STATE OF MICHIGAN

SUPREME COURT

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

vs.

Supreme Court Case No: 134798
COA Case No: 272560
LC No: 04-430645-ND

INITIAL TRANSPORT, INC., and EMPLOYERS MUTUAL CASUALTY COMPANY**,**

Defendants-Appellants.
_____/

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DEFENDANTS-APPELLANTS INITIAL TRANSPORT AND EMPLOYERS MUTUAL CASUALTY COMPANY'S SUPPLEMENTAL BRIEF

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INTRODUCTION

This case arises out of a single vehicle accident, in which a tractor-trailer carrying gasoline crashed and exploded causing extensive property damage to property owned by Appellee, the State of Michigan, Michigan Department of Transportation (hereafter "MDOT"). The property damages were in excess of $3.5 million. The motor vehicle was owned by Appellant Initial Transport, Inc. ("Initial") and insured by Appellant Employers Mutual Insurance Company ("EMC").

The commercial auto policy issued by EMC provided the statutory maximum of $1 million of coverage for property damages under Michigan's No-Fault Act. (**APPENDIX A**). The policy contained an endorsement ("MCS-90") required by Michigan law by virtue of its adoption of federal regulations promulgated by the United States Department of Transportation ("USDOT"), certifying that Initial maintained the appropriate minimum level of financial responsibility required for an interstate motor carrier hauling gasoline on public highways. (**APPENDIX B**). In this case, that appropriate minimum level was the same amount as the limits in the underlying policy to which the endorsement was attached, i.e., $1 million. Initial also carried, through EMC, a separate umbrella liability policy with an additional $4 million limit.[1]

MDOT refused EMC's tender of $1 million under the commercial auto policy issued to Initial. Instead, MDOT filed suit for damages, alleging, among other causes of action, that EMC or Initial were liable beyond the $1 million policy limits for any remainder of its damages. EMC

[1] The umbrella policy is a "following form" policy, and thus adopts the conditions, endorsements and exclusions in the underlying policy. Further, both the commercial auto policy and the umbrella policy contained, among other coverage parts insuring various risks, the Commercial Auto Form CA 22 24 09 94, the "Michigan Property Protection Coverage" endorsement. Section A of the form, entitled "Coverage" provides that it "is subject to Chapter 31 of the Michigan Insurance Code [including MCL 500.3101 et seq.] and applies only to an 'accident' which happens in Michigan." (**APPENDIX C**). Consistent with the $1 million cap on property damages in MCL 500.3121(5), the endorsement provides in Paragraph 1 of Section C, entitled "Limit of Insurance", that "the most we will pay for all 'property damage' resulting from any one 'accident' is $1,000,000. . . ." *Id.*

and Initial argued that to require either of them to pay more than $1 million was contrary to the Michigan No-Fault Act's $1 million statutory cap on property damage claims against insurers. The trial court granted summary disposition in favor of EMC and Initial and also denied MDOT's claim for statutory interest penalties due to EMC's and Initial's alleged refusal to tender timely payment of MDOT's claim.

MDOT appealed, arguing that the federal regulations adopted by Michigan in the Motor Carrier Safety Act ("MCSA"), MCL 480.11 *et seq*., created a private right of action and implicitly amended the No-Fault Act by creating an exception to the statutory cap of $1 million for property damage claims arising out of the ownership, maintenance, or use of a motor vehicle. The Court of Appeals, in a 2-1 decision, reversed, holding that the MCSA created a private right of action and that it implicitly amended the No-Fault Act's statutory cap for property damage claims. Judge Whitbeck authored a partial dissent, in which he found no private right of action from the language of the federal regulations adopted by the MCSA and no implicit amendment of Michigan's No-Fault Act.

Initial and EMC filed an application for leave to appeal to this Court. On February 1, 2008, this Court issued an order directing oral argument on the application for leave to appeal and requesting supplemental briefs from the parties on several questions. EMC and Initial hereby submit this supplemental brief in response to this Court's questions, reassert their request that this Court grant leave to appeal so that these significant issues of public import can be more fully addressed or, in the alternative, peremptorily reverse the decision of the Court of Appeals.

1. The Purpose and Scope of Michigan's No-Fault Act

In order to appropriately address this Court's questions, it is necessary to explain the history and legislative intent of Michigan's No-Fault Act, MCL 500.3101, *et seq*. The No-Fault

Act abolished tort liability for personal injury and property damage claims, except for certain claims explicitly retained by the act. The No-Fault Act also placed a statutory maximum on the amount of available damages for property damage claims.

a. General Policy Behind the No-Fault Act

The No-Fault Act was passed as a part of comprehensive state legislation known as Tort Reform. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 504-05 (1981). The major goal and purpose of the No-Fault Act was to curtail the rampant abuse of the judicial system to secure large and multiple (often overlapping) payouts from insurance companies and individuals on less than certain, and often frivolous claims and allegations. *Id*. The cumulative effect of these windfalls was to create higher insurance premiums, which in turn threatened the very fabric of the insurance system upon which society relies as a protection from catastrophic losses and hazards. *Id*.

Thus, as a compromise, the No-Fault Act required the provision of minimum amounts of insurance to be secured by motorists and in exchange, tort liability was abolished, with the very explicit and specific exceptions noted in the act, only. Compulsory insurance provided benefits to victims as a substitute for their common law remedy in tort. *Id*., see also *Shavers v Attorney General*, 402 Mich 554 (1978). The No-Fault Act's self-insurance concept is rooted in the self-help principle "*sic utere tuo ut alienum non laedas*" (use your own so you do not injure that of another). *Shavers*, *supra* at 596, citing 16 Am Jur 2d, Constitutional Law, § 267, p. 523.

b. All Common-Law Causes of Action Were Abolished Except those Explicitly Retained and Damage Remedies Were Statutorily Limited

Importantly, after explicitly and broadly abolishing all tort liability, the No-Fault Act retains only certain causes of action allowing for additional liability, and limits the amounts of damages recoverable for those common-law torts that have been abolished. Most notably, MCL

500.3135(1) provides that "[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." (emphasis added). This is an exception to the general abolition of tort liability. *Citizens Ins Co of America v Tuttle*, 411 Mich 536, 548 (1981). The intent of the Legislature, inferable from the face of MCL 500.3135 is clear: the catastrophically injured and the victim of extraordinary economic loss are allowed compensation *in addition to* that provided in MCL 500.3107 (wage loss and medical care expenses) and MCL 500.3110 (dependent care expenses). *Workman v Detroit Automobile Inter-Insurance Exchange*, 404 Mich 477, 508-09 (1979). Otherwise, tort liability was abolished. *Shavers, supra*.

The insurance required under the No-Fault Act also insures the owner of property from damages to tangible property caused by the maintenance, use or operation of a motor vehicle. *Shavers*, *supra* at 596. However, the No-Fault Act *limits the remedy*; the amount of damages recoverable under the property protection insurance section is capped at $1 million. MCL 500.3121(5). Thus, when it promulgated the No-Fault Act, the Legislature crafted very explicit language and carved out very precise exceptions to the otherwise broad and general abolition of tort liability. Therefore, the No-Fault Act broadly abolished all pre-existing common-law causes of action in tort arising out of the operation, use or maintenance of a motor vehicle, retained certain of those causes of action, only, and explicitly *limited the remedy available for damages* for the abolished causes of action. As such, the No-Fault Act contains the exclusive legislative pronouncement regarding causes of action for property damage claims and the remedies

available therefor, when such claims arise, as they did in this case, out of the use, operation, or maintenance of a motor vehicle.[2] MCL 500.3135(1); MCL 500.3121(5).

