 1991) (§ 3.1) 32
Cooperider, The Court, the Legislature, and Governmental Tort Liability in Michigan, 72 Mich Law Review 187, 251 (1973) 33
MCR 7.306 6
MCR 7.309 6

STATEMENT OF THE BASIS OF JURISDICTION IN THE SUPREME COURT

Appellants' statement of the basis of jurisdiction in this Court is complete and correct.

STATEMENT OF QUESTIONS PRESENTED

1. Whether a forklift is a "motor vehicle" as that term is used in MCL 691.1405.

Circuit Court's Answer: No.
Court of Appeal's Answer: No.
Plaintiffs-Appellants' Answer: Yes.
Defendants-Appellees' Answer: No.
Michigan Municipal League's Answer: No.

2. Whether, in light of 1995 PA 140, *Mull v Equitable Life Assurance Society of the United States*, 444 Mich 508; 510 NW2d 184 (1994) affects the answer to the previous question.

Plaintiffs-Appellants' Answer: Yes and No.
Court of Appeal's Answer: No.
Michigan Municipal League's Answer: No.

3. Whether, if the answer to question (2) is in the affirmative, language in *Mull* not affected by 1995 PA 140 should be disavowed.

Plaintiffs-Appellants' Answer: No.
Michigan Municipal League's Answer: Yes.

4. Whether a decision by the Court to disavow such parts of *Mull* would affect the outcome in this case.

Plaintiffs-Appellants' Answer: No
Michigan Municipal League's Answer: No.

5. Whether the "motor vehicle exception" in MCL 691.1405 creates a cause of action against governmental agencies, or merely defines an exception to the immunity conferred by MCL 691.1407 (1).

Plaintiffs-Appellants' Answer: Both.
Michigan Municipal League's Answer: Exception only.

STATEMENT OF THE CASE

Introduction

In 1964, the Legislature enacted the Governmental Immunity Act, MCL 691.1401, *et seq.*, to effectuate and preserve: a) the state's common law sovereign immunity, and b) for public agencies other than the state, the common law's broad "governmental function" immunity from all tort liability arising from activities where a governmental agency was engaged in the exercise or discharge of a governmental function. *See* MCL 691.1407(1). The Governmental Immunity Act pronounces that "[e]xcept as otherwise provided in this act . . ." governmental agencies are immune from all tort liability. Since its landmark decision in *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984), this Court has repeatedly recognized that § 1407(1) confers a "broad grant of immunity" upon governmental agencies, subject only to "narrowly drawn statutory exceptions." *Robinson v City of Detroit,* 462 Mich 439, 455; 613 NW2d 307 (2000).[1] The Governmental Immunity Act expresses a longstanding public policy of this state, derived from the common law doctrines of immunity, to limit the imposition of tort liability on governmental agencies involved in activities authorized or mandated by law. *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 155; 615 NW2d 702 (2000) (citing *Ross* at 621).

The so-called "motor vehicle exception" of the Governmental Immunity Act, MCL 691.1405, is at issue here. This exception provides as follows:

[1] *See also Nawrocki v Macomb Co. Rd Comm*, 463 Mich 143, 149; 615 NW2d 702 (2000); *Kerbersky v NMU,* 458 Mich 525; 582 NW2d 828 (1998); *Sewell v Southfield Schools*, 456

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948 [i.e., Michigan's Vehicle Code].

Until now the Court has not had the occasion to determine the meaning of the term "motor vehicle" as it is used in § 1405. Specifically, the central question raised in this case is whether a forklift is a "motor vehicle," thus exposing governmental agencies to liability for the negligent operation of the forklift based on its status as owner.

The answer depends, in part, on the meaning of the term "motor vehicle" as used in Michigan's Vehicle Code. MCL 257.1, *et. seq.*. In *Mull v Equitable Life Assurance Society of America*, 444 Mich 508; 510 NW2d 184 (1994), this Court held that a front-end loader and other like construction equipment, such as forklifts, are "motor vehicles" as that term is used in the owner's liability statute of the Vehicle Code, MCL 257.401. Like the "motor vehicle exception" to governmental immunity, the owner's liability statute imposes civil liability on *owners* of motor vehicles for vehicular negligence. In this case, appellant Michael Stanton relies on the *Mull* definition of "motor vehicle" in support of his claim under § 1405.

In response to *Mull*, the Legislature enacted 1995 PA 140 amending the definition of "motor vehicle" in MCL 257.33. The amended definition provides, in pertinent part, the following:

> "Motor Vehicle" means every vehicle that is self-propelled, but for purposes of chapter 4 of the act [i.e., the owner's liability

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Mich 670; 576 NW2d 153 (1998); *Coleman v Kootsillas*, 456 Mich 615; 575 NW2d 527 (1998); and *Vargo v Sauer*, 457 Mich 79; 576 NW2d 656 (1998).

> statute] motor vehicle does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under this act.

Appellants contend that the narrower meaning of "motor vehicle" applicable to Chapter 4 of the Vehicle Code does not apply to § 1405, and since their claim is brought § 1405, the *Mull* definition controls.

As amicus curiae demonstrate below, appellants' position conflicts with this state's long-stating jurisprudence on the subject of governmental immunity, especially the well-established principle that the Governmental Immunity Act confers a broad sweep of governmental immunity, and that the exceptions are to be narrowly construed. *Nawrocki* at 158. Applying this principle, the only reasonable interpretation of "motor vehicle" as that term is used in the "motor vehicle exception" is one that excludes forklifts and other construction equipment. The opinion of the court of appeals below should be affirmed.

Proceedings Below

The court of appeals below (237 Mich App 366; 603 NW2d 285 (1999)) succinctly set forth the facts and procedural posture of the present controversy as follows:

> [Plaintiff-Appellant] Michael Stanton was injured when he was struck by a forklift driven by defendant Allan Maynard Howard, an employee of defendant city of Battle Creek. Michael Stanton filed suit, alleging that defendants were negligent in operating and maintaining the forklift. Michael Stanton's wife, [plaintiff-appellant] Joy Stanton, alleged a loss of consortium of consortium claim. Defendants moved for summary disposition pursuant to MCR 2.116(7), (8), and (1), on the basis that plaintiffs' claims were barred by governmental immunity. The trial court agreed that plaintiffs' claims were barred by governmental immunity, and granted summary disposition in favor of defendants.

Id. at 368. Plaintiff-appellants' appealed.

The court of appeals affirmed, holding as a matter of law that a forklift is not a motor vehicle as that term is used in the motor vehicle exception to governmental immunity, MCL 691.1405. The court began its analysis by looking to the language of the motor vehicle exception which provides, in pertinent part, that governmental agencies are liable for the "negligent operation . . . of a motor vehicle of which the governmental agency is owner, as defined in [Michigan's vehicle code, MCL 257.1 *et. seq.*]." Concluding that the Legislature was referring to the term "motor vehicle" under MCL 257.33 (as opposed to "owner" under MCL 257.37), the court noted that *Mull, supra*, interpreted that term to include industrial equipment, such as the forklift at issue in this case. After *Mull*, however, the Legislature amended that definition to expressly exclude industrial equipment. Quoting the History and Statutory Notes regarding 1995 PA 140, the court explained:

> This amendatory act is curative, expressing the original intent of the legislature that the term "motor vehicle" as defined in section 33 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.33 of the Michigan Complied Laws, does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under this act. * * *

Id. at 370 (emphasis added).

