STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Sawyer, P.J., Saad and Meter, JJ.

HAROLD HUNTER JR.,
Plaintiff-Appellant,

-v- Docket No 147335

DAVID SISCO and
AUTO CLUB INSURANCE ASSOCIATION,
Defendants,
and

CITY OF FLINT,
Defendant-Appellee.
_____/

APPELLANT'S

~~MOTION FOR LEAVE TO FILE~~ SUPPLEMENTAL BRIEF

(in response to brief of MDOT in companion appeal, Docket No 146763)

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TABLE OF CONTENTS

Table of Contents	p. i
Index of Authorities	p. ii
Supplemental Argument (in response to that of MDOT)	p. 1
Relief Requested	p. 5
Signature of Counsel	p. 5
Proof of Service	p. 5

INDEX OF AUTHORITIES

Cases

Atherton v Village of Bancroft, 114 Mich 241; 72 NW 208 (1897) pp. 1, 5

Beath v Rapid R Co, 119 Mich 512; 78 NW 537 (1899) pp. 1, 3, 5

In re Brock, 442 Mich 101; 499 NW2d 752 (1993) p. 4

Daley v LaCroix, 384 Mich 4; 179 NW2d 390 (1970) pp. 1, 3, 5

Ferguson v Muskegon County, 181 Mich 335; 148 NW 212 (1914) pp. 2, 3, 5

Geveke v Railway Co, 57 Mich 596; 24 NW 675 (1885) pp. 4, 5

Gilson v City of Cadillac, 134 Mich 189; 95 NW 1084 (1903) pp. 1, 5

Greenawalt v Nyhuis, 335 Mich 76; 55 NW2d 736 (1952) pp. 1, 3, 5

Myers v Genesee Co Auditor, 375 Mich 1; 133 NW2d 190 (1965) p. 4

Nation v W D E Electric Co, 454 Mich 489; 563 NW2d 233 (1997) p. 4

Power v Harlow, 57 Mich 116; 23 NW 606 (1885) pp. 4, 5

Racho v City of Detroit, 90 Mich 92; 51 NW 360 (1892) pp. 2, 3, 4

Roberts v City of Detroit, 102 Mich 64; 60 NW 450 (1894) pp. 1, 4

Sherwood v Chicago & W M.Ry Co, 82 Mich 374; 46 NW 773 (1890) pp. 1, 3, 4, 5

Thompson v W Bay City, 137 Mich 94; 100 NW 280 (1904) pp. 2, 3, 4

Wesche v Mecosta Co Rd Comm'n, 480 Mich 75; 746 NW2d 847 (2008) p. 4

Sherbutte v City of Marine City, 374 Mich 48; 130 NW2d 920 (1964) p. 4

Williams v City of Detroit, 364 Mich 231; 111 NW2d 1 (1961) p. 4

Wardlow v City of Detroit, 364 Mich 291; 111 NW2d 44 (1961) p. 4

Wold Architects & Engineers v Strat, 474 Mich 223; 713 NW2d 750 (2006) p. 4

Statutes

MCL 8.3a	p. 1
MCL 691.1405	pp. 2, 3
1879 PA 244, §1	p. 2
1885 PA 214, §1	p. 2
1887 PA 264, §1	p. 2
1909 PA 283, §1	p. 2
How St §§8313, 8314	p. 4

SUPPLEMENTAL ARGUMENT (in response to that of MDOT)

Pursuant to its order of March 21, 2014 granting leave in *Hunter*, Docket No 147335, the Court directed the clerk "to schedule the oral argument in this case for the same future session of this Court when it will hear oral argument in *Hannay v Dep't of Transportation* (Docket No 146763)." Given this link, the attorneys for MDOT surely reviewed the closely related issues—and merits briefs—filed in *Hunter*, and could not then have failed to see that counsel for Mr. Hunter devoted a significant section of his merits brief, pp. 24-44 (filed May 2, 2014), to *exactly* the subject that dominated oral argument, *viz.*, whether the statutory phrase "liable for bodily injury" was, by long legislative usage and consistent interpretation by this Court, a term that had come to acquire "a peculiar and appropriate meaning in the law" and which therefore, by legislative mandate, <u>must</u> be "understood according to such peculiar and appropriate meaning". MCL 8.3a.