2. The Purpose and Scope of the MCSA

a. The MCSA is a Regulatory Act that Prospectively Addresses Safety for Motor Carriers in the State of Michigan

In 1963, the Michigan Legislature enacted the Motor Carrier Safety Act (MCSA), MCL 480.11 *et seq*. As its title asserts, that act applies general safety regulations to the transport and trucking industry in the state of Michigan. *Amerisure Mutual Ins Co v Carey Transp Inc*, 2007 WL 29235 (January 4, 2007) (Unpublished Opinion of the Michigan Court of Appeals) (**APPENDIX D**) (applying the MCSA adopted "hours of service rules" for motor carrier operators in 49 C.F.R. § 395.1), see also *Lowe v City of Portage*, 2003 WL 220178045, * 2 (August 26, 2003) (Unpublished Opinion of the Michigan Court of Appeals) (**APPENDIX E**) (applying MCL 480.11 *et seq*., and citing the federal regulation requiring drivers of commercial vehicles to obtain a commercial drivers license (CDL)); *People v Hegedus*, 169 Mich App 62, 65-6 (1988) (noting that cited defects in a vehicle were regulated by and in violation of MCL 480.11 *et seq*.); *Johnston v S D Warren Co*, 2008 WL 183639, * 4 (E D Mich, January 18, 2008) (opinion and order on motion in limine allowing MCL 480.11 *et seq*., as admissible evidence to demonstrate regulations applicable to safe loading of motor carriers); *Nichols v All Points Transport Corp of Michigan Inc*, 364 F Supp 2d 621, 632, n 4 (E D Mich 2005) (citing MCL 480.11 as Michigan's Motor Carrier Safety Act and stating that it requires all drivers of commercial vehicles to obtain a CDL). The MCSA, as a whole, is a broad ranging but precisely

[2] MCL 500.3101(2)(e) (broadly defining "motor vehicle"); See also *Drake v Citizens Ins Co*, 270 Mich App 22 (2006) (generally discussing the No-Fault Act's wide coverage of all motor vehicles within its scope as long as the damages complained of arises out of the use, operation or maintenance of the motor vehicle).

tailored regulatory act governing safety standards applicable to motor carriers in the state of Michigan.

b. Michigan's Adoption of the Federal Safety Regulations

Effective January 8, 1996, Michigan adopted portions of the federal Motor Carrier Safety Act and the federal motor carrier safety regulations by enacting MCL 480.11a, which provides, in pertinent part, as follows:

> (1) This state adopts the following provisions of title 49 of the code of federal regulations, on file with the office of the secretary of state except where modified by this act:
>
> ***
>
> Motor carrier safety regulations, being 49 CFR parts 40, 356, 365, 368, 371 through 373, 375, 376, 379, 382, 385, 387, 390 through 393, 395 through 399 except for [exceptions not relevant to this proceeding].

49 CFR 387.1, one of the adopted sections, states:

> The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.
>
> ***
>
> No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility. [49 CFR 387.7(a).]

A private transporter of hazardous material, such as oil or gasoline, is required to maintain a minimum of $1 million in financial responsibility. 49 C.F.R. § 387.9. A violation of the rules is punishable by "a civil penalty of no more than $11,000 for each violation." 49 C.F.R. § 387.17. As with the purpose of the Michigan MCSA, the "stated purpose" of its federal counterpart "is to promote the safe operation of commercial motor vehicles, to minimize dangers

to the health of operators of commercial motor vehicles and other employees[, and] ... to assure increased compliance with traffic laws and with the commercial motor vehicle safety and health rules, regulations, standards, and orders . . . ." *Interstate Towing Ass'n Inc v Cincinnati*, 6 F 3d 1154, 1159 (1993).

ARGUMENTS

I. THE MCSA DOES NOT CREATE A PRIVATE RIGHT OF ACTION

The MCSA does not provide for a private right of action or a remedy for third parties. A plain reading of the MCSA and the No-Fault Act demonstrates that the MCSA prospectively regulates the trucking industry by imposing safety standards. On the contrary, the No-Fault Act retrospectively operates to address liability and damages for accidents arising out of the maintenance, operation, or use of a motor vehicle. The No-Fault Act abolishes tort liability, with limited and statutorily provided for exceptions. In turn, the No-Fault Act provides for the sole remedy available when addressing property damage claims. There is no *other liability or other remedial scheme or statute*, including the MCSA, which supersedes the explicit and focused provisions of the No-Fault Act. If the Legislature were to choose to explicitly amend the No-Fault Act and create an exception to the otherwise abolished tort liability by adding additional liability or by providing for additional or new causes of action that would allow for the recovery of greater amounts than the statutory maximums in the No-Fault Act, it would do so expressly and explicitly, not by implication or silence.

The first question in addressing whether a statute creates a private cause of action is to examine the language of the statutory provision. Where a statute does not explicitly create a private cause of action, a court may infer a cause of action "if it determines that that remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness

of the provision." *Gardner v Wood*, 429 Mich 290 (1987). As noted by the 6th Circuit, "[a] far more efficient approach [to determine whether the Legislature intended to create a private right for a cause of action] would be for Congress to express clearly its intent either in the plain language of the statute or in the legislative history." *Howard v Pierce*, 738 F 2d 722, 724, n 3 (1996). A review of the plain language of the MCSA, and the legislative intent and history behind it, does not reveal the existence of either an express or implied private right of action. Additionally, applying the judicial tests that have been enunciated and refined for determining the issue, a private right of action cannot be said to exist in favor of MDOT.

A. The Plain Language of the MCSA Admits of No Private Right of Action or Remedy for Third Parties Seeking to Recover for Property Damage

The first question in addressing whether there exists "a statutory cause of action is, of course, one of statutory construction." *Touche Ross & Co v Redington*, 442 US 560, 568 (1979) (Rehnquist, J. delivered the opinion of the Court) (stating that "implication of a private right of action based on tort principles . . . is entirely misplaced"). The cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent. *Michigan Humane Society v Natural Resource Comm'n*, 158 Mich App 393, 401 (1987). When considering that intent, statutory language should be given a reasonable construction *considering the provision's purpose and the object sought to be accomplished*. *Id*. (emphasis added). Additionally, a Court may not impose its own policy choices when interpreting a statute. *People v McIntire*, 461 Mich 147, 152 (1999), see also *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 370 (1998). "[C]ourts may not rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature." *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 214, n 10 (2007) (internal quotations omitted).

Additionally, "[t]he Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748 (2002). The meaning of the Legislature "is to be found in the *terms and arrangement* of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v General Motors Corp*, 448 Mich 147, 160 (1995) (emphasis added). Further, a court "may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459 (2000). When parsing a statute therefore, it is to be presumed that "every word is used for a purpose" and effect will be given "to every clause and sentence." *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002). Therefore, the courts are to avoid an interpretation that makes any part of a statute surplusage or nugatory. *Id*. at 684.

In considering whether the Legislature intended to create a private right of action by its "in rote" adoption of the federal regulations, the first task is to look at the language of the relevant statutory provision in applying the rules pertaining to whether or not a statute creates a private right of action and therefore a remedy in favor of any particular party. *Touche*, *supra* at 568. Nowhere in the language of the MCSA is there a provision that gives a third party a private right of action, i.e., a cause of action to pursue any damages whatsoever arising out of the maintenance, use or operation of a motor vehicle. Nowhere in the language of the MCSA, and the adopted federal regulations is there a specified remedy available for property damages caused by the operation, use, or maintenance of a motor vehicle. In its opinion, the Court of Appeals acknowledged as much, stating that "the MCSA *does not expressly provide for a private remedy for a third party against an insured or insurer . . . .*" Slip Op. at 5. (emphasis added).

After noting the complete absence in the MCSA of any remedy and having answered, in the negative, the first question of whether the plain language of a statute creates a private right of action, the Court of Appeals nonetheless states that "implied remedies may be cognizable" if it is determined that the Legislature intended to created such a cause of action. Slip. Op. at 5, citing *South Haven v Van Buren County Bd of Comm'rs*, 478 Mich 518, 528-29 (2007). The Court of Appeals then cites to 49 C.F.R. § 387.11, which provides that insurers furnishing the necessary policies certifying the minimum levels of financial responsibility must be "willing to designate a person upon whom process, issued by . . . any court having [subject matter jurisdiction] . . . may be served in any proceeding at law or equity . . . ." *Id*. This "implie[d] a remedy" according to the majority. *Id*.

