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STATE OF MICHIGAN

IN THE SUPREME COURT

NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives for the ESTATE OF JAWAD JUMAA, a/k/a JAWAD JOMAA, Deceased,

Plaintiffs-Appellees,

v

PRIME HEALTHCARE SERVICES-GARDEN CITY, LLC, d/b/a GARDEN CITY HOSPITAL, a foreign limited liability company, KELLY W. WELSH, D.O., and MEGAN SHADY, D.O., Jointly and severally,

Defendants-Appellants.
_____/

MSC No. 165377

COA No. 358209

L.C. Case No. 20-004169-NH
(Wayne Circuit Court)

PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

***** ORAL ARGUMENT REQUESTED *****

CERTIFICATE CONCERNING COMPLIANCE WITH ADM FILE NO. 2019-16

ADDENDUM

APPENDIX OF EXHIBITS

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

FIEGER, FIEGER, KENNEY &
HARRINGTON, P.C.

Robert G. Kamenec (P35283)
Lead Attorney for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555; (248) 233-3560 (f)
(313) 268-9875 (cell)
r.kamenec@fiegerlaw.com

FIEGER, FIEGER, KENNEY &
HARRINGTON, P.C.

Adam G. Winn (P84137)
Attorney for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555; (248) 233-3560 (f)
a.winn@fiegerlaw.com

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COUNTER-JURISDICTIONAL STATEMENT

Plaintiff-Appellee states the Jurisdictional Statement provided by Defendants-Appellants is correct and accurate.

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THE ESTATE OF A CHILD MAY RECOVER DAMAGES FOR THE CHILD'S LOST FUTURE EARNINGS?

The trial court says "yes."

The Court of Appeals says "yes."

Plaintiffs-Appellees say "yes."

Defendants-Appellants say "no."

II.

TO WHAT SPECIFICITY MUST FUTURE EARNINGS NEED BE SHOWN?

The trial court did not address the question.

The Court of Appeals says "with reasonable certainty based on the child's unique and known traits and abilities."

Plaintiffs-Appellees say "with expert testimony based on reliable statistical averages."

Defendants-Appellants say "with evidence that survivors were financially dependent on the child, with evidence of personalized traits, and with deductions for personal consumption and taxes the child would have paid."

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Plaintiffs' Allegations.

This medical malpractice action arises out of the untimely and preventable death of Jawad Jumaa, a 13-year-old boy (**Exhibit 3**, Complaint, ¶14, JA 12). On January 15, 2017, Jawad presented to the emergency department at Defendant Garden City Hospital, where he was treated over a period of four hours. Id. at ¶¶16-17. No inquiry was made as to the extent of his illness. Instead, one of the physicians, Dr. Shady, made a diagnostic impression of "torticollis," noting no concern or suspicion for meningitis at that time. Id. at ¶22. After Jawad's vital signs were taken again, and the nursing staff noted complaints of head and neck pain, Jawad was discharged at 20:15. Id. at ¶¶23-26. At home, his mother gave him Tylenol and Motrin, and a pain relieving patch for his neck, but to no avail. Id. at ¶¶26-27. Jawad's mother discovered him the following morning, not breathing, cold to the touch. Id. at ¶¶28-31. An autopsy revealed the cause of death to be acute purulent meningitis. Id. at ¶16. Plaintiffs' Complaint was filed March 18, 2020.

B. Trial Court Proceedings.

Defendants moved for partial summary disposition of future economic damages (**Exhibit 5**, JA 54-61), first ***arguing*** that a decedent's future lost earning capacity is not recoverable under the Wrongful Death Act, MCL 600.2922 ("WDA") and second, merely ***declaring***, without further explanation, that the lost future earning capacity of a 13-year-

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old who was not working or supporting anyone is "remote, speculative and contingent." Motion, ¶6, JA 55.

In response, Plaintiffs explained that a decedent's lost future earnings are recoverable under the WDA and demonstrated that a 13-year-old's death *necessarily* entails a loss of earning capacity (**Exhibit 6**, JA 63-83). Plaintiffs attached the Affidavit of Nitin Paranjpe, PhD; two charts estimating Jawad's lost earning capacity (one assuming a high school education, another assuming a BA degree), and a third measuring loss of household services (**Exhibit 4**, JA 29-52). Dr. Paranjpe used reliable data from, *inter alia*, the US Census Bureau, the Department of Education, and the Bureau of Labor Statistics.[1] He took into account Jawad's mother's nursing degree and his father's employment as a mechanic. He used a generally-accepted 15% adjustment for fringe benefits together with a 4% wage-growth factor (**Exhibit 4**, Affidavit, ¶¶11-27, JA 32-35). He estimated Jawad's gross lost earning capacity as $11,217,096 with a high school education and $19,073,908 with a bachelor's degree. **Reduced to present value pursuant to MCL 600.6306a(4), these figures amount to $2.997 million and $4.725 million respectively.**

In reply and at oral argument, Defendants failed to respond to Dr. Paranjpe's Affidavit and his various charts (**Exhibit 7**, JA 85-89); (**Exhibit 8**, TR 7/21/2021, pp 4-8, 20, JA 94-98, 100). The trial court denied the motion (**Exhibit 1**, Order).