The court of appeals next concluded that the term motor vehicle, as used in the motor vehicle exception of the Governmental Immunity Act, is ambiguous by its interaction with the vehicle code, and as a result, statutory interpretation was appropriate and necessary. *Id.*

at 371. Concluding that the motor vehicle exception and the owner liability statute, MCL 257.401, share a common purpose (i.e., owner liability for negligent operation of a motor vehicle), the court read the two statutes together, reasoning as follows:

> Chapter four of the Vehicle Code deals with civil liability for owners and operators of motor vehicles. The remainder of the Vehicle Code deals with licensing and registration of motor vehicles and traffic laws. Because actions brought pursuant to the motor vehicle exception to governmental immunity seek to hold the government civilly liable for injuries caused by motor vehicles that the government owns and operates, we believe the Legislature intended that the definitions of "motor vehicle" provided in chapter four of the Vehicle Code, rather than the chapters governing licensing, registration, and traffic laws, should apply to the motor vehicle exception to governmental immunity.

Id. at 372.

Finally, the court of appeals concluded that any other interpretation would result in an absurd or illogical result that was contrary to the Legislature's intent. Specifically, the court reasoned that allowing recovery of "damages for injuries caused by industrial equipment owned by the government" but not for "injuries caused by industrial equipment that was privately owned," *Id.* at 373, would violate the Legislature's clear intent to restrict the tort liability of governmental agencies.

Appellants filed an application for leave to appeal the court of appeals' decision to this Court, which was denied by Order dated April 25, 2000. Appellants filed a motion for reconsideration which was granted by Order dated July 26, 2001, granting leave to consider five specific issues. The Michigan Municipal League Defense Fund moved the

Court to file a brief amicus curiae in support of defendants-appellees, which was granted by Order dated October 11, 2001. This amicus brief is filed in accordance with MCR 7.306 and 7.309.

STANDARD OF REVIEW

The issues directed by the Court for consideration in this case involve questions of statutory construction. Accordingly, the standard of review in this matter is *de novo* review. *Hardy v Oakland County*, 461 Mich 561, 564-65; 607 NW2d 718 (2000).

ARGUMENT

I. "MOTOR VEHICLE" AS THAT TERM IS USED IN THE "MOTOR VEHICLE EXCEPTION" TO GOVERNMENTAL IMMUNITY, MCL 691.1405, CANNOT REASONABLY BE CONSTRUED TO INCLUDE A FORKLIFT OR OTHER CONSTRUCTION EQUIPMENT.

The central question in this case is whether a forklift is a "motor vehicle" as that term is used in the "motor vehicle exception" to governmental immunity, MCL 691.1405. The answer to this question is "no." Any other conclusion would conflict with this state's longstanding jurisprudence on the subject of government immunity, especially the venerable rule that the Governmental Immunity Act confers a broad sweep of immunity to governmental agencies, subject only to "*narrowly* construed" exceptions. *Nawrocki* at 158 (emphasis in original).

A. Because "Motor Vehicle" As That Term Is Used In § 1405 Of The Governmental Immunity Act Is Susceptible To More Than One Meaning, Judicial Construction Is Appropriate.

The first issue that must be resolved in this case is whether § 1405's use of the term "motor vehicle" is subject to judicial construction. It is.

The primary aim of statutory construction is to "identify and give effect to the intent of the Legislature." *Chandler v Dowell Schlumberger, Inc.*, 456 Mich 395, 398; 572 NW2d 210 (1998), quoting *Shallal v Catholic Social Services of Wayne Co.*, 455 Mich 604, 611; 566 NW2d 571 (1997). To do this, the Court must first "examine the language of the statute in question." *Id.* If the statutory language is clear and unambiguous, judicial construction is neither necessary nor permitted. *Lorencz v Ford Motor Co.*, 439 Mich 370, 376; 483 NW2d 844 (1992). If, on the other hand, reasonable minds can disagree about the meaning of the statutory language, judicial construction is necessary and permitted. *Yaldo v North Point Insurance Co,* 457 Mich 341, 346; 578 NW2d 276 (1988).

The statutory language at issue here is the "motor vehicle exception" to governmental immunity, § 1405, which provides the following:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a ***motor vehicle*** of which the governmental agency is owner, ***as defined in*** Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948 [i.e., Michigan's Vehicle Code]. (emphasis added)

Judicial construction of the term "motor vehicle" in § 1405 is appropriate for at least two reasons.

First, looking to the Vehicle Code for a definition of "motor vehicle" in § 1405 creates a potential ambiguity since the Vehicle Code provides *two distinctly different meanings of the term "motor vehicle."*[2] A *broad* meaning of "motor vehicle"–articulated

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[2] Specifically, MCL 257.33 provides:

> "Motor Vehicle" means every vehicle that is self-propelled, but for purposes of chapter 4 of the act motor vehicle [i.e., the owner's liability statute] does not

in *Mull*–which ostensibly applies to chapters in the Vehicle Code dealing with registration, titling and other matters. And a *narrow* meaning of "motor vehicle" - articulated by the Legislature in 1995 PA 140 – which expressly applies to the chapter in the Vehicle Code dealing with owner liability for vehicular negligence. The ambiguity exists here because either one of these meanings, on the face of § 1405 and § 33 alone, could equally apply to § 1405. For the reasons set forth below in Section I(B), the narrow meaning controls.[3]

Second, § 1405's modifying clause "as defined in" does not relate to the term "motor vehicle" under the well accepted principles of statutory construction. Specifically, the rule of construction providing that a modifying clause is confined *"solely" to the last antecedent* unless a contrary intention appears. *Sun Valley Foods v Ward,* 460 Mich 230, 238; 596 NW2d 119 (1999); Here, the last antecedent to § 1405's modifying clause "as defined in [the Vehicle Code]" is the word "owner," not the term "motor vehicle." Thus, because there is no apparent intention to the contrary, only the

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include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under this act.

[3] Appellants seem to suggest that the "but for chapter 4" language in § 33 operates to limit the applicability of the second, narrow meaning of the term "motor vehicle," to chapter 4 of the Vehicle Code and only chapter 4. This presumption, however, is not supported by the language of § 33 or any case law. The "but for purposes of chapter 4" language in § 33 simply articulates under which chapter, *in the Vehicle Code*, the narrow meaning of "motor vehicle" must apply. Had the Legislature intended to preclude applicability of the narrow meaning of "motor vehicle" beyond the realm of the Vehicle Code, it would have so stated. The Legislature did not employ such limiting language. Chapter 4 is the only chapter in the Vehicle Code providing for owner liability. *See Omne Financial v Shacks, Inc,* 460 Mich 305, 311; 596 NW2d 591 (1999) (where Court held that "nothing may be read into statute that is not within the manifest intent of the Legislature as derived from the act.")

word "owner"[4] is defined by the Vehicle Code.[5] Accordingly, the Court need not look solely to the Vehicle Code for construction of the term "motor vehicle" as used in § 1405. Instead, the Court may, and should, also consider other statutes to the extent they address

[4] The Vehicle Code provides a precise and important definition of the word "owner" as it relates to owner liability for motor vehicle accidents. Specifically, MCL 257.37 states as follows:

> "Owner" means any of the following: (a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days. (b) Except as otherwise provided in section 401a, a person who holds the legal title of a vehicle. (c) A person who has the immediate right of possession of a vehicle under an installment sale contract. MCL 257.237

[5] Indeed, in *Haverman v Bd of County Rd Commissioners for Kent County*, 356 Mich 11; 96 NW2d 153 (1959) this court so held. Interpreting the predecessor motor vehicle exception to governmental immunity, MCL 691.151 *et. seq.*, (*Id.* at 16), this Court held that the modifying clause "as defined in the [Vehicle Code]" applied solely to the term "owner," and not to the term "motor vehicle." *Id.* at 17-19. Noting that the term "owner" was the last antecedent to the modifying clause, the Court reasoned as follows:

> Under the general rule of construction it would appear the reference clause refers to the term 'owner' and not 'motor vehicle' unless we can find something in the subject matter or dominant legislative purpose requiring a different construction.
>
> What was the purpose of the 1945 act? It was an act aimed at abolishing the defense of governmental function in certain actions and authorizing insurance premium payments to protect political subdivisions of the State and municipal corporations against liability. Neither the dominant purpose nor subject matter seem to require a reference to 'motor vehicle' rather than 'owner.'