However, nothing in the language of the MCSA nor in its legislative history and purpose, *Amerisure*, *supra*; *Interstate Towing Ass'n*, *supra*, is there a cause of action on behalf of anyone to recover the specific remedy of compensation for property damages occasioned by the maintenance, operation or use of a motor vehicle. Indeed, this Court in *South Haven*, *supra*, the case relied on by the majority in the Court of Appeals, concluded that the statute at issue provided no specific remedy. *Id*. at 529. The Court then warned that only when a statute provides a remedy, should the courts enforce the remedy by recognizing the cause of action. *Id*. at 528. Otherwise, the Court held, the courts were to enforce only those remedies explicitly provided by the statute "not [a remedy] that the court prefers." *Id*. Here, the Court of Appeals majority did just that. Rather than recognizing that the MCSA provides no remedy for the specific damages complained of by MDOT, the majority uses a vague reference to an insurer's universal obligation to designate a resident agent for service of process within the state if the insurer is underwriting risk in that state, to imply a specific cause of action on behalf of a third

party to seek a remedy of compensation for property damages. This is merely creating a remedy that the Court of Appeals prefers rather than one that exists within the four corners of the MCSA. *South Haven, supra*.

Further, nothing in the language of the MCSA provides for an implied "cause of action." The MCSA requires that a motor carrier maintain minimum levels of "financial *responsibility*." 49 C.F.R. § 387.7(a) (emphasis added). It further provides that "[n]o motor carrier shall operate a motor vehicle" unless this minimum level of financial responsibility has been "obtained" and is "in effect". *Id*. However, the mere requirement that a motor carrier maintain a certain level of financial *responsibility* does not create, either expressly or by implication, a cause of action. This is a fundamental distinction between the *obligations* created by Michigan's adoption of the federal requirements in the MCSA, and the circumscribed *liability for damages* in the No-Fault Act. That interstate motor carriers, per the federal regulations, are obligated to maintain a certification that they are insured at a minimum level of financial *responsibility* is of no moment to the Michigan Legislature's express decision to impose *liability* for property damages, but to limit the remedy therefor.

In enacting the No-Fault Act, the state of Michigan created a system that accounted for the just compensation of those whose property is damaged from the use, maintenance or operation of a motor vehicle. *Shavers, supra*; *Rusinek, supra*; *Tuttle, supra*. Thus, the fact that federal regulations require an interstate motor carrier to maintain a higher level of financial responsibility than can be imposed upon a registrant who is compliant with Michigan's No-Fault Act cannot impose upon that registrant a requirement that would contravene his or her rights under state law. The No-Fault Act's *limitation of damages* does not prevent the bringing of a claim, it merely *limits the amount of damages* that a plaintiff can receive. See, e.g., *Kiser v*

Jackson-Madison County General Hospital et al, 2002 WL 1398543, * 6 (May 3, 2002) (USDC WD Tenn) (**APPENDIX F**) (addressing a preemption argument and holding that federal regulations *explicitly* creating a cause of action for patients who were subjected to discrimination in treatment based on a lack of insurance did not preempt or otherwise affect the remedy available under the state's governmental tort liability act, which capped damages for personal injury and property damage based on the limits in the state's insurance statute and noting that "compliance with both federal and state regulations [was] not a physical impossibility").[3]

In analyzing a statute, "[t]he interpretive process does not [as Plaintiff-Appellant attempts to do here] remove words and provisions from their context, infuse these words and provisions with meanings that are independent of such context, and then re-import these context free meanings [or words] back into the law." *Mayor of Lansing v Michigan Public Service Commission*, 470 Mich 154, 167 (2004). Additionally, a statute cannot properly be read "when its words and provisions are isolated and given meanings that are independent of the rest of its provisions." *Id*. Simply put, the MCSA's adopted requirement that an interstate motor carrier maintain minimum levels of financial "responsibility" does not create a cause of action for "liability" for damages above those allowed by state law. *Kiser*, *supra*; MCL 500.3121(5).

In *Carolina Casualty Co v Insurance Co of N America*, 595 F 2d 128, 138 (3rd Cir 1979) the court addressed the issue of whether a BMC-90 endorsement, which is required to engage in interstate commerce (a parallel to the MCS-90 required by the MCSA in this case) prevents

[3] It should be noted that in *Kiser*, the state governmental tort liability act capped damages by reference to the state's insurance regulation, but also explicitly provided an exception where the governmental agency decided to carry additional insurance, in which case, the damages were limited to that additional amount. Distinguished from the present circumstances is the fact that the tort liability act, not the federal regulations, allowed for the statutory cap to be exceeded up to the additional amount carried by the governmental agency. In the present case, the No-Fault Act does not expressly or by implication allow for damages to exceed the $1 million cap. And, in the present case, the federal regulations do not expressly create a cause of action or amend the No-Fault Act's explicit provision in this regard. Indeed, the court in *Kiser* stated that there was "no conflict" between the purposes of the federal law providing for a private right to *damages* and the state law *limits of liability*. *Kiser*, *supra* at * 6.

courts from examining the manner in which private agreements, such as insurance contracts or state laws, e.g., state insurance regulations, would otherwise allocate the ultimate financial burden of the injury. The Court held that while a lessee cannot free itself of its federally imposed duties when protection of the public is at stake, the federal requirements are not so radically intrusive as to absolve lessors or their insurers of otherwise existing obligations under applicable state tort law doctrines or under contracts allocating financial risk among private parties. The Court, after stating that it was not concerned with the preemption of state regulations of motor carriers engaged in interstate commerce, went on to state:

> Whatever preemptive effect the ICC regulations may have in that limited field [of interstate commerce] cannot form a basis for arguing that federal law also displaces state law doctrines governing master-servant relationships, respondeat superior, contribution among tortfeasors, or even ordinary negligence. [*Id*.]

The Court noted that "so massive a disruption of the tissue of state law would be extraordinary in the American legal framework." *Id*., citing P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 470-71 (2d ed. 1973). A court may give effect to otherwise existing allocations of financial responsibility where the goal of protecting the public has already been fulfilled. *Id*.

In this instance, the goal of protecting the public has already been fulfilled by Michigan's no-fault insurance system. The No-Fault Act predetermines upon whom the burdens of financial risk for damage to property will fall. State law requires the insurer to bear the burden. In exchange, the maximum amount that one can recover for damage to property is $1 million. The federal regulations requiring certification of a minimum level of financial responsibility do not otherwise displace state law governing tort law, negligence and liability. *Carolina Casualty*, *supra* at 138.

The purpose of the federal regulations is to ensure that an interstate motor carrier has independent financial responsibility to pay for losses sustained by the general public arising out of its trucking operations. However, once it is clear that there are sufficient funds available to safeguard the public, the inquiry changes: "[t]he pertinent question is whether the federal policy of assuring compensation for loss to the public prevents courts from examining the manner in which private agreements or state laws would otherwise allocate the ultimate financial burden of the injury." *American Alternative Ins Co v Sentry Select*, 176 F Supp 2d 550, 558 and n 16 (2001), citing *Carolina Casualty*, *supra*; *Travelers Ins Co v Transport Ins Co*, 787 F 2d 1133, 1140 (7th Cir 1986) (concluding that the federal regulatory requirement does *not* preclude the operation of otherwise valid private insurance agreements *or state laws*).

B. The Legislative Intent in the MCSA Does Not Reveal a Private Right of Action or a Remedy on Behalf of Third Parties to Recover for Property Damage

There is also no legislative intent in the MCSA to create a private right of action. The task in addressing whether a statute creates a private cause of action, aside from an analysis of its plain language, is to consider whether the Legislature in a given case "intended to create a private right of action." *Touche, supra* at 568. Unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy does not exist. *Ellison v Cocke County, Tennessee*, 63 F 3d 467, 470 (1995), citing *Northwest Airlines Inc v Transp Workers*, 451 US 77 (1981); see also *Thompson v Thompson*, 484 US 174, 179-80 (1988) (a private remedy will not be implied, unless legislative intent to create a private right of action can be inferred from the statute or another source).

In *Touche*, the Court addressed whether a statute requiring broker-dealers to keep accounts, reports and records for inspection and to protect investors created a cause of action in

tort in favor of customers of the broker-dealers. *Id*. at 569. The Court concluded that the language of the statute, requiring the maintenance of financial records for inspection and public scrutiny, did not, by its terms, create a private cause of action in favor of anyone. *Id*. According to the Court, the statute "[did] not by any stretch of its language purport to confer private damages rights or, indeed, *any remedy in the event the regulatory authorities are unsuccessful in achieving their objectives* . . . ." *Id*. at 570 (emphasis added). The Court noted that in the past, it had found that a statute implied a cause of action, but only in cases where the statute in question provided for the inference of the *precise remedy* alleged to exist. *Id*. at 571.