[1] These materials were not submitted to the trial court but were referenced by Dr. Paranjpe in his unrebutted Affidavit. They are supplied to this Court as exemplars of statistical evidence of lost future earnings data (See **Appellee's Appendix**).

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C. Material Proceedings in the Court of Appeals.

Defendants sought leave to appeal, arguing that future wages and services were "too speculative to allow recovery" and any claim for "lost services was terminated at the age of majority." (**Exhibit 9**, Defendants' Corrected Application, pp 9-10, JA 131-132). Again, there was no substantive argument on "speculation" and no response to Dr. Paranjpe. The Court of Appeals granted leave "limited to the issues raised in the application and supporting brief." (*See* Order dated October 13, 2021).

D. Defendants' Court of Appeals Briefing.

Defendants argued the decedent's future wages and services were "too speculative," using the same cursory statement from their Application (**Exhibit 10**, Brief on Appeal, pp 23-24, JA 165-166), again without response to Dr. Paranjpe, even in their Reply Brief (**Exhibit 11**, Reply Brief, pp 9-10, JA 180-181).

E. The Court of Appeals Decision.

On December 1, 2022, the Court of Appeals issued a published opinion,[2] affirming the trial court's decision and citing *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016) for the proper interpretation of MCL 600.2922(6). "[T]he Legislature's use of the word 'including' meant that the enumerated list of kinds of damages available is not exhaustive; '[t]herefore, damages for lost earnings are allowable under the

[2] *Jumaa v Prime Healthcare Services-Garden City, LLC*, 344 Mich App 522; 1 NW3d 405 (2022).

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wrongful-death statute.'" (**Exhibit 12**, Slip Op, p 3, JA 185). The *Jumaa* Court noted that *Denney* had not been overturned by this Court upon application, *Id.*, and that this Court's decision in *Baker v Slack*, 319 Mich 703, 714; 30 NW2d 403 (1948) interpreted an earlier and different version of the WDA (the version addressed by *Baker* lacking the "including" and "open ended" language of the current WDA). *Id.* at 3-4, JA 185-186. The *Jumaa* Court concluded "*Baker* ha[d] clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*." *Id.*

With respect to the calculation of damages, the *Jumaa* Court held that "a child's expected future earning potential is not *inherently* too speculative to permit recovery." *Id.* at 7, JA 189 (italics original), rejecting the proposition that a child must have an employment history for the recovery of such damages. The Court wrote:

> We hold only that it seems highly likely that the future earning potential of a 13-year-old can be proven with reasonable certainty based on personal characteristics and influences known at the time, and we unequivocally reject the proposition that the future earning potential of a 13-year-old categorically cannot be proven with reasonable certainty.

Id. It concluded that "[w]hether *Jawad's* future earning potential can be proven with reasonable certainty is a matter for the parties to address in the trial court on remand." *Id.*

Judge Swartzle, concurring debutante, encouraged this Court "definitively answer" the "complicated questions of statutory interpretation, legislative history, and binding precedent" that *Denney* had "short-circuited." Concurring Opinion, p 2, JA 192. Judge

Swartzle did not reference to this Court's denial of leave to appeal in *Denney* nor its leave to appeal in *Touma/Langell v McLaren Port Huron*, COA Docket No. 347274, July 30, 2020 (unpublished); 2020 WL 4382791, *lv den* 508 Mich 976; 965 NW2d 550-551 (Nov 5, 2021) ("*Langell*").

After the Court of Appeals denied reconsideration, Defendants' Application followed and this Court granted leave and instructed the parties to address the two Questions now presented. 994 NW2d 789 (2023).

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ARGUMENT I

THE ESTATE OF A CHILD MAY RECOVER DAMAGES FOR THE CHILD'S LOST FUTURE EARNINGS.