Undersigned counsel's *Hunter* merits brief, pp. 24-44 detailed the history by which "liable for bodily injury" has come to encompass *all* liability—whether for mental injury, emotional distress, humiliation, embarrassment, loss of enjoyment of life, and other types of damages flowing from an underlying physical or corporeal injury. Cited therein (and for the most part quoted at length) were *Sherwood v Chicago & W M Ry Co*, 82 Mich 374, 383-384; 46 NW 773 (1890), *Roberts v City of Detroit*, 102 Mich 64, 67; 60 NW 450 (1894), *Atherton v Village of Bancroft*, 114 Mich 241, 247-248; 72 NW 208 (1897), *Beath v Rapid R Co*, 119 Mich 512, 517-518; 78 NW 537 (1899), *Gilson v City of Cadillac*, 134 Mich 189, 192; 95 NW 1084 (1903), *Greenawalt v Nyhuis*, 335 Mich 76, 87; 55 NW2d 736 (1952), and *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970).

Moreover, the September 27, 2013 order granting leaving in *Hannay* itself also made the

legal effect of the statutory term "bodily injury" in MCL 691.1405 the central focus of the subsequent briefing. Yet MDOT's attorneys proffered their supplemental brief by asserting that they were entirely unaware that "liable for bodily injury" might be terminology which has "acquired a peculiar and appropriate meaning in the law" which must be "understood according to such peculiar and appropriate meaning". Indeed, they seem to avow that they were unaware that MCL 8.3a might apply, or even exists (they still do not cite it).

MDOT seeks to distinguish *Roberts, supra*—along with *Racho v City of Detroit*, 90 Mich 92, 97; 51 NW 360 (1892); *Thompson v W Bay City*, 137 Mich 94, 95; 100 NW 280 (1904) and *Ferguson v Muskegon County*, 181 Mich 335; 148 NW 212 (1914) [cases not previously referenced by anyone]—ostensibly on grounds all turned on the language of statutes using supposedly different phrasing than MCL 691.1405. Attached to MDOT's supplemental brief are copies of those various enactments—1879 PA 244, §1; 1885 PA 214, §1; 1887 PA 264, §1; and 1909 PA 283, §1. Each of these statutes uses a similar phraseological formulation; 1879 PA 244, §1 is typical, and apparently served as the archetype for the others:

> *The People of the State of Michigan enact*, That any person or persons sustaining **bodily injury** upon any of the public highways or streets in this state, by reason of neglect to keep such public highways or streets, and all bridges, crosswalks, and culverts on the same in good repair, and in a condition reasonably safe and fit for travel, by the township, village, city or corporation shall be **liable** to, and shall pay to the person or persons so injured or disabled, just damages, to be recovered in an action of trespass on the case, before any court of competent jurisdiction.

MDOT argues that the use of the words "just damages" renders the four cases (*Roberts, Racho, Thompson* and *Ferguson*) distinguishable, as such terminology nowhere appears in MCL 691.1405 to define the scope of damages.

At the outset, MDOT fails to appreciate fully the logical consequence of its own [mis]analysis. If omission of the words "just damages" from MCL 691.1405, as compared to

predecessor statutes, were significant, then the 1964 Legislature, which first adopted the Governmental Tort Liability Act (including MCL 691.1405), and the 1970 Legislature, which re-enacted the measure in valid (constitutional) form, intended, in mandating liability for defective highways, to allow only *unjust* damages (albeit without saying anything of the kind). Were there a scintilla of validity to MDOT's theory, it would necessarily lead to the conclusion that the 1964 and 1970 legislatures meant to continue liability for defective highways (following abolition of common law governmental immunity), but then simultaneously to take it away by not providing for "damages". Ascribing to two different legislatures such an exercise in utter futility exceeds all bounds of credulity.

The correct understanding is that MCL 691.1405 declares government authorities "liable" for "bodily injury", <u>it being understood the "liable" means "for damages"</u>. After all, no one would understand MCL 691.1405 to mean that government is "liable" for "making apologies" for "bodily injury", or "doing penance". "Liable" means for monetary damages (for "bodily injury")—even MDOT concedes as much (as does the City of Flint). The dispute concerns the extent of such damages liability, and the answer to that was settled in *Sherwood, Roberts, Atherton, Beath, Gilson, Greenawalt* and *Daley*—such liability embraces within its ambit all damages, including but not limited to pain and suffering, mental or emotional distress, loss of enjoyment of life, humiliation, embarrassment, and other similar recognized items of damage. *Racho, Thompson* and *Ferguson* say <u>nothing whatever</u> on the subject [FN2].