As with the statute in *Touche, supra*, the fact that the MCSA requires certain information to be kept on hand for purposes of inspection and to assure that the minimum requirements of financial responsibility are maintained by the interstate motor carrier does not create a private right of action on the basis of tort principles in favor of anyone, i.e., a right to recover damages due to negligence in favor of a party injured by the individual charged with the responsibility of maintaining the requisite information. *Touche, supra* at 569. In the event that "regulatory authorities" are unsuccessful in achieving the objectives of the MCSA, requiring every interstate motor carrier to maintain the certification that they are carrying [proof of the minimum amount of financial responsibility], a "private damages right" or "any remedy", for that matter, is not available in any greater or lesser degree than it would be where the driver is compliant. *Id*. at 570; *Thompson, supra* at 179-80. The plain language of the provision only requires documentation, 49 C.F.R. § 387.7(a), and provides for a fine to be imposed upon the driver in the absence of his or her ability to present such proof, 49 C.F.R. § 387.17. The particular requirement, in this instance, appears to be little more than "intended solely to be an integral part of a system of preventative reporting and monitoring." *Touche, supra* at 571, n 11.

The language of the MCSA does not create the precise remedy alleged by MDOT to exist in this case, to wit, a right to recover compensation for property damages based on a theory of tort liability. *Touche, supra* at 571. Indeed, the ministerial fines provided for by the statute is more akin to the penalty that may be imposed upon a driver of a motor vehicle in Michigan upon his or her failure to provide proof of insurance in accordance with MCL 500.3101a. This "violation", of course, does not remove the offending driver from the Michigan no-fault system altogether, and subject him or his insurer to any greater degree of tort liability than would be available if he had been driving with the requisite proof of motor vehicle insurance. In the event of an accident in such circumstances, the omission would not require him to be liable for more than the statutory cap on property damages.

Further, where "the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history [that the statute] may give rise to suits *for damages* reinforces [the] decision not to find such a right of action implicit within the section." *Touche, supra* at 571 (emphasis added). At best, what can be gleaned from the pertinent MCSA provision in the instant case, and from the legislative history regarding the adoption of the federal regulations, is an absence of legislative direction on the subject of remedies or damages to third parties. "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche, supra* at 571. Where the Legislature "wishe[s] to provide a private damage remedy, it kn[ows] how to do so and d[oes] so expressly. *Blue Chip Stamps v Manor Drug Stores*, 421 US 723, 734 (1975).

Finally, if there is an existing statutory remedy that seeks to compensate for the precise damages sought by the party claiming an implied right of action, then it would seem that such provision, however limited, would be a clearer legislative expression on the subject than to say

that such a right of action for the same damages exists by virtue of imprecise statutory language at best, and, at worst, utter silence. *South Haven*, *supra* at 528 (stating that "[i]t is well settled that when a statute provides a remedy, a court should enforce the legislative remedy rather than one the court prefers."). While "some quantum of additional remedy [may be] permitted where a statutory remedy is 'plainly inadequate'", this principle would not hold sway where an existing and available statutory remedy exists, regardless of its perceived adequacy. See, e.g., *Lash v City of Traverse City*, 479 Mich 180, 192, n 19 (2007), citing *Pompey v General Motors*, 385 Mich 537, 553, n 14 (1971) and noting that the quoted principle derives from dictum and in any event appears not to be applicable where statutory authority exists to provide a remedy). Of course, in this instance, Michigan's No-Fault Act provides a remedy for property damage claims, the precise damages sought by MDOT, and however inadequate the $1 million cap may appear to MDOT to be, it is the explicit statutory remedy for these claims. *Lash*, *supra*, citing *Grand Traverse County v Michigan*, 450 Mich 457 (1995) (holding that available statutory remedy precluded a private cause of action without resort to assessing its adequacy); *White v Chrysler Corp*, 421 Mich 192, 206 (1984) (refusing to permit a tort remedy for violations of the Michigan Occupational Safety and Health Act despite acknowledging that the statutory remedy was inadequate because it resulted in the undercompensation of many seriously injured workers).

Assuming that the Legislature, by its in rote adoption of the federal regulations into the MCSA, thereby also "adopted" the legislative intent behind the federal regulations, reviewing that legislative intent and the history of the MCSA, there is no indication it was ever intended to create a private right of action. The regulatory requirement appears more to impose a "public duty", for which there is no private right of action. *Taylor v Saxton*, 133 Mich App 302, 306 (1984). Where a statute "imposes a new duty unknown to the common law and provides a

comprehensive administrative or other enforcement mechanism or otherwise entrusts the responsibility for upholding the law to a public officer, a private right of action will not be inferred." *Claire-Ann Co v Christenson & Christenson Inc*, 223 Mich App 25, 31 (1997). Here, the MCSA imposes a new duty unknown to the common law, to wit, the requirement that interstate motor carriers of certain substances maintain, and present when asked, certification that they carry the minimum amount of financial responsibility. 49 C.F.R. §§ 387.1; 387.7(a). The MCSA further entrusts the responsibility for upholding the law to a public officer, namely, certain law enforcement officials, who have the authority and duty to issue citations upon a failure of the motor carrier to present the requisite proof. MCL 480.11a(c), see also 49 C.F.R. § 387.17. A private right of action under such circumstances does not exist. *Claire-Ann Co*, *supra*. Application of this rule is particularly relevant when the Legislature has explicitly provided for a private right of action for the recovery of property damages occasioned by the operation, use or maintenance of a motor vehicle by virtue of the explicit provisions of the No-Fault Act.

C. Michigan Supreme Court Jurisprudence Supports the Conclusion that the MCSA Does Not Create a Private Right of Action or a Remedy on Behalf of Third Parties to Recover for Property Damage

Further, applying this Court's prior judicial analysis to the question yields a similar result. In *Gardner*, *supra*, this Court applied a four-part test derived from the Second Restatement of Torts, and noted that a cause of action could be created to redress a statutory violation where the purpose of the statute at issue was found to be exclusively or in part:

(1) to protect a class of persons which includes the one whose interest is invaded;

(2) to protect the particular interest which is invaded;

(3) to protect that interest against the kind of harm which has resulted; and

(4) to protect that interest against the particular hazard from which the harm results.

[*Id*. at 302, citing *Longstreth v Gensel*, 423 Mich 675, 692-93 (1985); 2 Restatement Torts, 2d, § 286, p. 25.]

To the extent that *Gardner* is still good law, and to the extent that such an analysis even applies in this case, where, as conceded by MDOT and the Court of Appeals, no statutory violation has occurred, application of the four factors reveals that the MCSA does not create a private right of action.[4] The MCSA has, as its principal goal, the regulation of safety and technical requirements for interstate motor carriers. *Amerisure*, *supra*; *Interstate Towing Ass'n*, *supra*. It is designed, in part, to protect the general public from the dangers of unsafe motor carriers upon the public highways. Thus, the first two elements of the test from *Gardner* would appear to be satisfied. The MCSA is intended to protect the general public against personal injury or property damage due to unsafe motor carriers. It seeks to affect this purpose by imposing technical safety requirements on interstate motor carriers and their owners and operators.

However, the next two elements of *Gardner* are not satisfied. With respect to the third element, the MCSA does not provide for a method to protect the interest (property) against the kind of harm that has resulted (monetary loss due to property damage). Therefore, applying the fourth element, there is no provision in the MCSA that provides for a method by which monetary compensation can be sought as the result of damage to property. In other words, the MCSA does not provide for a cause of action for *compensation* for property damage due to an accident involving an interstate motor carrier.

[4] In *Lash*, *supra*, this Court noted that use of the several factors in *Gardner* has been questioned and, in any event, the courts addressing the question of whether a statute should be held to "infer" a private right of action have focused almost exclusively on legislative intent. *Lash*, *supra* at 193, n 24.

While the MCSA prospectively seeks to protect property by imposing technical safety requirements on interstate motor carriers, it does not provide a mechanism by which such damage can be redressed. The No-Fault Act, not the MCSA, contains the statutory provisions that provide both a cause of action and a remedy for property damage occasioned by the maintenance, use or operation of any motor vehicle. Thus, application of the four-part test in *Gardner* fails.