Id. at 18-19.

Subsequent to the *Haverman* decision, the Legislature amended the Governmental Immunity Act, but did not change the word order in the statute. The term "owner" is still the last antecedent to the modifying clause "as defined in [the Vehicle Code]." The Legislature is presumed to act with knowledge of prevailing statutory interpretation by this Court, *See Gordon Sel-Way Inc v Spence Bros, Inc*, 438 Mich 488, 506; 475 NW2d 704 (1991), and in using the same language and word order in the 1964 Act may be presumed to have understood the "practical" holding in *Haverman*.

or concern *owner liability* arising from motor vehicle operations, such as the no-fault insurance act, MCL 500.3101 *et. seq.*

In sum, judicial construction is appropriate in this case. The rules of statutory construction providing the most assistance here are: (1) legislative intent should be determined through consideration of the purpose of the statute at hand; (2) statutes sharing a common purpose should be read *in pari materia* to achieve a coherent body of law; and (3) similar statutes should be read together so as to avoid absurd results.

B. Under This State's Jurisprudence Regarding The Subject Of Governmental Immunity, The Narrower Meaning Of The Term "Motor Vehicle" As Set Forth In § 33 Of The Vehicle Code Must Also Apply To The "Motor Vehicle Exception" To Governmental Immunity.

One means of effecting the Legislature's intent with regard to a statute is to construe the statute in a manner consistent with its purpose. *Frankenmuth Mutual Ins Co v Marlette Homes, Inc,* 456 Mich 511; 573 NW2d 611 (1998). With regard to the Governmental Immunity Act, the Legislative purpose is well settled. It has been settled law since *Ross, supra,* that the Legislature intended the Governmental Immunity Act to provide a broad grant of governmental immunity, subject only to certain *narrowly drawn exceptions*. *Haliw v Sterling Heights*, 464 Mich 297, 303; 627 NW2d 581 (2001) (citing *Ross*).

This substantive law guides any interpretation of the Governmental Immunity Act. Recently, this Court explained in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), a case involving the interpretation of the "motor vehicle exception" to governmental immunity, as follows:

> We begin our analysis [under the Governmental Immunity Act] with the basic principle, of which there is no longer any dispute, that the grant of immunity in MCL 691.1407 (1); MSA 3.996(107(1) is broad and that the statutory exceptions thereto are to be narrowly construed.

Id. at 455 (citations omitted).[6]

Guided by this basic principle, the *narrow* meaning of the term "motor vehicle" as set forth in § 33 of the Vehicle Code must apply to § 1405 as well. The Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws. *Walen v Dept of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993) The Legislature is further presumed to be familiar with the principles of statutory construction and the common law. *Nation v WDE Electric Co,* 454 Mich 489, 494-495; 563 NW2d 233 (1997). Accordingly, by enacting 1995 PA 140 to *reassert its original, narrow intent concerning the meaning of the term "motor vehicle,"* the Legislature is presumed to have known that this *narrow meaning* would also necessarily have to apply, under the law stated above (i.e., narrow construction required), to the "motor vehicle exception" to governmental immunity (*See Nawrocki,* at 158).[7]

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[6] In *Robinson*, a case involving a tort claim for injuries sustained in connection with a police pursuit of a fleeing suspect in a motor vehicle, the Court held that a narrow construction of the "resulted from" language in the motor vehicle exception required, in order to show avoidance of governmental immunity, that the police vehicle had actually hit the fleeing car "or otherwise force it off the road or into another vehicle or object." *Id.* at 457. It was not sufficient that an accident was proximately caused by "merely the fact of pursuit." *Id.* at 455-56. The Court also held that a narrow construction of the "negligent operation" language in the motor vehicle exception required more than merely a "police officer's decision to pursue a fleeing vehicle." *Id.* at 457.

[7] The fact that the Legislature, in enacting 1995 PA 140, was simply reasserting its original intent with regard to the meaning of the term "motor vehicle" is evident from the History and Notes of 1995 PA 140, cited and quoted by the court below. Specifically, the History and Notes state that "[t]his amendatory act is curative, expressing the *original intent* of the Legislature" with regard to the meaning of "motor vehicle." This undermines appellants' argument that the Legislature in

If the Legislature, in enacting curative legislation in the wake of *Mull,* had intended to change the substantive law of this state (i.e., the requirement that the statutory exceptions to governmental immunity be narrowly construed), then the Legislature would be expected to announce its intentions in that regard. Such a legislative intention cannot be presumed absent a clear statement of such a purpose. *Nation* at 494 (citing *Energetics, Ltd v Whitmill,* 442 Mich 38, 51; 497 NW2d 497 (1993)). It would thus be contrary to established rules of statutory construction, and contrary to the substantive law of governmental immunity, to presume that the Legislature intended that the *broader* meaning of "motor vehicle" in § 33 of the vehicle Code would control in § 1405 actions against governmental agency owners, while the *narrow* meaning which reasserts the Legislature's original limitation with regard to *owner liability* would govern owner liability claims brought against any other defendant.

Appellants' invitation to this Court to apply in § 1405 the exceptionally broad meaning of "motor vehicle" in § 33 of the Vehicle Code after *Mull* runs afoul of established rules of statutory construction and the substantive law of governmental immunity. Appellants' position is unsupportable, the lower courts appropriately rejected it, and this Court should reject it as well.

1964, when it enacted the Governmental Immunity Act, could not have intended to apply a meaning that was created in 1995 via PA 140. To the contrary, the Legislature *never* intended that the term "motor vehicle" would have the broad meaning momentarily created in *Mull,* especially with regard to *owner* liability for motor vehicle accidents. *See Adrian School Dist v Mich Public School Employees Retirement System*, 458 Mich 326, 337; 582 NW2d 767 (1998) (where this Court stated that "when a legislative amendment is enacted soon after a controversy arises regarding the meaning of an act, it is logical to regard the amendment as a legislative interpretation of the *original* act . . . .") (citation omitted) (emphasis added).

C. **Because The "Motor Vehicle Exception" To Governmental Immunity And The Owner's Liability Statute Of The Vehicle Code Relate To The Same Subject Matter, And To The Extent The No-Fault Insurance Act Also Relates To Owner Liability For Vehicular Negligence, The Three Statutes Must Be Construed Together To Establish A Cohesive Body Of Law With Respect To Owner Liability For Motor Vehicle Accidents**.

The doctrine known as *in pari materia* provides that where two or more statutes relate to the same subject matter, they should be read, construed, and applied together in order to ascertain the Legislature's intent. *Omne Financial v Shacks, Inc,* 460 Mich 305; 596 NW2d 591 (1999). This doctrine applies even if the statutes do not make any reference to one another. *Id.* The purpose of this rule is to further legislative intent by finding a coherent construction of statutes relating to a particular body of law. *People v Izarrara-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001).