The WDA's damages provision, MCL 600.2922(6) provides "the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including" and lists some categories. It does not mention lost earning capacity. This Court must decide whether the silence is one of inclusion or exclusion. Just as a blockage in a faucet has the opposite effect of a hole in a filter, there is difference between (1) starting with subsection (6) and asking whether it creates a claim for lost earning capacity and (2) starting with a decedent's underlying claim and asking whether subsection (6) filters out lost earning capacity. In Michigan, only the second question is relevant. The WDA is "a 'filter' through which the [decedent's] underlying claim may proceed, not a faucet which creates a new claim in the decedent's survivors. *Wesche v Mecosta County Road Comm'n,* 480 Mich 75; 746 NW2d 847 (2008). This departs from "the view [] followed by the vast majority of states . . . ." *Hardy v Maxheimer*, 429 Mich 422, 446; 416 NW2d 299 (1987) (RILEY, C.J., dissenting). But it has long been Michigan's view, and it makes this Court's task easier. Does the WDA's damages provision "filter" lost earning capacity from a decedent's underlying claim? No. It unambiguously fails to do so.

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A. Standard of Review.

This Court reviews *de novo* questions of law, including issues of statutory interpretation. *Soaring Pine Capital v Park Street Group*, 511 Mich 89, 100; 999 NW2d 8 (2023). "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." *See* MCL 8.3a. When the legislature . . . borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached . . . ." *Hodge v State Farm*, 499 Mich 211; 884 NW2d 238 (2016).

An unambiguous statute "must be enforced as written and no further judicial construction is permitted." *Gardner v Dep't of Treas*, 498 Mich 1, 6; 869 NW2d 199 (2015). This Court does not "correct statutes that may be viewed by some (or even many) as cumbersome, impractical or inadequately precise." *People v Dunbar*, 499 Mich 60, 72; 879 NW2d 229 (2016) (quotation marks and citation omitted). When the language "compels a particular result, . . . those desiring to alter this result must seek to do so through those bodies authorized by our Constitution to undertake such decisions—typically the legislative branch." *Id*.

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B. Summary.

It took until 1970 for the United States Supreme Court to acknowledge (albeit in admiralty jurisdiction) that there was no basis in law or logic for the rule that the common law did not recognize a cause of action for wrongful death.[3] By then, state legislatures had already precluded common law development with a patchwork of statutes that a leading treatise calls "among the greatest failures of American law"—"fragmented, inconsistent, impractical, illogical, often irrational, and sometimes positively cruel." 1 Rooks, *Recovery for Wrongful Death* (2023 ed), §1:1, p 22.

States vary in to whom a claim "belongs" (the decedent or the survivors), who can sue and when, whose economic loss is measured (the decedent, the survivors, or both), and allowable categories and amounts of noneconomic and punitive damages[4] (which account for the most variance in final awards).[5] Add in varying legislative amendments

[3] *Morgane v States Marine Lines, Inc,* 398 US 375 (1970).

[4] More than half of states allow for punitive damages, which are commonly awarded in child death cases. Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B U L Rev 437, 476 & n 243 (2020). Less than ten states cap noneconomic damages in general tort and product liability actions and less than half have medical malpractice caps. Center for Justice and Democracy at New York Law School, *Caps on Compensatory Damages: A State Law Summary* (2020).

[5] In 2022, the U.S. Chamber of Commerce ranked the States by frequency of "nuclear" ($10 million or more) verdicts per capita from 2010 to 2019. *Nuclear Verdicts: Trends, Causes, and Solutions* (2022). "[E]conomic damages . . . accounted for just 14% of the total amount awarded in nuclear verdicts during the 10 year study period." *Id*. at 11. The top 5 states (FL, NY, PA, IL, and CA) are all "loss of support" states in terms of wrongful death economic damages. *See* 3 Rooks, Appendix B, pp 141-405. Michigan was not even

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and judicial constructions over time and "precedents are of limited value because they must be squared, not against any general common-law, but against the precise terms of the statute." 2 Rooks, *Recovery for Wrongful Death* (2023 ed), §12:2.

Today, every state has a unique death damages provision and a unique body of interpretive case law. *See* 3 Rooks, *Recovery for Wrongful Death* (2023 ed), Appendix B, pp 141-405.[6] Michigan's damages provision, MCL 600.2922(6), is the only one that reads:

> ***[T]he court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances*** including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [Emphasis added.]