Additionally, the four-part test has not been applied where statutory law already provides a cause of action to protect the public. There is already an adequate mechanism in place to protect the public interest being asserted. *Lash*, *supra* at 191. As explained, Michigan's express legislative choice to enact the no-fault system adequately provides protection to the public. This system has withstood the test of constitutional challenge and judicial scrutiny for over 34 years, as well as the uncertainty of an ever-changing economic climate. The Michigan No-Fault Act protects the public by creating a legislative system to abolish tort liability and maintain stability in the costs of insurance. *Shavers*, *supra*; *Tuttle*, *supra*. On the other hand, adequate remedies for financial compensation are established by the maximum limitations recoverable for property damage. MCL 500.3121(5).

The Legislature, under our Constitution, can abolish or modify common-law and statutory rights and remedies. *Philips v Mirac Inc*, 470 Mich 415, 430 (2004) (affirming the constitutionality of damage caps for injuries incurred in automobile accidents involving rental cars, MCL 257.401(3)). The case is even more convincing when the remedy is limited by statute. *Id*. And the Legislature can leave a cause of action intact, while, at the same time, limit the damages recoverable. *Id*., citing *Karl v Bryant Air Conditioning Co*, 416 Mich 558, 573-76

(1999) and *Shavers*, *supra*. See also *Zdrojewski v Murphy*, 254 Mich App 50 (2002) (holding similarly with respect to the damages caps under the medical malpractice statute).

Further, as noted more recently in *Lash*, *supra*, the Court in *Gardner*, *supra*, observed that the purpose of the statute alone was an insufficient basis for inferring a private right of action. *Lash*, *supra* at 193. The determination should not only be "*consistent with legislative intent*", but too, it should further the purpose of the legislative enactment. *Id*. (emphasis in original). A cause of action cannot be maintained where it would be inconsistent with the intent of the Legislature as such is a matter for legislative resolution and, in any event, subsequent decisions of this Court have refused to impose a remedy for a statutory violation in the absence of legislative intent. *Id*. and n 24, citing *Office Planning Group Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 498 (2005), which recognized that although the United States Supreme Court's analysis in *Cort v Ash*, 422 US 66 (1975), was instructive as to the several factors to be considered when determining whether a private right of action exists, "post-*Cort* cases [such as *Touche*, *supra*] have retreated from the consideration of enumerated factors and focused exclusively on [the plain language of the statute and in the absence thereof] on evidence of legislative intent "to create, either expressly or by implication, a private cause of action".

Applying either the four-part test from *Gardner*, *supra*, or the more recent pronouncements of this Court, as noted in *Lash*, *supra* and *Office Planning*, *supra*, reveals that the MCSA does not contain a private right of action based in tort principles for recovery of property damages that exceed the statutory cap explicitly provided for by Michigan's No-Fault Act. Finally, as noted in *Lash*, *supra*, *Grand Traverse Co*, *supra*, and *White*, *supra*, where an explicit statutory cause of action exists, which provides for a precise remedy, however limited,

the exclusivity of such remedy has been affirmed. Michigan's No-Fault Act provides the sole cause of action and remedy available for property damages caused by the operation, use or maintenance of a motor vehicle in the state of Michigan. Michigan has mandated insurance for property damage claims in exchange for the abolition of tort liability for *any amounts* exceeding the statutory cap, with limited exceptions, not pertinent to the issues raised in this appeal. The No-Fault Act provides that all claims for property damage are to be governed by the no-fault system and in exchange, additional liability for property damage claims is abolished.

While the Legislature adopted the federal regulatory system, which incorporates technical standards and safety requirements for motor carriers, the Legislature nowhere expressed an intent to create a private right of action by virtue of this federal regulatory incorporation. Even assuming that this Court can find a private right of action in the MCSA, the next question would be whether the remedy available for assertion of that right would be constrained by the available remedy under state law. In this instance, the available remedy under state law, as explicitly laid out in the No-Fault Act for claims alleging property damage due to the operation, use or maintenance of a motor vehicle is limited, i.e., capped at $1 million. While the purpose of the federal regulations adopted by the MCSA is said to have been to protect the public, and, consequently, this would be deemed to include the state, on behalf of the public, this without more does not create, by implication, a private right of action to a remedy that is greater than that allowed by state law.

Additionally, a private right of action will only be deemed to have been created, by implication, where such newly created right does not conflict with explicit provisions in other statutes. The Court of Appeals has interpreted the MCSA to have implicitly amended the No-Fault Act by creating a cause of action or a private remedy that contravenes the explicit

abolishment of tort liability in the No-Fault Act. The plain language of the No-Fault Act unequivocally abolishes a private right of action for property damage in place of the requirement to maintain a minimum amount of property protection insurance. If left to stand, the Court of Appeals holding is that this explicit abolition of a cause of action can be said to have been destroyed, by implication, by in rote adoption of ministerial federal regulations. A private right of action should never be found to be implied by statute when it will interfere with existing and express statutorily created remedies or rights.

II. THE MCSA DID NOT AMEND THE NO-FAULT ACT

Assuming that the MCSA does create a private right of action in favor of third parties, the MCSA did not amend the No-Fault Act's limitation of damages for property damage claims. In order for a statute to be amended, it must be amended in its own provisions, and in any event, not by in rote adoption of federal regulations that pertain to safety and certification standards for interstate motor carriers. "If the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly." *Wayne Co Prosecutor v Department of Corrections*, 451 Mich 569, 576 (1996). Amendments by implication are not favored and will not be indulged in if there is any other reasonable construction and such intent "must very clearly appear, and courts will not hold to a repeal [or an amendment] if they can find reasonable ground to hold the contrary." *Id.*, citing *House Speaker v State Administrative Bd*, 441 Mich 547, 562 (1993); *Owen v Joyce*, 233 Mich 619, 621 (1926).

While the Court of Appeals correctly noted that the doctrine of *in pari materia* may be used when addressing whether a subsequent statute that relates to the same subject matter has amended a similarly situated but previously enacted statute, the Court of Appeals application of the doctrine took certain liberties that are not in keeping with its underlying principles. Under

the doctrine, statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *People v Stephan*, 241 Mich App 482, 497 (2000), citing *People v Webb*, 458 Mich 265, 274 (1998). However, the object of the rule is to "further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purposes. *Id*. at 498 ("[t]wo statutes that form a part of one regulatory scheme" should be read in *pari materia*"). Importantly, if the two provisions "lend themselves to a construction that avoids conflict, that construction should control." *Id*.

While the No-Fault Act and the MCSA do share the common, but general, subject matter of motor vehicles, the former is a broad and comprehensive part of tort liability and insurance reform that deals fundamentally with the economic fabric of claims and liability for damages and injury arising out the use, operation or maintenance of motor vehicles, while the latter is a comprehensive regulatory scheme that has, as its fundamental purpose, to insure the safety of motor vehicles, more particularly "motor carriers". The MCSA applies standards and technical rules to motor vehicles prior to their use, operation or maintenance. The No-Fault Act provides for the aftermath of accidents and injuries occurring due to the use of motor vehicles. The MCSA prospectively attempts to prevent such accidents from happening in the first place. Consequently, the No-Fault Act provides for the payment of damages arising out of accidents that have already occurred, and the MCSA attempts to impose safety measures upon owners and operators of motor vehicles so that accidents do not happen. Thus, while a common denominator of both statutes is motor vehicles, a divergent theme becomes apparent when one statute addresses in retrospect, what the other attempts to avoid in the first place. The MCSA seeks to

"forestall" accidents, not to "provide or compensate" after an accident has occurred. *Touche*, *supra* at 571, citing *Cort v Ash*, *supra* at 79.

Assuming, arguendo, that the two provisions do share a "common purpose" for purposes of applying the doctrine of *in pari materia*, the very differences explained in the aforementioned paragraphs demonstrate, unequivocally, that there can be no conflict between the two relevant provisions, and thus, no reason to infer that the MCSA implicitly amended, in any regard, the No-Fault Act. The plain language of both provisions does not conflict and is not ambiguous. *Stephan*, *supra* at 497. The No-Fault Act provides an exclusive and comprehensive statutory remedy for property damages caused by the operation, use, or maintenance of a motor vehicle in the state of Michigan. The MCSA, according to the pertinent provisions at issue here, provides for a federally mandated certification that a motor carrier transporting certain substances maintains a minimum level of financial responsibility depending upon the substance. As demonstrated in our analysis of the plain language of these provisions in the first section, reference to a minimum level of financial, "responsibility" does not equate with the No-Fault Act's provision for damages. The No-Fault Act unambiguously abolishes tort liability and imposes a maximum amount for property damages caused by the operation, use or maintenance of a motor vehicle. The MCSA unambiguously requires a motor carrier to maintain, and present upon request, certification demonstrating that he or she possesses security for the minimum amount of financial responsibility.