In this case, the "motor vehicle" exception to governmental immunity should be construed together with the owner's liability statute of the Vehicle Code, MCL 257.401, and certain sections of the no-fault insurance act, MCL 500.3101, *et seq.*, all of which relate to owner liability for motor vehicle accidents. Failing to do so will result in a chaotic and varied body of law with respect to *owner* liability.

1. The Owner's Liability Statute. The "motor vehicle exception" to governmental immunity and the owner's liability statute share exactly the same subject matter and purpose: That is, to establish and limit *owner* liability for the negligent operation of a *motor vehicle.* Therefore, the two statutes should be read, construed, and applied together so as to effectuate

a coherent and cohesive body of law with regard to *owner* liability arising from the negligent operation of motor vehicles.

By virtue of its recent amendment, the owner's liability statute provides a recent, specific definition of the term "motor vehicle" as it relates to *owner liability*. It is appropriate to use it in § 1405 where no definition is provided.[8] Specifically, as amended by 1995 PA 140, the term "motor vehicle" as used in the owner's liability statute is defined so as to expressly exclude equipment such as the forklift at issue in this case. Therefore, to construe the "motor vehicle exception" consistently with the owner's liability statute, a forklift is not within the scope of the "motor vehicle exception."

2. <u>The No-Fault Insurance Act</u>. The "motor vehicle exception" should also be read together with the no-fault act to the extent it relates to owner liability for vehicular negligence. Supplementing the owner liability statute, the no-fault act establishes a comprehensive system, in part, of <u>*owner*</u> liability for the negligent operation of a motor vehicle, including compulsory insurance and tort liability limitations. *See* MCL 500.3101 and MCL 500.3135. Importantly, the no-fault act also provides a definition of "motor

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[8] In *Malcolm v East Detroit*, 437 Mich 132; 468 NW2d 479 (1991), this Court held that the subsequently enacted and more specific Emergency Medical Services Act (EMSA), MCL 333.20701, *et. seq.*, which imposed liability on certain enumerated "persons" for acts or omissions constituting gross negligence or willful misconduct, including governmental entities, modified the immunity granted in Section 7 of the Governmental Immunity Act with respect to governmental employees providing emergency medical services. *Id.* at 134 and 139. The Court relied, in part, on the rule that "a subsequently enacted specific statute will control over a prior general one, ***especially if they are in pari materia***. *Id.* at 139. In *Alex v Wildfong*, 460 Mich 10; 594 NW2d 464 (1999), this Court held that § 1405 was the more specific statute vis-à-vis the owner liability statute, 257.401(1). *Id.* at 21. Here. however, because § 1405 does not provide a definition of the term "motor vehicle," the two statutes are not in conflict here but can be easily read in harmony.

vehicle" which does not include vehicles that are not subject to registration under the Michigan vehicle code. MCL 500.3101 (2)(e)[9]. A forklift is not subject to registration under the Vehicle Code, and therefore is not a motor vehicle under the no-fault act. MCL 257.33. Therefore, to construe consistent with the no-fault act, a forklift would not be a motor vehicle within the scope of the "motor vehicle exception."[10]

These three statutes, when read together, establish a coherent and comprehensive body of law with regard to owner liability for motor vehicle accidents. Specifically, they have the following effect. *First*, certain motor vehicles owned by either private persons or governmental agencies are required to be registered with the Department of Motor Vehicles. (MCL 257.216). Forklifts, and other such construction equipment, are not generally subject to registration. (MCL 257.216(d)). *Second*, motor vehicle insurance coverage, by both private persons and governmental agencies, for the types of motor vehicles that are subject to registration is required in order to secure payment for injuries resulting from motor vehicle accidents. (MCL 500.3101 (1)) *Third*, to impose civil liability on either private or

[9] Specifically, MCL 500.3101(2)(e) defines "motor vehicle" as "a vehicle, including a trailer, *operated or designed for operation upon a public highway* by power . . . . Motor vehicle does not include a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan vehicle code . . . ." (Emphasis added.) The Vehicle Code, on the other hand, defines "special mobile equipment" as a vehicle not "*designed or used primarily for the transportation over the highways* . . . ." MCL 257.62 (emphasis added).

[10] The no-fault act also employs other terms of art strikingly similar to those used in the vehicle code and the "motor vehicle exception" to governmental immunity. For example, the definition of "owner" is almost identical under the no-fault act (*See* MCL 500.3101(2)(g)), the vehicle code (*See* MCL 257.37), and the "motor vehicle exception" by reference to the vehicle code for a definition of "owner" (*See* MCL 691.1405). In addition, the no-fault act defines a "motor vehicle accident" as "a loss involving the *ownership*, operation, maintenance, or use of a *motor vehicle* as a motor vehicle . . . ." (MCL 500.3101(2)(f)), while the vehicle code and the "motor vehicle exception" both directly concern liability for motor vehicle accidents stemming from the status as an *owner*. (*See* MCL 257.401 and 691.1405).

governmental *owners* of registered motor vehicles for motor vehicle negligence in appropriate circumstances. (MCL 257.401 and MCL 691.1405) *Fourth*, to prescribe and limit the potential liability of both a private owner and governmental agency owner for the harm caused by the motor vehicle negligence. (MCL 500.3135)[11]

Appellants argue that the doctrine of *in pari materia* does not apply in this case because (1) the meaning of "motor vehicle" as used under the Vehicle Code is unambiguous and thus not subject to judicial construction, (2) the owner's liability statute and the "motor vehicle exception" do not share a common purpose, and (3) a statutory definition should not be expanded through the doctrine of *in pari materia.*

First, as demonstrated above in Section I(A), the meaning of the undefined term "motor vehicle" as used in § 1405 is not so clear and unambiguous as to preclude statutory construction.

Second, appellants' argument that the owner's liability statute and the "motor vehicle exception" do not share a common purpose is premised on the erroneous belief that the "governmental immunity exception" imposes liability on a governmental employer under the doctrine of *respondeat superior*. It does not. Under the doctrine of *respondeat superior*, an employer would be subject to liability for the negligent operation of a motor vehicle by one

[11] This Court has already held that the limitations set forth in the No-Fault Act, MCL 500.3135, apply to any potential governmental liability for the negligent operation of a motor vehicle under the motor vehicle exception of the Governmental Immunity Act. *Hardy*, at 566. In *Hardy*, the plaintiff filed a personal injury suit seeking damages for pain and suffering against defendant-county for injuries sustained as a result of his motor vehicle being rear-ended by a patrol car being driven by a sheriff's deputy. *Id.* at 565. This Court held that that the threshold injury requirements set forth under Section 3135 of the No-Fault Act for recovery of non-economic damages applied in suits brought under the motor vehicle exception to governmental immunity. *Id.* at 565-66.

of its employees *regardless of whether or not the employer was the owner of the motor vehicle.* *Serinto v Borman Food Services*, 380 Mich 637; 158 NW2d 485 (1968). By contrast, the "motor vehicle exception" and the owner's liability statute both require *ownership* as an express condition to governmental liability. *See* MCL 691.1405 and MCL 257.401. In addition, the "motor vehicle exception" and the owner's liability statute do not require that the motor vehicle accident arise from an employee's conduct within the scope of his or her employment duties, whereas the doctrine of *respondeat superior* does. *Id.* In short, the doctrine of *respondeat superior* and the "motor vehicle exception" are not even remotely similar.