True, "[t]he Legislature didn't write and amend the wrongful-death act in a vacuum," (Defendants' Brief, p 31), but the same is true of *Denney*, which did not suddenly emerge from the oversights of a single Court of Appeals panel. *Denney* evolved organically from dialogues between the Legislature and this Court and between each of those bodies and their past selves. A leading wrongful death scholar opines: "If one were to employ a road metaphor to describe the development of our nation's regime . . . , the usual descriptors intended to convey confused or faulty legal development, such as

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mentioned in the report, as it fell outside the Top 10—a group accounting for nearly ¾ of all "nuclear verdicts." *Nuclear Verdicts*, p 14.

[6] This resource can be accessed on Westlaw by searching "WRONGDEATH APP B."

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'winding' or 'rocky,' would be euphemistically inadequate." McClurg, *Dead Sorrow*, 85 B U L Rev 1, 18 (2005). Michigan's convoluted history illustrates the two reasons why *Denney* is the *only* correct interpretation of Michigan's *current* Wrongful Death Act.

First is the plain text of MCL 600.2922(6). In 1971, the Legislature struck language requiring the assessment of damages "with reference to the pecuniary injury resulting from such death." In the wrongful death context, "pecuniary injury" is a term of art that specifically means lost financial support and lost household services from the perspective of a decedent's survivors. *Baker*, 319 Mich at 714. The 1971 Legislature replaced the "pecuniary injury" limitation with a broad grant that the jury "may" award damages it "shall deem fair and just under all of the circumstances. . . ." The "and also" phrase that divided "pecuniary injury" from two exclusive categories of non-"pecuniary" damages (the estate's medical/funeral expenses and the decedent's conscious pain and suffering)– was replaced by a nonexclusive "including."[7] 1985 Amendments added "loss of financial support" to the list. They did not modify the nonexclusive "including" or restore the "pecuniary injury" limitation. Nothing in the current damages provision informs an ordinary English speaker that loss of earning capacity damages are excluded. Given the uncommon influence hospitals and doctors have over policy, Defendants are especially

[7] *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), §5 Presumption of Nonexclusive "Include" (noting "belts-and-suspenders phrases" such as "but not limited to" are unnecessary because "the word including itself means the list is merely exemplary and not exhaustive . . . .").

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undeserving of a reprieve from the rule that relief from undesired effects of a statute must come from the Legislature.

Second, *Denney* follows this Court's precedent giving of broad effect to the fiction that an action under the WDA is the *same action that accrued to the decedent at the time of injury*, ***not*** a *new action accruing to survivors at the time of death. Hardy, supra*. Why? Because historically, Michigan's statute concerning the survival of actions (the survival act) was interpreted to have that effect when spliced with the death act in 1939. *Hawkins v Regional Med Laboratories, PC*, 415 Mich 420, 432-433; 329 NW2d 729 (1982), citing *In re Olney Estate*, 309 Mich 65, 80-82; 14 NW2d 574 (1944). In 1961, the Legislature passed a broader survival act, providing: "[a]ll actions and claims survive death." *Hardy*, 429 Mich at 437-438, quoting MCL 600.2921. This Court could find no reason to except a decedent's claim underlying a wrongful death action, which would "no longer be regarded as one created at the time of death, but as one that 'survives by law.' " *Id*. at 440.

Survival was recognized to great effect in cases interpreting the interplay between the WDA and tort reform statutes. *Wesche,* 480 Mich at 88, in particular, stressed that the categories of damage available in wrongful death actions start with the *underlying claim*, not the WDA damages provision, which is merely a "filter" for the underlying claim. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644; 761 NW2d 414 (2008), and *Denney* simply combined this Court's plain reading of "[a]ll actions and claims survive death" with a plain reading of the WDA damages provision—which unambiguously fails to "filter" out

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lost earning capacity damages. For the *Denney* panel to hold otherwise would have been reversible error under this Court's precedents.

C. Historical Background.

1. Michigan's Survival and Death Statutes before 1939.

Thanks to an offhand comment of England's Lord Chief Justice thirty years after the American Revolution, it became "magically intoned" that "if a tortfeasor chopped the tip off of a person's finger, an action could be pursued and full recovery enjoyed, but if he chopped off the person's head, no civil action would lie." *McClurg*, *supra* at 19. The decedent's action for injuries ***resulting in*** death accrued to the decedent but did not survive to his estate; and an action for injuries to survivors ***resulting from*** the decedent's death was not recognized at all. Waddams, *Damages for Wrongful Death*, 47 Modern L Rev 437 (1984).

In 1846, Parliament passed Lord Campbell's Act, which provided, in the only language rather uniform in American death acts:

> Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. . . .[3 Rooks, App B, p 142.]

