

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WILLIAM R. BACKUS,

Plaintiff-Appellee,

v

AMY BETH FAJNOR-STRONG,

Defendant-Appellee,

and

MELODY ANN KAUFFMAN,

Defendant-Appellant,

and

M & M AUTO SALES, INC., and LANSING  
SCHOOL DISTRICT,

Defendants.

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Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

MacKENZIE, J. (dissenting).

I respectfully dissent. *Haberl v Rose*, 225 Mich App 254; 570 NW2d 664 (1997), upon which the majority relies, is inapplicable to this case because plaintiff's complaint did not premise Kauffman's alleged liability on the owners' liability statute, MCL 257.401(1); MSA 9.2101(1). Instead, plaintiff alleged that Kauffman violated MCL 257.638; MSA 9.2338 (improper passing), MCL 257.705; MSA 9.2405 (inadequate brakes), MCL 257.683; MSA 9.2383 (driving an unsafe vehicle), and the common law duty to use due care. Because plaintiff did not plead a violation of the owners' liability statute, it should not be used to abrogate Kauffman's governmental immunity under MCL 691.1407(2); MSA 3.996(107)(2).

MCL 691.1407(2); MSA 3.996(107)(2) governs individual immunity for lower-level governmental employees, and provides that they are immune from tort liability provided that they are acting within the scope of their authority, the governmental agency employing them is engaged in the exercise of a governmental function, and the employees are not grossly negligent. *Haberl* notwithstanding, in my opinion, this statute is controlling. MCL 691.1407(2); MSA 3.996(107)(2) explicitly provides that governmental employees are immune from liability "[e]xcept as otherwise provided *in this section*." [Emphasis added.] Because the civil liability statute is not part of that section, it must give way to individual immunity. Accordingly, I would hold that the trial court abused its discretion in refusing to allow Kauffman to amend her affirmative defense, since the amendment would not have been futile.

Even if *Haberl* is controlling, in which case this panel would be bound to follow it, I believe *Haberl* was wrongly decided, the dissent of Judge Saad espouses the correct legal result, and is in accord with the intent of the Legislature.

/s/ Barbara B. MacKenzie