In *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999), this Court held that governmental agencies are liable under § 1405 as owners, not as employers. *Id.* at 13 and n 21. Because defendant Fruitport Township did not own the motor vehicle, plaintiff's claim was barred by immunity even though the driver was acting within the cope of his employment. This Court also held in *Haverman, supra*, that the predecessor statutes of the motor vehicle exception and the Vehicle Code were intended to be "construed together *in pari materia* for the purpose of determining any question of interpretation arising on comparison of one with the other." The Court went on to state that " '[t]hese statutes must receive such a construction as will render each consistent with the other.' " *Id.* at 25 (citation omitted).

Appellants' argument fails because "motor vehicle" is not a defined term under § 1405. Whether the Court looks to the owner liability statute, the no-fault act, or both, for

guidance, it becomes clear that owner liability does not attach for ownership of construction and industrial equipment in the same way that it does to "motor vehicles." Appropriate statutory construction does not require any expansion of the definition of motor vehicle in MCL 257.33. Rather, it simply requires the adoption of the narrower meaning of "motor vehicle" which does not include forklifts applicable to the owner liability statute, which is most consistent with the terms of the "motor vehicle exception" to governmental immunity.

D. The Term "Motor Vehicle" As Used In The "Motor Vehicle Exception" Must Be Read Narrowly To Exclude Forklifts In Order To Avoid Absurd Results.

Statutes relating to the same subject matter must also be construed so as to avoid absurd results. *Omne* at 312. Failing to read the motor vehicle exception, the owner's liability statute, and the no-fault act together, in the end, will simply produce the absurd result sought to be avoided by the opinion of the court below. Specifically, the reading advanced by appellants would result in the imposition of greater potential *owner* liability on governmental agencies than would be imposed on private parties, who have now been protected by 1995 PA 140. It would also result in a substantial expansion of governmental liability as a result of the holding in *Mull*, a case in which no party was a governmental agency. This result is absurd in the context of the Governmental Immunity Act's specific purpose, which is to grant *broad* government immunity from tort liability. *See Nawrocki* at 158. That purpose requires the potential for governmental-owner liability under the motor vehicle exception to be–*at the very least*–as narrow, if not narrower, in scope than the

corresponding potential private-owner liability under the owner's liability statute, particularly where the liability depends on the same words in the respective statutes.

Appellants protest at pages 32 and 33 of their brief the difference in potential liability between private and public tortfeasors, contending it amounts to an "absurd result." This argument reflects a misunderstanding of the law of governmental immunity.

This Court has recognized repeatedly that the passage of the Governmental Immunity Act "evidences a clear legislative judgment that public and private tortfeasors are to be treated differently." *Nawrocki* at 156. Immunity necessarily results in some governmental torts going unremedied. As this Court explained:

> Because immunity necessarily implies that a "wrong" has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied. 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.

Id. at 157. *See also Alex* at 19 (where the Court recognized a difference in treatment between private and governmental tortfeasors, noting that this represented a "policy choice" by the Legislature with which the Court may disagree, but was not free to undo).

The role of government necessarily requires activities undertaken for the common good, typically not undertaken by private citizens, including police and fire protection, highway construction and maintenance to name a few. The immunity laws in this state reflect a legislative attempt to balance the risks associated with activities of government, with the interests of the citizenry in need of such a governmental role. Accordingly, it is not absurd that some torts committed by employees of governmental agencies will go

unremedied, which might be remedied if committed by an employee of a private employer. That is, indeed, the very nature and effect of governmental immunity. And the difference in treatment is nothing more than the application of the Legislature' policy decision recognizing the necessary role governmental agencies play in our society. *Nawrocki* at 156 and 183.

In sum, different treatment of private and governmental tortfeasors can <u>never</u> be regarded as "absurd" since that is the essential effect of governmental immunity. The only absurd result would be to construe § 1405 as providing *broader potential liability* to a governmental owner of a motor vehicle than a private owner would be exposed to under the owner's liability statute. Appellants' interpretation of § 1405 must be rejected.

II. <u>IN LIGHT OF 1995 PA 140, *MULL v EQUITABLE LIFE ASSURANCE SOCIETY OF AMERICA*, 444 MICH 508; 510 NW2D 184 (1994) DOES NOT AFFECT THE ANSWER TO THE PREVIOUS QUESTION.</u>

A. <u>The Expansive Interpretation of "Motor Vehicle" Adopted in *Mull* Should Not Apply to § 1405.</u>

In *Mull*, this Court was asked to decide whether a front-end loader was a "motor vehicle" as that term is used in the owner's liability statute, MCL 257.401. At that time, § 33 of the Vehicle Code simply defined "motor vehicle" as "every vehicle which is self-propelled and every vehicle which is propelled by electric power from over-head trolley wires, but not operated on rails." *Id.* at 513. "Vehicle" is defined at § 33 of the Vehicle Code as "every device in, upon, or by which any person or property *is or may be* transported or drawn upon a highway . . . ." *Id.* The "is or may be" language was scrutinized. Defendants asserted that only vehicles that were, in fact, operated on public roads ("is") and

vehicles that were permitted by law to be operated on public roads ("may be") were included in the owner liability statute's definition of "motor vehicle." By a 4-3 majority, the *Mull* court held that the front-end loader was a motor vehicle. *Mull* at 523. *Mull* did not involve a governmental agency defendant, and the Court did not interpret the term "motor vehicle" as used in the motor vehicle exception to governmental immunity. *Id.* at 510-13.

Justice Griffin's dissent pointed out that "may" is a word of permission. A vehicle that "may be" drawn upon the highway is one that is legally permitted and equipped was required by law for highway use. Hence, "motor vehicle" means every device that *is*, in fact, transported on the highway or would be permitted to be transported on a highway. Since the backhoe in *Mull* was being used on private property and was not equipped for use on a public road, the dissent argued it was not subject to the owner liability statute.

In 1995, in response to *Mull*, the Legislature enacted PA 140 for the specific purpose of overturning this Court's conclusion that a front-end loader is a "motor vehicle" as that term is used in the owner's liability statute of the Vehicle Code. The act amends the statutory definition of "motor vehicle" in § 33 by reinstating the narrower definition of "motor vehicle" for purposes of the owner's liability statute. Specifically, the amended version of MCL 257.33 provides the following:

> "Motor Vehicle" means every vehicle that is self-propelled, but for purposes of chapter 4 of this act motor vehicle does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under the act. Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act. The last sentence—regarding

> electric vehicles—was added in a still more recent amendment and is of no relevance here.

Appellant argues that *Mull* affects the present case – even in light of 1995 PA 140 – because PA 140 simply modifies "motor vehicle" as that term is used under the owner's liability statutes (i.e., Chapter 4), and not as that term is used in the other seven chapters of the Vehicle Code or as it is used under the motor vehicle exception to governmental immunity. Appellants contend they brought this action not under the owner's liability statute, but rather, under the motor vehicle exception and assert the 1995 amendment to § 33 should not apply. Appellants are wrong for two reasons.

First, as explained above, the motor vehicle exception, § 1405, does not import the definition for the term "motor vehicle" by referring to the Vehicle Code. Instead, that reference supplies a definition for the word "owner," which is the last antecedent to the modifying clause "as defined in the Vehicle Code." The motor vehicle exception should be read in a fashion consistent with its purpose, and together *in pari materia* with the owner's liability statute. There is no question after 1995 PA 140 that, as the term "motor vehicle" is used in the owner's liability statute, a forklift is not a motor vehicle.