The Queen's Bench determined damages were limited to "pecuniary injury"—the replacement value of wages and household services the decedent would have provided to dependents had he lived. *Blake v Midland Ry Co*, 118 Eng Rep 35 (1852). "Sentimental"

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damages were not recognized. Thus, the term "pecuniary injury," found nowhere in the text of Lord Campbell's Act, became a term of art in the wrongful death context. Comment, *Damages for the Wrongful Death of Children*, 22 U Chi L Rev 538, 539-540 (1955) (explaining importation of the "pecuniary-loss doctrine" into American case law and statutes).

Michigan's statutory history also began in 1846 with "a rather liberal 'survival act' to replace the rule that actions died with the plaintiff or defendant. *Hawkins,* 415 Mich at 428-429, citing 1846 Rev Stats, ch 101 §5. The original survival act did not cover personal injury actions. In 1848 came the "death act," a Lord Campbell's Act, which, unlike the English act, expressly limited damages to "the *pecuniary injury* ***resulting from*** such death." 1929 CL §14062 (emphasis added).

In 1885, actions for "negligent injuries to persons" were added to the *survival* act. *Hawkins*, 415 Mich at 428. Instead of resolving overlap with the death act as some states did, by holding that "damages under the survival act are confined to those accruing to the decedent before his death,"[8] this Court held "the Death Act and the Survival Act are each exclusive within its sphere." *Ford v Maney's Estate*, 251 Mich 461, 464-465; 232 NW 393 (1930).[9] In cases of "instantaneous" death, no complete cause of action ever accrued to

[8] Schumacher, *Rights of Action under Death and Survival Statutes*, 23 Mich L Rev 114, 129 (1924) (distinguishing Michigan from such states).

[9] In 1924, a commentator could already state "there are as many types of survival acts as there are states" and the overlap between survival acts and death acts had "perplexed

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the decedent, and heirs were limited to death act damages, i.e., their own "pecuniary injury." But when the decedent survived for any length of time, an action accrued in the decedent and survived, allowing damages for the decedent's conscious pain and suffering and lost earning capacity. *Olivier v Houghton Cnty St R Co*, 134 Mich 367, 369; 96 NW 434 (1903).

Lost-earning-capacity damages were not limited to what the deceased could have earned between injury and death. *Id*. By 1903, this Court felt no need to address such an "unreasonable limitation," it having been "long ago" "settled" in Michigan that the correct measure was lost earning capacity for the decedent's entire pre-injury life expectancy. *Id*. This Court explained that ***the survival act took the perspective of the decedent, not his heirs***:

> The present plaintiff sues in a representative capacity. He ought to be able to demand the same damages that the deceased might have exacted if the action had been brought to trial during the latter's lifetime. If this be not so, then the [survival] statute is in part inoperative, and the action does not survive to the legal representative, except in a limited degree. . . . It would not, under [this Court's] decisions, have been any answer for defendant to say that, 'while this is precisely what we have deprived you of, you cannot recover at all, as we have, in addition to crippling you, shortened your life.' To admit such an answer is going a step beyond refusing compensation for loss of life. It is permitting a defendant to assert the excessiveness of his own tort to escape paying full compensation for the injury. [*Olivier v Houghton Cnty St R Co*, 138 Mich 242, 244-45; 101 NW 530 (1904).]

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and baffled the courts and given rise to strange and contradictory decisions . . . ." Schumacher, *supra*, n 11, at 18.

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The Court responded with indignation to the railroad's argument that there should be a set off for what a living decedent would have spent on himself:

> Still more inequitable is the suggestion that the plaintiff's damages ought to be reduced because the defendant . . . succeeded in relieving the deceased of the burden of supporting himself . . . . In the first place, such a contention erroneously presupposes that the tortfeasor is concerned in the manner in which his victim shall dispose of the damages which he receives for his injuries. With all respect for the contention, it may be stated that it is none of the defendant's business how the injured party disposes of the money received in compensation for the injury. [*Id*. at 244.]

The railroad had fundamentally misunderstood the injury to be compensated:

> ***The fallacy is in assuming as a premise [] that the action is, in some sense, to recover for the cost of the injured party's maintenance. This is in no sense true. The action is to recover the damages which have resulted as a present loss to the injured party, in being deprived of a capacity to earn money, which capacity he had before the injury, and which he now has not.*** That capacity he had, with an assurance of a continuance for his expectancy of life . . . . He has it not now for any period. If we subtract nothing from such expectancy, we have as a result the period of earning capacity of which the injured party is deprived. [*Id*. at 244-245 (emphasis added).]