The Court of Appeals also concluded that the MCSA was more specific than the No-Fault Act and should therefore be considered as having implicitly amended it. As the argument goes, the No-Fault Act contains the "general" provision (liability is capped at $1 million) and the MCSA contains the "specific" provision (providing for minimum levels of responsibility for

motor carriers above and beyond the general cap on damages in the No-Fault Act). However, assuming that the MCSA is "more specific" than the No-Fault Act, as demonstrated that specificity relates to and follows the divergent path behind the theme and purpose of the MCSA (technical interstate motor carrier safety standards), and does not in any way relate to the maximum amounts available for property damages due to the operation, use or maintenance of a motor vehicle. Nowhere in the MCSA or the federally adopted regulations are provisions addressing noneconomic injury or damages.

Further, under the no fault act, the no fault insured who causes damages is not personally liable to the injured party; rather, the appropriate remedy for such damages, including property damages is a direct action against the tortfeasor's insurer. *Travelers Ins Co v U-Haul of Michigan Inc*, 235 Mich App 273, 282 (1999). On the other hand, any "remedy" occasioned by a violation of the rule requiring the certification (the MCS-90 endorsement) is a citation against the offending owner or operator of the motor carrier. "[T]he only 'liability' that may be imposed under the MCSA is a fine or a penalty for failing to comply with the federal regulations adopted in the MCSA." Thus, "the Legislature has exclusively reserved to the No-Fault Act the rights of third parties to recover for damage to tangible property." COA Slip Op. at 3 (Whitbeck, J. dissenting in part).

Further, the No-Fault Act explicitly contains the phrase "[n]otwithstanding any other provision of law". MCL 500.3135(3). This Court has held that this language indicated the Legislature's determination that restrictions set forth in the No-Fault Act control *liability* provisions in other statutes affecting the operation or use of a motor vehicle in the state of Michigan. See *Hardy v Oakland County*, 461 Mich 561, 565 (2000). In that case, this Court held that, with respect to the "threshold injury" requirement of the No-Fault Act, MCL

500.3135(1), the introductory phrase in MCL 500.3135(2), now MCL 500.3135(3), "notwithstanding any other provision of law . . . ." meant that, regardless of the apparently broad liability imposed by the motor vehicle exception to governmental immunity, MCL 691.1405, which allows suits against governmental agencies for damages (property or personal injury) resulting from an employee's negligent operation of a motor vehicle, the damages that could be recovered from the governmental agency were limited by the "threshold injury" requirement in MCL 500.3135(1). The Court stated that "this measure reflects the Legislature's determination that the restrictions set forth in the No-Fault Act control the broad statement of liability found in the immunity statute." *Id*. Thus, the No-Fault Act's abrogation of negligent property damage claims arising from motor vehicle incidents or accidents abrogated actions for property damage under the owner's liability statute. *U-Haul*, *supra* at 282-83 (holding that the exclusive remedy for such claims was in accordance with the provisions of the No-Fault Act).

Thus, assuming *arguendo* that the MCSA creates a private cause of action or a remedy, and therefore imposes *liability*, it is nonetheless limited by this restrictive and limiting language in the No-Fault Act. The apparently broad or additional requirement that the owner of a vehicle engaged in the transportation of hazardous substances maintain certain limits of insurance is limited or restricted by the introductory language in the No-Fault Act "[n]otwithstanding any other provision of law . . . ." The MCSA is another "provision of law". Notwithstanding what it may be deemed to allow or require, and what liability it may be held to impose, its application is necessarily limited by the Legislature's intent to create a comprehensive and all inclusive framework for the payment of claims arising out of motor vehicle accidents *"in this state"*. See *Hardy*, *supra*; *U-Haul*, *supra*; MCL 500.3135(3).

MDOT cites *Hardy*, *supra*, and argues that because the GTLA existed prior to the No-Fault Act, and therefore, prior to the introductory language in MCL 500.3135 "[n]otwithstanding any other provision of law . . . ." that this phrase is limited only to legislation that existed on or before the passage of the No-Fault Act in 1973. MDOT Reply Brief, pp. 16-17. To shore up its argument, MDOT cites *Ballard v Ypsilanti Twp*, 457 Mich 564, 568-69 (1998), a decision by this Court in which it was stated, as a general proposition, that "the Legislature, in enacting a law, cannot bind future Legislatures." *Ballard*, *supra* at 569, citing *Malcolm v East Detroit*, 437 Mich 132, 139 (1991); *Harsha v Detroit*, 261 Mich 586 (1933).

Nothing in *Hardy* or *Ballard* can be said to constitute a holding by this Court that the plain language of MCL 500.5135(3) that "[n]otwithstanding any other provision of law . . . ." applies only to the law in existence at the time or before the statute was promulgated or amended. To read this language in this manner would remove the statute from the present day and allow it to apply only to the law in existence at the time it was enacted.

Moreover, Article 3, § 7 of the Michigan Constitution provides:

> The common law and *the statute laws now in force*, not repugnant to this constitution, *shall remain in force* until they expire by their own limitations, or are changed, amended or repealed.

[Mich Const, art 3, § 7 (emphasis added).]

Given this clear constitutional directive, the argument that the phrase "[n]otwithstanding any other provision of law" somehow applies only to statutes that were in force or effect at the time that this provision entered the statutory annals of Michigan legislation is suspect at best.

In fact, the plain and unequivocal phrase "notwithstanding any other provision of law", while, of course limited in a sense to applying only to existing and subsequent laws that *do not* expressly amend it or expressly state that it is in fact an exception to this statement, *Ballard*,

supra, *Malcolm*, *supra*, *Harsha*, *supra*, is quite broad in its application. Moreover, given the Michigan Constitution's clear pronouncement that "statute laws now in force . . . shall remain in force until they . . . are changed, amended or repealed" the broad language: "notwithstanding *any other provision of law*" would clearly apply, i.e., remain in force as against subsequent laws that do not expressly change, amend or repeal its active terminology. Thus, this "frozen in time" argument made by MDOT does not hold sway.

Even assuming that the phrase "notwithstanding any other provision of law . . . ." in MCL 500.3135(3) can be read in the No-Fault Act to apply only to then existing laws, a proposition arguably forwarded by this Court in its decision in *Ballard*, the plain language of MCL 480.11a nowhere explicitly states that it is enacting an exception to the maximum limits of liability established by the comprehensive and all-inclusive No-Fault Act. While *Ballard* may stand for the general proposition that one legislature may not bind future legislatures, this does not mean that a subsequent legislature's pronouncements that are equivocal, at best, in addressing a prior statute, or, as in this case, utterly silent on the subject of amendment, can be seen as in any way violating this general restriction.

Further, MCL 500.3135(3) provides that liability arising only from the use "*within this state* of a motor vehicle . . . [is] abolished." Where the owner or operator of a vehicle uses that vehicle "in this state", the only requirement is that he or she be in compliance with the provisions of the No-Fault Act. No word, phrase or term in a statute is to be read out of the provision or ignored. *Mayor of Lansing*, *supra*. When the Legislature qualified the abolishment of tort liability for use of a motor vehicle it carefully noted that such abolishment applied only *in this state*. Thus, regardless of additional or parallel requirements that may be created by the federal regulatory scheme encompassed by the MCSA, the fact is that the all encompassing scheme

governing liability and insurance requirements that is the No-Fault Act defines the universe of requirements applicable to owners of motor vehicles that operate such motor vehicles "in this state."[5]

Finally, as the No-Fault Act explicitly abolishes *liability* by legislative mandate, allowing for the creation or post-no-fault act re-creation of "liability" would undermine the comprehensive and all-inclusive scheme established by the Michigan Legislature regarding the operation and use of motor vehicles in this state. The Legislature's subsequent adoption of a federal law, incorporating it into the statutory framework of the MCSA, cannot be deemed to be an inroad to the abolishment of tort liability that is the No-Fault Act, especially where, as here, the Legislature did not explicitly create an exception.