Second, as explained above, the effect of 1995 PA 140 was to establish two meanings of the term "motor vehicle" as it is used under the Vehicle Code. A broad meaning for Chapters 1 through 3 and 5 through 8, and a narrow meaning as it is used in Chapter 4. Therefore, even if § 33 of the Vehicle Code supplies the meaning of the term "motor vehicle" as used in the motor vehicle exception, the narrow meaning created by 1995 PA 140 for purposes of owner liability claims must control an owner liability claim under § 1405.

Section 1405 does not have the same subject or purpose as the titling, registration, and other chapters of the Vehicle Code, but as an owner liability exception to immunity, it has the same subject and purpose as Chapter 4: to provide for and limit owner liability for vehicular negligence by others.

B. <u>1995 PA 140 Applies Retroactively</u>.

The Legislature can provide that a statute shall apply with retroactive force. *Romein v General Motors*, 436 Mich 515, 462 NW2d 555 (1990); *Taxpayers United for Michigan Constitution, Inc v Detroit*, 196 Mich App 463; 493 NW2d 463 (1992), *lv den* 443 Mich 884; 508 NW2d 403 (1993). Retroactive legislation which is remedial or cures judicial misinterpretation of a statute does not violate due process. Where, as in this case, the Legislature expressly provides for retroactive effect to its curative legislation, such effect will be given to the law provided that it does not impair a final judgment. *Romein*, *supra*. When legislation is adopted correcting or setting aside a judicially created cause of action, particularly when that cause of action had not existed prior to the judicial decision and was not intended by the Legislature, then the legislative "fix" is to be given retrospective effect to the degree it does not impair a final judgment. *See, Seese v Bethlehem Steel Co,* 168 F2d 58 (CA 4 1948) and *Long v IRS*, 742 F2d 1173 (CA 9 1984). There is no question concerning the Legislature's intent to grant retroactive effect to the amendment of the term "motor vehicle" found at MCL 257.33; MSA 9.1833. The lower court so found, and Appellants do not challenge the legislative intent. Neither had a final judgment been entered before 1995

PA 140. The court of appeals correctly held, given the circumstances of this case, that retroactive application was appropriate.

Accordingly, 1995 PA 140 renders the decision in *Mull* completely inconsequential to the case at hand. In short, a forklift is not a "motor vehicle" under the motor vehicle exception to governmental immunity.

III. BECAUSE *MULL v EQUITABLE LIFE ASSURANCE SOCIETY OF AMERICA*, 444 MICH 508; 510 NW2D 184 (1994) NO LONGER HAS ANY EFFECT ON THE OUTCOME OF THIS CASE IN LIGHT OF 1995 PA 40 THE QUESTION OF WHETHER CERTAIN LANGUAGE IN *MULL* NOT AFFECTED BY 1995 PA 140 SHOULD BE DISAVOWED IS NOT NECESSARY FOR DECISION AND NEED NOT BE CONSIDERED BY THE COURT

As stated above, 1995 PA 140 robs *Mull* of any vitality with respect to the central question presented in that case and in this case. Amicus curiae will note, however, that it believes that *Mull* was incorrectly decided. The Court's definition of "motor vehicle" ignored the legislative distinction between two special classes of vehicles: "motor vehicles," on the one hand, and "special mobile equipment" on the other, which includes forklifts. In holding that a forklift (i.e., special mobile equipment) is also a "motor vehicle," *Mull's* interpretation was both novel and, incorrect and violated the principle that a court should strive to give effect to lawfully enacted legislation, not to render any portion thereof meaningless. *See Stowers v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971).

Mull erred when it declined to distinguish between "motor vehicle" and "special mobile equipment" such as a forklift. By defining them separately, the Legislature intended

for them to be regarded separately. Specifically, "motor vehicle" is defined as "every [device in, upon, or by which any person or property is or may be transported or drawn upon a highway] that is self-propelled." "Special mobile equipment" would be read as "every [device in, upon, or by which any person or property *is or may be* transported or drawn upon a highway][that is] *not designed or used primarily for* the transportation of persons or property and incidentally operated or moved over the highway." (Emphasis added.) Motor vehicles and special mobile equipment are subsets of the broader statutory class known simply as "vehicles." By reasonable implication, a "motor vehicle" is a device designed or used primarily for transportation or drawn upon a highway. "Special mobile equipment," such as a forklift, is not. Accordingly, "vehicles" classified as "special mobile equipment" do not also fall within the subclass of "vehicles" known as "motor vehicles." This distinction carries with it important implications with regard to the treatment of the vehicle under Michigan law [12]

Mull ignored these significant legislative distinctions, which had been observed by earlier lower court decisions. *Calladine v Hyster Co*, 115 Mich App 175; 399 NW2d 175 (1987). *See also, Jones v Cloverdale Equipment*, 165 Mich App 511; 419 NW2d 11 (1987).

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[12] "Motor vehicles" are subject to certain requirements under the Vehicle Code that do not apply to special mobile equipment, such as the requirement of registration and certificate of title, MCL 257.216, and numerous safety requirements for headlights, taillights, turn signals, windows and doors. *See, e.g.,* MCL 257.685(c), 697(a), 698(a), and 708. In addition, motor vehicles are subject to the security requirements of Michigan's no-fault act. *See* MCL 500.3101(1). Similarly, the no-fault act defines a "motor vehicle" as "a vehicle . . . operated or designed for operation upon a public highway by power . . ." MCL 500.3101(2)(e). Vehicles not subject to the registration requirements of the Vehicle Code are expressly excepted from the no-fault act's definition of "motor vehicle". *Id.*

Mull erred by telescoping one class of vehicles into another, and in so doing did violence to the statute and to the substantial interests of the citizenry. As the dissent noted:

> Such a sweeping interpretation, extending vicarious liability to every owner of every device "capable of being" operated on a highway, would produce absurd results that could not have been intended by the Legislature. The list of those affected would include, for example, owners of motorized wheelchairs, riding lawnmowers, golf carts, and even airplanes.

Id. at 529 (citation omitted).

The owner liability act holds owners responsible for the use of their "motor vehicles," such as the automobiles used in every day life on the highways of this state. In enacting the no-fault act in 1956, the Legislature supplemented that responsibility by requiring mandatory automobile insurance to cover the owner for any liability under the owner's liability statute,, and to provide recovery to those entitled to it, and also limited the owner's potential tort liability by requiring threshold injuries for pain and suffering damages and by setting caps on economic damages. *See* MCL 500.3101 (1) and MCL 500.3135. Automobile insurance under the no-fault act is not required, however, for industrial, farm and construction equipment not designed for use on public roads.. *See* MCL 500.3101 (1) and MCL 257.216. Nor was it required for such equipment in 1964 when the Legislature enacted the Governmental Immunity Act, using the term "motor vehicle" in § 1405.

Justice Griffin's dissenting opinion in *Mull*, joined by Justices Riley and Boyle, articulates well that the majority opinion was not well considered, and was fraught with

perhaps unintended mischief. The swift legislative response, overturning the holding in *Mull*, seems to have vindicated the concerns of the dissenting justices.