Then, as now, neither the survival act nor the death act distinguished between child and adult decedents. In *Love v Detroit, J&C R Co*, 170 Mich 1; 135 NW2d 963 (1912), this Court unanimously affirmed an award for the pain and suffering and lost earning capacity of a 5-year-old:

> From the nature of the case, the amount of the damages cannot be estimated with certainty either as to the element of pain and suffering or the element of future earnings after the age of 21; but this does not, as we have repeatedly held, deprive the injured person of all damages.
>
> The measure of damages is well settled in cases for negligent injuries under the survival act.

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The fact that the child's death has occurred before he has become a wage-earner does not foreclose inquiry as to the probable value of his services for the years ensuing his death.

To enable the jury to determine the probable earning capacity of the child for the period of his probable life after arriving at the age of 21, a wide latitude must necessarily be allowed in the admission of testimony as to the child's status and future prospects and the vocations and their remuneration which might reasonably be expected to be open to him. [*Id.* at 7-8 (citations omitted).]

2. The 1939 Amendments.

In 1939, the Legislature amended the *death* act as follows:

Section 1. . . . Whenever the death of a person **or injuries resulting in death** shall be caused by wrongful act [] and the act [] is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages[], then [] the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . . **All actions for such death, or injuries resulting in death, shall hereafter be brought only under this act.**

Section 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person~~, and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate;~~ and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered **and also damages for the reasonable medical, hospital, and funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. . . .**

Section 3. Repeal of the survival statute. Insofar as the provisions thereof are inconsistent with the provisions of [] this act, . . . section 1040 of the Compiled Laws of 1929 is hereby repealed. [1929 CL §§14061, 14062; 1948 CL §§691.581-691.583.] (Emphasis added.)

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This Court addressed the extent to which section 3 repealed the survival act in *Olney*, 309 Mich at 65. One Justice, citing Massachusetts law, opined that section 3 wholly barred the survival action that accrued *to the decedent at the time of injury* and replaced it with an "entirely new statutory cause of action" accruing *to the personal representative at the time of death*. *Id*. at 77-78 (opinion of SHARPE, J.).

A majority of five disagreed, holding the 1939 Amendments only repealed the survival act to the extent it was inconsistent with the amendments. *Id*. at 80 (Opinion of NORTH, C.J.). The Legislature's intention to retain survival of the action accruing to the decedent *at the time of injury* was evinced by a new mention of "injuries ***resulting in*** death" where the prior death act had only mentioned injuries to heirs *resulting* ***from*** death. *Id*. at 82.

One year later, in *Grimes v King*, 311 Mich 399, 414; 18 NW2d 870 (1945), this Court affirmed a judgment for the husband of a dependent-less music teacher who "did what she pleased with the money she earned." The defendant argued that because the 1939 Amendments limited damages to "pecuniary injury," the non-dependent husband could not recover his wife's lost earnings, and there must be a deduction for the cost of her maintenance. *Id*. This Court reminded the defendant that loss of services was a "pecuniary injury," even to a non-dependent husband, but it did not stop there:

> The administrator's loss is not limited to the pecuniary loss suffered by the husband for the value of his wife's services. The deceased had an established earning capacity as a music teacher and had she lived

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> throughout her expectancy could have added to the worth of her estate in which her heirs at law would participate. [*Id*. at 415.]

Three years later, two Justices in the *Grimes* majority were gone and the passage quoted above was explained away in *Baker*. The plaintiff could only recover $198 in burial expenses for the death of his mother. The *Grimes* passage: (1) was dicta; (2) did not mean what it said; and (3) to the extent it did mean what it said, it was overruled as inconsistent with the language of the 1939 Amendments. *Id*. at 712-713. ***All three reasons turned on "[l]egislative language [that] could hardly be made more explicit on the subject," namely, the term 'pecuniary injury.'"*** *Id*. at 713-714 (emphasis added). Justice Butzel and Chief Justice Bushnell (the author of *Grimes*) concurred in result only, apparently disagreeing that the *Grimes* passage was dicta. *Id*. at 715.

In a dissent that would become law following the amendments of 1971 PA 65, Justice Adams observed: "Once the [survival and death] actions were merged in 1939, the problem of an adequate recovery . . . was largely met by the holding in *Grimes* only to be stripped away by the holding in *Baker*." *Breckon v Franklin Fuel Co*, 383 Mich 251, 287; 174 NW2d 836 (1970) (ADAMS, J., dissenting), adopted in *Smith v Detroit*, 388 Mich 637, 649; 202 NW2d 300 (1972).