Indeed, certain *ambiguities* in legislation require the insight and wisdom of judicial interpretation. However, the Legislature's failure to address a particular subject in passing a statute that appears, by that failure, to either conflict with or accord with a previous statute should not be deemed to be such an ambiguity, much less an affirmative statement on the part of the Legislature one way or the other. The majority in the Court of Appeals go one step beyond the rule that where ambiguity exists, it is appropriate to engage in judicial interpretation, one method of which being analyzing the Legislature's intent, and creates a rule of statutory interpretation that is dangerously akin to discerning legislative meaning by a reading of what the Legislature meant by what it did not say. This "tea leaf" approach to statutory interpretation obviously cannot be allowed to be applied in this case, nor in any other case where, the

[5] In fact, the reference in the federal regulations to "minimum … financial *responsibility*" is consistent with the concept of *liability*. The No-Fault Act abolished *liability*, i.e., responsibility, hence the term "*no-fault*." Without regard to fault, a person is required to pay up to $1 million in damages for property damage caused by the operation, use or maintenance of a motor vehicle. Regardless of the amount of "responsibility" a person is required to maintain proof of, that "responsibility" is circumscribed by the available damages under Michigan's No-Fault Act.

Legislature having failed to take account of a previously enacted provision, says nothing whatsoever of the matter.

Discerning legislative intent by what the Legislature did not say is far more dangerous a proposition than even doing so with respect to what the Legislature did say. Generally, established rules of law are not abandoned by mere implication. *People v Stoeckl*, 347 Mich 1, 16 (1956). And "it is a perilous exercise to attempt to discern legislative intent from the Legislature's silence . . . ." *People v Hawkins*, 468 Mich 488, 509, n 20 (2003) (internal citations omitted). This Court has admonished lower courts to focus on "the words actually contained in the statute, *as opposed to what is not, but possibly could have been, written into the statute.*" *Wessels v Garden Way Inc*, 263 Mich App 642, 650-51 (2004) (emphasis added), citing *Neal v Wilkes*, 470 Mich 661, 665 (2004). Indeed, "sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not its silence." *Donajkowski v Alpena Power Co*, 460 Mich 243, 261 (1999) (emphasis in original).

"[T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives." *Rowland*, *supra* at 214, n 10, citing *Plessy v Ferguson*, 163 US 537, 558 (1896). Courts may not "rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature." *Mayor of Lansing*, *supra* at 161. In short, a Court has no authority to add words or conditions to a statute. *Rowland*, *supra*.

Imagine the opportunity for judicial mischief that would be occasioned by such a rule of statutory construction. Silence by the Legislature to address every possible conflict or alleged conflict, as is the case here, would be deemed to be an open invitation to an activist panel to utilize every instance of legislative silence as an opportunity to infuse its own policy choices on

the matter. That is exactly what we have in this instance. Deeming, as the majority panel did in this case, that the transportation of hazardous substances should be additionally regulated, see Slip Op. at 5-6, the Legislature's failure to explicitly state that the MCSA was subject to the provisions, and especially the limitations, in the No-Fault Act, was an RSVP to the panel to declare that the silence inevitably was a statement by the Legislature allowing such an exception to be created. A judicial panel bent on imposing its own view of policy can certainly impose that view by interpreting a statute in a manner that presents this policy by reference to the Legislature's utter silence on the subject. Indeed, a court can say that a statute says whatever the court wants to say about a matter upon which the statute is silent.

In the least, where the Legislature *intends to create an exception* to a previous statutory provision or legislative act, it would seem that the first question to ask is whether there is an express pronouncement of this in the putative amendatory provision. *Ballard*, *supra* at 574 (stating that the question of whether there is an express statutory enactment subjecting the state to liability could be answered by referring to the language of the statute itself and holding that the Recreational Use Act did not create an exception to governmental immunity) (Taylor, J. concurring only in the holding and joined by Weaver, Brickley, JJ.). In *Ballard*, the Court noted that a statute could be amended only by express statutory enactment or "by necessary inference." However, such an inference could only be drawn when the two statutory provisions conflict, apply to the same subject matter, and are irreconcilable when put into effect. *Ballard*, *supra* at 576.

In the MCSA, there is no expression on the subject of *liability* for damages arising out of the use, operation or maintenance of a motor vehicle in the Legislature's in rote adoption of federal regulations. Indefinite congressional expressions cannot negate plain statutory language

and cannot work a repeal or amendment by implication. "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v Mancari*, 417 US 535, 550 (1974); see also *TVA v Hill*, 437 US 153, 189-90 (1978); *United States v Greathouse*, 166 US 601, 605 (1897).

Moreover, there is nothing in the legislative history to infer anything whatsoever about whether the statutory cap on property damages expressly provided for by the No-Fault Act was implicitly being amended or repealed by the incorporation of these federal regulations into an act that deals primarily with motor vehicle safety and technical standards. The term "amendment" implies such addition to or change within the lines of the original instrument as will affect an improvement, or better carry out the purpose for which it was framed. *Kelly v Laing*, 259 Mich 212, 217 (1932), citing 25 R.C.L. 904; *People v Stiner*, 248 Mich 272 (1929).

The federal motor carrier safety regulations adopted by Michigan in MCL 480.11a merely contain measures to insure the safety of truck drivers [and trucks in general] and where the language from the federal provisions does not address or speak to a specific legal concept in Michigan law, it is not to be determinative of the legal issue at hand. *Amerisure, supra* at *3 (holding that the terms "on duty" in the adopted federal regulations did not define or relate to the phrase "arising out of an in the course of employment" for purposes of interpreting the latter phrase in an insurance contract consistent with Michigan law).

III. EVEN THOUGH THE FINANCIAL MINIMUM REQUIRED BY THE MCSA IS THE SAME AS THE LIMITS OF THE UNDERLYING POLICY, MDOT IS SEEKING TO IMPOSE OTHERWISE ABROGATED TORT LIABILITY TO RECOVER ADDITIONAL AMOUNTS FROM EMC AND INITIAL

In this case, the MCS-90 endorsement is required for Initial, as an interstate motor carrier transporting gasoline, to demonstrate only that they carried $1 million as a minimum amount of

financial responsibility.[6] This means that under no circumstances could MDOT recover more than $1 million under the Michigan no fault policy to which the endorsement was attached. The MCS-90 has been universally construed to require only payment of amounts not covered by the primary policy up to the limits of the primary policy.[7] The maximum amount payable according to EMC's commercial auto policy was $1 million. This satisfied the minimum amount of financial responsibility required under the federal regulations for carriers of gasoline, which Initial was in this case.

To accept the Court of Appeals decision in this case, and thereby deem that the MCSA silently creates a private right of action and that such right of action through implicit amendment of the statutory cap on damages in the No-Fault Act can provide for damages in excess of that cap, places MDOT in the untenable position of being able to pursue all causes of action against EMC and Initial that were previously unavailable as a result of the No-Fault Act. Unless Michigan insurance and tort law are to be eviscerated by application of the MCSA, which creates no private right of action and which has not, by in rote adoption, implicitly amended Michigan's No-Fault Act, then the statutory cap on damages in the No-Fault Act controls.

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[6] The Endorsement for Motor Carrier Policies of Insurance for Public Liability (Form MCS-90/90B) and the Motor Carrier Public Liability Surety Bond (Form MCS-82/82B) contain the minimum amount of information necessary to document that these levels have been obtained and are in effect. The information within these documents is used by the federal MCSA and the public to verify that a motor carrier of property or passengers has obtained and has in effect the required minimum levels of financial responsibility. 65 Fed. Reg. 25020-02 (April 28, 2000).

[7] While there is conflicting case law among the federal circuits as to the effect that the MCS-90 endorsement has when different insurance companies "clamor for coverage", all courts have consistently read the plain language of the endorsement, regardless of the amount insured by the endorsement, *only* to provide "replacement coverage" where the primary policy excludes coverage or is insufficient in its own limits to satisfy the $1 million minimum. So, in a case such as this, where there is no dispute between multiple insurers for priority of coverage or indemnification, no court disputes that the plain language of the endorsement provides replacement coverage only up to the limits of the underlying primary policy to which it is attached. Indeed, "a majority of jurisdictions . . . have refused to view the requirement that the motor carrier procure insurance as determinative of *its ultimate liability*" and "the question of allocating coverage is left to the contractual agreements of the parties and *any applicable state laws*." *US Fire Ins Co v Fireman's Fund Ins Co*, 461 N W 2d 230, 232 (1990) (emphasis added) (internal citations omitted). EMC and Initial contend here that Michigan's No-Fault Act is precisely the "applicable state law" that otherwise determines liability and otherwise allocates financial responsibility according to state law and the policies behind that law.