Concluding that *Mull* was wrongly decided, however, does not answer the question whether its language not affected by 1995 PA 140 should be disavowed. In considering such a step, the Court should consider the effects of disavowal, including the effects on "reliance interests" and whether overruling it would work any hardship because of that reliance. *Robinson* at 465-466. As noted in *Robinson*, a citizen of the state is presumed to look first at the language of a statute in directing his actions, and not to judicial decisions interpreting that statute. *Id.* at 467. If a court has disrupted the legitimate expectations of the citizenry by an errant or distorted interpretation at odds with the statutory language, then a subsequent court "should overrule the earlier court's misconstruction." *Id.* at 467. In so doing, the subsequent court restores to the people the power to enact laws to govern themselves through their elected representatives in the Legislature. *Id.* Thus, if this court concludes that the holding and remaining dicta in *Mull* does violence to the language of the owner liability statute, as the legislature did, then it should overrule or disavow the remaining language in *Mull.*

This case serves to illustrate the potential mischief implicit in a holding like *Mull.* The term so significantly expanded in *Mull*—"motor vehicle"—appears in statutes and regulations not at issue, and not considered in *Mull*, such as 691.1405. As noted in *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998), a court is duty bound to disavow an earlier decision "when it becomes apparent that the reasoning of an opinion is erroneous, and

that less mischief will result from overruling the case rather than following it . . . ." *Robinson* at 468. This may be especially true where the errant reasoning purported to interpret a statute legitimately enacted by the legislative process. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

Even so, a court should be cautious in overruling or disavowing earlier precedent that might otherwise be limited to its facts or otherwise distinguished away. As Justice Kelly noted in dissent in *Robinson*:

> [T]his court has never departed from precedent without "special justification."[citations omitted]. Such justifications include the advent of 'subsequent changes or development in the law' that undermine a decision's rationale,"[citations omitted].; the need to bring a decision into agreement with experience or newly ascertained facts; ...and a showing that a particular precedent has become a detriment to coherence and consistency in the law." [citations omitted]

By these standards, *Mull* may indeed merit disavowal. The decision was immediately disavowed by the legislature in 1995 PA 140, which pointedly undercut the holding in *Mull*: that the owner liability statute applied to unregistered industrial and construction equipment not being operated on the public road. The remaining language in *Mull* is thus dicta; its holding has been gutted by curative legislation.

In view of 1995 PA 140, the reliance factor is nil. No citizens can or do rely on *Mull* in the face of the prompt, curative statutory amendment to the contrary. Whether there remains more mischief in *Mull* remains to be seen. In this case, Appellants' attempt to expand the scope of the motor vehicle exception to immunity, a statute that was never

considered in *Mull.* Such mischief can be addressed by simply rebuffing the argument, and may not require repudiation of *Mull* by this Court. On the other hand, the remaining effect of *Mull* is subject to some question. Does the language and analysis in *Mull* affect the meaning of any terms used in the no fault act? Can an insurer claim that a claimant was driving an uninsured "motor vehicle" and therefore deny him first party personal injury protection benefits on the remaining strength of *Mull*? *Mull's* misinterpretation of the phrase "is or may be," for example, remains uncorrected by 1995 PA 140, *Mull* at 519, as is *Mull's* consolidation of two separate vehicle categories into one.

Amicus do not, and cannot, claim to be particularly well informed about the potential reach of *Mull*, and the potential mischief that it may wreak. Its member municipalities own and operate many motor vehicles in the course of governing, and also own and operate construction equipment and industrial equipment like the forklift at issue in this case, and also own and operate equipment used for mowing lawns and parks and public golf courses. Even so, unlike an association of insurers for example, or an association of rental car companies, the Michigan Municipal League concerns itself more with issues of municipal and governmental law than automobile law as such. These few considerations have been raised because the court has directed the parties to brief the issue. *Mull* momentarily muddied the waters with respect to the owner liability statute, and by implication at least complicated the inquiry with respect to § 1405 and with respect to the no fault act. Little would be lost if *Mull* were disavowed, and the interests of establishing coherence with respect to the body of law regarding motor vehicle liability may be advanced.

IV. A DECISION BY THIS COURT TO DISAVOW THE *MULL* INTERPRETATION OF "MOTOR VEHICLE" SHOULD NOT AFFECT THE OUTCOME IN THIS CASE

Disavowing the language in *Mull* not affected by 1995 PA 140 should not affect the outcome of this case, unless the Court declines, for whatever reason, to give retroactive effect to 1995 PA 140. Even if *Mull's* interpretation of "motor vehicle" were to stand, it has no effect after the enactment of 1995 PA 140 on the interpretation of the term "motor vehicle" as used in the owner liability statute. *Mull* did not purport to interpret the motor vehicle exception, MCL 691.1405, and this Court should now hold that *Mull* has no effect on the liability of governmental agencies in tort for claims brought pursuant to 691.1405. Likewise *Mull* should have no effect on the operation of the no-fault insurance laws of this state, because the no-fault act includes its own definition of motor vehicle, which *Mull* did not purport to modify. MCL 500.3101(2)(e).

V. THE MOTOR VEHICLE *EXCEPTION* TO GOVERNMENTAL IMMUNITY FOUND IN MCL 691.1405 DOES NOT CREATE A CAUSE OF ACTION; IT MERELY WAIVES THE IMMUNITY DEFENSE FOR OWNER LIABILITY CLAIMS WITHIN ITS DEFINED SCOPE.

Appellants contend that 1995 PA 140 amends the definition of the term "motor vehicle" only for purposes of chapter 4 of the Vehicle Code only (i.e., the owner's liability statute) and not for purposes of § 1405 or any other statute.[13] Therefore, appellants argue,

[13] It bears noting that *Mull* only purported to interpret the term "motor vehicle" for purposes of Chapter 4 owner liability and by implication, did not affect the meaning of the term as used in 691.1405. That *Mull* affected the definition of "motor vehicle" in § 1405 was found by the court below, and assumed by the parties to this appeal. In the interests of consistency and common

because their claims are brought under the motor vehicle exception to governmental immunity, and not under the owner's liability statute, the narrow meaning of "motor vehicle" reimposed by 1995 PA 140 does not apply in the instant case. Appellants' position is undercut however, by the fact that *the motor vehicle exception does not create a cause of action.* Instead, it simply sets forth the proofs appellants must show to avoid governmental immunity. Section 1405 establishes an exception to governmental immunity, not a cause of action. In the instant case, appellants' underlying cause of action does arise, if at all, under the owner's liability statute. Accordingly, the narrow meaning of "motor vehicle" found in 1995 PA 140 applies.

The exceptions to governmental immunity have varied origins, and the statutory language is not uniform. The highway and motor vehicle exceptions pre-dated the 1964 codification of the Governmental Immunity Act. MCL 691.1401, *et seq.* The public building exception was created new in 1964. MCL 691.1406. Government had previously been immune from liability for injuries occurring on its premises other than roads. Proprietary functions had traditionally been the mirror image of governmental functions, so the codification of that doctrine as an exception was in some way different than codifying the other, older "exceptions." In defining "proprietary function" in MCL 691.1413, the Legislature also limited the scope of potential claims. The public hospital exception was added in 1986. *See,* Baylor, *Governmental Immunity in Michigan* (ICLE 1991) (§ 3.1); *see*

sense, therefore, 1995 PA 140 must apply to MCL 691.1405 if, and only if, *Mull* applies to 691.1405.

also, Cooperider, *The Court, the Legislature, and Governmental Tort Liability in Michigan*, 72 Mich Law Review 187, 251 (1973).