3. Lead-up to the 1971 Amendments.

The 1950s began a period of extreme division over the "pecuniary injury" limitation which persisted until 1971, when the Legislature struck the phrase "pecuniary injury" entirely and replaced it with "under all of the circumstances including." 1971 PA 65.

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In *Courtney v Apple*, 345 Mich 223; 76 NW2d 80 (1956), the jury returned a burial-expenses-only verdict for the death of a 3-year-old. Circuit Judge Black—Justice Black by the time the case reached this Court—ordered a new trial on damages, opining: "the jury should have returned a verdict for a substantial amount to cover the pecuniary loss sustained by the father." *Id*. at 228. A majority of four, citing *Baker*, held the trial court erred, the only permissible measure of "pecuniary injury" being wages the child would have contributed before the age of majority, minus the cost of maintaining and educating the child. *Id*. at 232. The majority quoted with approval a Missouri decision holding, "nothing can be allowed as solatium for grief or mental anguish." *Id*. at 235.

Justice Talbot Smith dissented. *Id*. at 242-243 (SMITH, J., dissenting) (explaining that, in practice, courts applying the "pecuniary loss" rule in child death cases had given juries wide discretion in fixing an amount). Justice Smith's view won out in *Wycko v Gnodtke*, 361 Mich 331; 105 NW2d 118 (1960), concerning the death of a 14-year-old. The trial court had reduced the verdict by half "since no boy [the decedent's] age 'could have had the earning capacity indicated by this verdict.' " *Id*. at 333.

Tracing the "barbarous" history in which English courts had atextually derived a "child-labor measure" of pecuniary loss from Lord Campbell's Act, this Court rejected "the unreal nature of the computation we of the courts (for nothing in the act so requires) have thus imposed upon the bereaved parents." *Id*. at 333-339. In a passage that led to reinterpretation or amendment of death statutes in 48 states and the District of

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Columbia,[10] Justice Smith asked: "What then is the pecuniary loss suffered because of the taking of a child's life?" *Id*. at 338. The answer: "It is the pecuniary value of the life." *Id*. A child had a real impact on a wage-earning parent's economic behavior. Thus, loss of companionship was recognized as a "pecuniary loss" to the economic functioning of the family, and amounts spent in maintaining a child were no longer recognized as *savings* to be deducted from the verdict but a *loss* of investment to be added to it. *Id*. at 342 (concluding, "[t]he bloodless bookkeeping imposed upon our juries by the savage exploitations of the last century must no longer be perpetuated by our Courts.") One year later, the Legislature recodified the death act to its current location, without adding language to abrogate *Wycko*.

Justice Black signed on to *Wycko* which stated, "we now reject, as prayed, by appellant, the child-labor measure of the pecuniary loss, . . . and all cases consistent therewith we now overrule." Shortly thereafter, he had a change of heart. *Currie v Fiting*, 375 Mich 440; 134 NW2d 611 (1965), affirmed an award to the parents of a 21-year-old who had just completed a business degree with an eye toward taking over her parents' business. Defendant argued that the traditional pecuniary loss rule ended a parent's damages at the age of majority. Justice Adams, rejecting the argument, wrote: "Why age 21 should set up a magic barrier baffles understanding in view of the total omission from the statute of a statement of limitation as to age. . . ." *Id*. at 452.

[10] See *McClurg*, *supra* at 22-23 (recognizing *Wycko* as "the leading case.")

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Justice Black dissented, stating that the Court's wrongful death opinions since *Wycko* risked "the Court's honor" with "the most disreputable abuse of the judicial power," that what the decisions "will do to contemporaneously rising liability insurance rates is visible for all to see," that "the sole question" answered in *Wycko* was whether the verdict was excessive and all else was "expansive dicta," and that the parents in *Wycko* were actually dependent on the decedent—a feature lacking in *Currie* and an important one given that the probate code only authorized distribution of death damages to "dependents." *Id*. at 457-489 (BLACK, J. dissenting).

Two months after *Currie*, in 1965 PA 181, the Legislature amended the probate code. "Dependents" became "persons" as it effectively remains today, codified at MCL 600.2922(6)(d). That amendment did not matter to the majority in *Breckon*. "The Legislature ha[d] changed in no degree or manner the damage measure of 1939, that is, the measure allowed of 'pecuniary injury' or 'pecuniary loss.'" That "restrainer 'pecuniary' " which "still appeared 4 times in the statute" was to be interpreted according to *Baker*. *Id*. at 278. *Wycko* was recast as a holding that the verdict was not excessive under the facts of that case and a whole lot of dicta. *Id*. at 263.