MDOT, through its allegations in the underlying complaint and by virtue of its appeal of the trial court's decision, asserts that it has a right to more than the amount of the $1 million limit of the underlying Michigan No-Fault Policy. MDOT did not argue that the MCS-90 provided additional insurance in the trial court and only raised this argument for the first time on appeal. Thus, any argument concerning the applicability of the MCS-90 has not been preserved for appellate review. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421 (1996) (where a party raises an issue for the first time on appeal the issue is not preserved for appellate review).

In any event, MDOT now asserts either that the MCS-90 endorsement allows for the recovery of more than the No-Fault Act's statutory cap of $1 million, or alternatively, that it can recover additional amounts from EMC and Initial under the various theories of liability that it forwarded in the trial court, and which, but for the No-Fault Act, would otherwise exist.[8] MDOT's assertion is that the MCSA and corresponding federal law requires interstate motor carriers that transport hazardous substances to carry insurance above and beyond that required of all other owners of motor vehicles. (MDOT Reply Brief, p. 1, ¶ 3). The reason for this, MDOT argues, is because transporters of hazardous substances create extraordinary risks of damage in the event of an accident. (*Id*., ¶ 1). Thus, according to MDOT, for "ordinary" vehicles, tort liability is abolished under the No-Fault Act if $1 million in property damage insurance is maintained, but not for interstate motor carriers transporting hazardous substances.

[8] MDOT asserted causes of action against both EMC and Initial in negligence and strict liability. Contrary to appellants' assertions, if MDOT's theory of the case is accepted and the in rote adoption of the federal regulations into the MCSA has abrogated No-Fault Act's abolishment of tort law, then MDOT apparently may seek additional damages from Initial, and perhaps its insurer, on these theories. Having freed itself from the restraints of the No-Fault Act, by claiming that the MCSA silently creates a private right of action on their behalf and that by implicit amendment it has revived or recreated the existence of all theories of tort law for accidents arising out of the use, operation or maintenance of a motor vehicle carrying hazardous substances in the state of Michigan, MDOT is at liberty to claim and recover on all of the available theories that it may have against whatever party may be seen to have any indicia of responsibility. This further upsets the liability scheme created by the No-Fault Act; the insurer, not the insured is responsible to pay the claim.

However, this is not what the Court of Appeals has done in attempting to create a judicial exception to the No-Fault Act's maximum level of responsibility for property damage. Without any direct or express statutory reference, without any direct amendment of the No-Fault Act, and without any express statement that the tort liability that was abolished by the No-Fault Act is or was being excepted, the Court of Appeals has held that the adoption by the Michigan Legislature in the MCSA of federal regulations establishing a certification requirement for the minimum levels of financial responsibility, MCL 480.11a, created an exception to the property damages limitation of $1 million in the No-Fault Act. Without any legislative authority and in the face of the strong public policy that drove the Legislature to abolish tort liability and create only limited exceptions to that liability in the No-Fault Act, the Court of Appeals in this case, out of whole cloth, judicially creates an exception.

If the Legislature wants to require motor carriers of hazardous substances to incur additional liability through property damage claims sounding in tort, which liability is greater than that imposed upon every other motor carrier in the state of Michigan, then it must do so by direct and express legislative amendment of the No-Fault Act; this cannot be accomplished by judicial fiat.

IV. MDOT IS NOT ENTITLED TO PENALTY INTEREST UNDER MCL 500.2006

The Court of Appeals concluded that EMC and Initial were liable for penalty interest under MCL 500.2006. Slip Op. at 8. There is no dispute that EMC tendered the remaining amounts, up to $1 million, of its policy limits consistent with its policy, which included the Michigan Property Protection Insurance Coverage endorsement. See footnote 1, *supra*. MDOT contends that EMC should have paid its tendered policy limits without a release, even though

MDOT challenged the basis of the payments under that policy and under Michigan's No-Fault Act.

MDOT's claim against EMC and Initial, containing allegations and causes of action that are otherwise abolished under the No-Fault Act, was reasonably in dispute by virtue of the fact that no prior case has held that the statutory cap on property damages is superseded by the MCSA. Additionally, EMC made timely payment of the balance of its policy limits on August 9, 2006, precisely in compliance with the Trial Court's Order. Since EMC simultaneously paid its remaining policy limits upon receipt of the signed release, in accordance with this order, its payment was timely and not subject to the imposition of penalty interest.

Finally, the plain language of the penalty interest provision demonstrates that EMC was in compliance with the applicable requirement to pay only that insurance coverage available at the time of the dispute, to wit, the statutorily fixed maximum of $1 million. The plain language of MCL 500.2006 provides for interest based only upon "the limits of insurance coverage *available* . . . rather than the amount of the loss." MCL 500.2006(4) (emphasis added). Further, that subsection provides that "[i]f payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, *interest is not due*." (emphasis added). This provision clearly precludes interest where a claimant rejects the amount then due under the existing "limits of insurance coverage" then "available". As demonstrated, the amount then due to MDOT was only the amount of coverage available under existing law, the $1 million maximum provided for by the No-Fault Act. EMC tendered this amount and the fact that a subsequent court decision has called into question the limits of available coverage, a

determination which is as of yet unresolved, would not entitle MDOT to recover any interest, as provided by the plain language: the interest award is only based upon the applicable limits of insurance coverage available. MCL 500.2006(4). At the time EMC tendered the remaining amount of the statutory maximum, the only amount from insurance coverage then available was that provided for by Michigan's No-Fault Act. MCL 500.3121(5).

Additionally, the plain language of MCL 500.2006(1) requires interest where failure to pay on a claim is not reasonably in dispute, and then, only when such payment is not timely. Although "timeliness" is not defined by the statute, MCL 500.2006(4) provides that "[i]f benefits are not paid on a timely basis, the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss . . . ." The trial court ordered EMC to tender the applicable amount under the then existing available coverage upon MDOT's execution of a release. Within a reasonable time (before 60 days), EMC furnished payment when MDOT furnished a release. The trial court's order further explicitly provided that no interest would be awarded. The Court of Appeals acknowledged that as of the date of the trial court's order, June 21, 2006, MDOT's no-fault claim ceased being reasonably in dispute, although MDOT's other claims remained reasonably in dispute. Slip Op. at 8.

According to the statute, failure to pay a claim entitles the claimant to interest only if the claim is not reasonably in dispute. MCL 500.2006(1). The Court of Appeals acknowledged that MDOT's No-Fault Act claim ceased being reasonably in dispute only after the June 21, 2006 trial court order which required EMC to pay the remainder of its then existing obligation under Michigan's No-Fault Act. EMC tendered payment within 60 days of that date. MCL 500.2006(4). Further, interest is only available on an amount up to the available coverage limits. At the time of this dispute and after it was resolved by the trial

court's June 21, 2006 order, only the $1 million dollar statutory maximum was available, making EMC's primary coverage of that amount the only coverage available. MCL 500.2006(4). At this time, MDOT's remaining claims, to wit, that there is a private cause of action in tort against EMC and/or Initial as a result of MCSA's implicit amendment of Michigan's No-Fault Act, which explicitly abolished MDOT's alleged claims, are based on legal theories that have yet to be affirmed by this Court. Under the plain language of the statute and the facts as presented in this supplemental brief and in EMC's and Initial's application for leave to appeal, the Court of Appeals erred in awarding interest to MDOT.

CONCLUSION

As demonstrated in this supplemental brief, the issue of whether or not the MCSA creates a private right of action hinges upon whether or not the MCSA implicitly amended the No-Fault Act. For the reasons stated herein, EMC and Initial are of the position that this Court should peremptorily reverse the Court of Appeals decision and hold that the MCSA does not create a private right of action and has not implicitly amended the No-Fault Act to provide for causes of action that have been abolished and remedies that have been limited thereby for more than 34 years. In the alternative, EMC and Initial urges, as it did in its original application for leave to appeal, that the issues presented in this case warrant this Court's full attention.

Respectfully submitted,

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