The language in each exception varies. Metaphorically, each described exception defines a gateway through the defensive wall of immunity. If the facts of the claim so warrant, plaintiff is entitled to bring the claim inside, through the gateway. Once inside, the plaintiff must prevail to recover.[14]

This Court has consistently held that the exceptions set forth under the Governmental Immunity Act do not provide an independent cause of action to claimant. Instead, the Governmental Immunity Act merely creates exceptions to the broad grant of immunity. There is no suggestion in the language of the statute, or the case law, that § 1405 is in this way materially difference from all of the other exceptions. The applicable exceptions must be proven *in addition to an underlying cause of action in tort.* For example in *Haliw, supra*, a case involving the so-called "highway exception" to governmental immunity, this Court noted that claimants filing a personal injury suit against a governmental agency must (1) show "a cause of action in avoidance of governmental immunity," and (2) "where a plaintiff successfully pleads in avoidance of governmental immunity . . . the plaintiff must still prove, consistent with traditional negligence principles" a *prima facie* case of negligence.

Likewise, in *Johnson v City of Detroit*, 457 Mich 695; 579 NW2d 895 (1998), a case involving the so-called "public building exception" to governmental immunity, this Court

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[14] To continue the "gateway through the wall" metaphor, Troy did not fall because the gate was opened to bring in the Trojan horse. It was only after the waiting army followed under cover of darkness that the city's defenders were overcome.

held that proving an exception to governmental immunity does not necessarily result in governmental agency is liability. Instead, the plaintiff must still establish an underlying cause of action for negligence. The Court remarked that "[e]stablishing a building-defect claim circumventing governmental immunity does not negate traditional tort law principles."[15] *See also, Kerbersky, supra.*

Coleman v Kootsillas, 456 Mich 615; 575 NW2d 527 (1998), involved the proprietary function exception, in the context of an immense, and immensely profitable, municipal landfill. Plaintiff's tort claim was for personal injury, occurring during landfill operations, but having nothing to do with the profitability thereof.

Vargo v Sauer, 457 Mich 79; 576 NW2d 656 (1998), involved the public hospital exception in MCL 691.1407(4). Plaintiff sued in tort, asserting a wrongful death/malpractice claim. The claim was permitted to the extent it fell within the exception.

In *Robinson v City of Detroit, supra*, this Court recognized that the general tort of vehicle negligence is broader than the so-called motor vehicle exception to immunity contained in 691.1405. Certain vehicle negligence claims that might be brought against private parties are not allowed under § 1405, such as where the government vehicle cannot narrowly be said to have "caused" the accident, *Id.* at 455, 456, or where the injuries are not clearly "resulting from" the negligent operation. *Id.* at 457.

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[15] In *Klinke v Mitsubishi Motors Corp*, 458 Mich 582; 581 NW2d 272 (1998), Justice Kelly noted in her dissent that "in order to successfully bring a suit against an agency of the state, one has to plead in avoidance of governmental immunity *and* prove an underlying cause of action. *Id.* at n 19 (emphasis in original).

Robinson confirms that like each of the other exceptions to immunity, the motor vehicle exception in § 1405 is not a cause of action in itself; rather, it is a narrow gateway through which vehicle negligence claims may be brought to the extent they are consistent with the limitations of governmental immunity, 691.1407, as modified by § 1405. The very terms of § 1405 restrict such governmental owner liability claims to injuries caused by an agent or employee of the governmental agency owner. Owner liability for private persons under § 257.401 is not so limited.

Thus to avoid the immunity defense, a plaintiff must show (1) that the governmental agency was the owner of the motor vehicle involved in the accident; (2) that the driver or operator was an officer, agent, or employee of the governmental agency; and (3) that plaintiff's injuries resulted from that officer, agent, or employee's negligent operation of the motor vehicle. The plaintiff must then prove an underlying cause of action for negligence under traditional tort law principles. This approach finds support in recent decisions of this court in which plaintiff's motor vehicle negligence claims were brought pursuant to § 1405 in order to avoid the bar of governmental immunity. In *Hardy, supra,* the court noted that plaintiff had brought the claim under § 1405 *pursuant to the owner liability statute of the motor vehicle code*, *Hardy* at 562-563, and held that the no-fault personal injury thresholds were applicable in such a claim. *Id. at 566.* In *Alex v Wildfong, supra,* the court noted that plaintiff's claim against Fruitport Township failed because the township did not own the vehicle. The Court noted that in § 1405, "the legislature specifically provided for the liability of governmental agencies that own motor vehicles." *Alex* at n. 21.

This conclusion is further supported by the specific legislative provision in § 12 of the Governmental Immunity Act, which provides: "Claims under this act are subject to all of the defenses available to claims sounding in tort brought against private persons." MCL 691.1412.

This defense clause in the Governmental Immunity Act presupposes that a traditional tort claim will need to be adjudicated in the event that plaintiff succeeds in demonstrating that her claim avoids immunity pursuant to one of the narrowly drawn exceptions.

Construed together with the § 12 defense clause, the motor vehicle exception provides simply that: (1) where the motor vehicle is owned by a governmental agency, and (2) the driver is an officer, agent or employee of that agency, then (3) the defense of governmental immunity will not defeat plaintiff's owner liability cause of action.[16] Appellants' argument to the contrary notwithstanding, § 1405 does not authorize a cause of action for vicarious liability. Government liability is conditioned on ownership under § 1405. It is not conditioned on the employee acting within the scope of his employment or authority, or any other hallmark of vicarious liability doctrine. Indeed, in this court's recent decision in *Alex v Wildfong*, all members of the court concurred in the holding that defendant township was not liable under § 1405 for the negligence of a volunteer firefighter responding to a fire, while driving his own vehicle. If § 1405 were a vicarious liability statute as Appellant contends,

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[16] Note that the owner liability statute of the Vehicle Code created a statutory cause of action, 1915 PA 302 (see *Haverman)* that existed *before* the motor vehicle exception to immunity was codified in 1945 PA 127, § 1, MCL 691.141(1).

the decision in *Alex v Wildfong* would have been impossible.[17] That the Legislature conditioned governmental liability on *ownership* of the motor vehicle and specifically referenced the Vehicle Code to define the term *owner*, suggests an intent to permit a cause of action against governmental owners of motor vehicles under the owner's liability statute, in cases where governmental immunity is avoided under § 1405 and subject to limitations in § 1405.

CONCLUSION AND RELIEF REQUESTED

In conclusion, the phrase "motor vehicle" as found in MCL 691.1405 does not include forklifts. *Mull* was wrongly decided, both in terms of determining the Legislature's intent as to the definition of "motor vehicle" in the Motor Vehicle Code and by imposing owner liability on industrial and construction equipment not used on public roads. Adoption by the Legislature of 1995 PA 140 in response to *Mull v Equitable Life Assurance*, 444 Mich 508; 510 NW2d 184 (1994) was curative legislation, to be given retroactive effect in order to correct an error on the part of the judiciary as to the legislative intent.

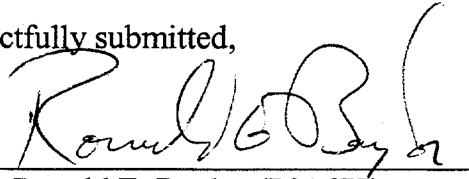
Although *Mull* should have no remaining effect in this case after 1995 PA 140, this Court should consider disavowing it because it is palpably incorrect, has been overtaken by a change in law, and it's remaining language not affected by the curative legislation is fraught with remaining mischief. The interests of a consistent and coherent body of law suggest *Mull* should be dismissed. MCL 691.1405 does not create a cause of action. Rather, it defines an

[17] The dissent related the question of Defendant Wildfong's *potential personal liability as owner under the owner liability statute.*

exception to governmental immunity to permit an injured party to recover against governmental agencies pursuant to an owner liability claim, MCL 257.401, fitting within the exceptions and limited by its terms.

For all of these reasons, the decision of the court below should be affirmed.

Respectfully submitted,



Dated: October 25, 2001

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