Most crucially, in *Sherwood, Beath, Greenawalt* and *Daley*, the defendants were not governments of any kind; two were private individuals and two were railroads. In all four cases, this Court held "liability for bodily injury" encompasses mental distress damages and all other recognized types of damage arising from physical or corporeal injury—and *Sherwood* in turn

relied on *Geveke v Railway Co*, 57 Mich 596; 24 NW 675 (1885) and *Power v Harlow*, 57 Mich 116; 23 NW 606 (1885), two more non-government cases. Meanwhile. none of MDOT's four cases even mentions, still less depends upon, the words "just damages" in any one of the early governmental liability acts[1], making MDOT's supplemental brief a long walk off a short pier.

Indeed, only in *Roberts* did the decision turn on the interplay between the statutory words "liable" and "bodily injury". There, presaging *Wesche*, the injury was to the wife, and plaintiff husband was held to have no right of recovery "(1) because he has no right to recover for the bodily injury—*i.e.* pain and suffering, etc.—of another; (2) because the statute in terms limits the recovery to the person so injured or disabled." 102 Mich at 67. In MDOT's remaining three cases, there is no discussion whatsoever of the scope or types of recoverable damages[2].

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[1] Those statutes were enacted when the common law made government immune, so, to the extent liability was created contrary to common law, the 1879-1907 statutes were subject to narrow construction *against* liability, whereas the current GTLA, to the extent restricting governmental tort liability, is subject to narrow construction as being in derogation common law *non-immunity*—*Myers v Genesee Co Auditor*, 375 Mich 1, 6-9; 133 NW2d 190 (1965); *Sherbutte v City of Marine City*, 374 Mich 48, 52-54; 130 NW2d 920 (1964); *Williams v City of Detroit*, 364 Mich 231; 111 NW2d 1 (1961); *Wardlow v City of Detroit*, 364 Mich 291; 111 NW2d 44 (1961), as detailed in Mr. Hunter's brief on leave granted, pp. 22-23. *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997); *Wold Architects & Engineers v Strat*, 474 Mich 223, 233–234; 713 NW2d 750 (2006); *In re Brock*, 442 Mich 101, 119-120; 499 NW2d 752 (1993).

[2] In *Racho*, decedent's administratrix was held entitled to recover for wrongful death due to defective highway maintenance because the 1848 wrongful death act, as amended in 1873 (How St §§8313, 8314), applied with equal force to governmental tort liabilities. 90 Mich at 96.

Thompson similarly has nothing to do with either *Hannay* or *Hunter*—the issue there was municipal liability for the negligence of a contractor engaged in installing a sidewalk under contract with the property owner, who had obtain a permit from the City. The City did not control the work and was not responsible for the contractor's negligence. 137 Mich at 96 ff.

Finally, *Ferguson* also has naught to do with the types of damages recoverable for "bodily injury". The issue in that case was whether a county was liable for a pedestrian injury on a sidewalk alongside a county road through an unincorporated village. Sidewalks were simply outside the purview of a county's responsibility; counties could construct only roads, bridges and culverts, but not sidewalks or crosswalks, under the laws then in force. 181 Mich at 338-339.

So, upon critical examination MDOT's supplemental brief focuses on cases having little, and mostly nothing, to do with or to say about "liability" for "bodily injury". But *Sherwood, Atherton, Beath, Gilson, Greenawalt* and *Daley* (as well as *Geveke* and *Power*), wholly ignored by MDOT, do address that central issue (as does *Roberts*, in indirect fashion), and all agree such liability includes all the types of money damages at issue in *Hunter* and *Hannay*.

RELIEF REQUESTED

The circuit court's *Hunter* ruling should be reinstated, and the Court of Appeals reversed.

Respectfully submitted,

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PROOF OF SERVICE

Pursuant to MCR 7.204(G), Allan Falk certifies that on October 30, 2014, he served a copy of Plaintiff-Appellant's Supplemental Brief and Motion for Leave to File Supplemental Brief on opposing counsel by placing same in an envelope addressed to:

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and depositing same with the US Postal Service, first class postage thereon fully prepaid.

Courtesy copies were e-mailed to counsel of record in *Hannay*: mg@granzottolaw.com; lindstroma@michigan.gov; and schneiderm7@michigan.gov;

I declare that the statements above are true to the best of my information, knowledge, and belief.

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