Within a year, the Legislature struck all mentions of the "restrainer 'pecuniary' " as interpreted in *Baker* from the WDA.

4. 1971 and 1985 Amendments.

In 1971 PA 65, the Legislature removed the "pecuniary injury" rule that had limited wrongful death damages for 123 years. It replaced the "and also" that divided "pecuniary

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injury" from the two exclusive categories of non-"pecuniary damages," with a nonexclusive "including:"

> The court or jury may give such damages as the court or jury shall deem fair and just, ~~with reference to the pecuniary injury resulting from such death~~ **under all of the circumstances**, to those persons who may be entitled to such damages when recovered ~~and also~~ **including** damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. **The amount of damages recoverable by a civil action for death caused by the wrongful act, neglect or fault of another may also include recovery for the loss of the society and companionship of the deceased.**

In 1985 PA 93, the Legislature added "loss of financial support" to the list of damages which "may award . . . as the court or jury shall consider fair and ~~just~~ **equitable** under all the circumstances."

The 1985 Amendments also moved the distribution provisions from the probate code to subdivisions (6)(a)-(e), discussed later in response to Defendants' argument that those provisions preclude lost earning capacity damages. The 1985 Amendments did not restore the "pecuniary injury" limitation or apply limiting language to the nonexclusive "including."

5. *Hawkins and Hardy*—This Court holds, contrary to the "vast majority" of states, that the 1961 Survival Act, MCL 600.2921 ("All actions and claims survive death") applies even to wrongful death actions.

The 1980s gave rise to a line of cases concerning the as-yet-unexamined interaction between the WDA and the 1961 survival act, MCL 600.2921 ("All actions and claims survive death.") These cases interpreted that language to apply even to actions

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under the WDA, thus departing from the "view [] followed by the vast majority of states . . . ." *Hardy*, 429 Mich at 446 (RILEY, C.J., dissenting). That is, in Michigan, WDA actions are not "new" actions accruing *at the time of death*; they are continuations of the *decedent's* action that accrued at the time of injury. This line of cases—subsequently melded with text-focused interpretations of the WDA's interplay with governmental immunity and tort reform statutes—would eventually collide with the broad text of the 1971 Amendments ("under all the circumstances including") in *Thorn* and *Denney*.

Endykiewicz v State Hwy Comm'n, 414 Mich 377, 387; 324 NW2d 755 (1982) held that the WDA damages provision governed over language now found in the highway exception of the Governmental Tort Liability Act.[11] A "literal" interpretation of the highway defect statute would mean only the deceased could recover in a death case. *Id*. at 388. That would conflict with the WDA which created "not [] a cause of action which survives the decedent, but [] a new action which can be brought, not for the benefit of the estate, but solely for the benefit of the beneficiaries named in the statute." *Id*. at 387, quoting *Lincoln v Detroit & M R Co*, 179 Mich 189, 195-196; 146 NW 405 (1914) (internal quotation marks omitted).

Endykiewicz and prior cases seems to have forgotten *Olney Estate*, 309 Mich at 80 (holding the 1939 Amendments incorporated survival of the action accruing to the

[11] "A person who sustains bodily injury or damage to his or her property . . . may recover the damages suffered by him or her . . . ." MCL 691.1402(1).

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decedent at the time of injury) and returned to the pre-1939 understanding of the death act from *Lincoln*, 179 Mich at 195-196. That was not the case two months later, when this Court issued *Hawkins*.

Hawkins concerned application of the malpractice statute of limitations to a WDA action. Defendant argued that the action accrued at the time of injury. Plaintiff argued that the action did not accrue until death. This Court agreed with defendant. After reviewing the history of the survival and death statutes, this Court overruled prior cases (but not *Endykiwiecz*) that had either ignored *Olney* in favor of *Lincoln* or construed Justice Sharpe's *Olney* opinion as the majority. *Id*. at 437. Under *Olney*, because the decedent's death was non-instantaneous:

> [T]he proper application of the pertinent statutes guarantees survival of the cause of action which accrued to the decedent in his lifetime, ***enlarges*** the elements of damage so as to include those authorized under the wrongful death act, ***preserves the original action*** unabated by the death of Mr. Hawkins and authorizes the executrix of his estate to pursue it to judgment [*Id*. at 439 (emphasis added).]

Hardy took the survival act logic one step further by holding <u>*all*</u> actions under the WDA <u>*are*</u> the surviving actions of the decedent, regardless of whether death was instantaneous. In 1961, the Legislature had "abandoned" a "restrictive 'laundry list' approach" by passing with the current survival act, MCL 600.2921, which provides, "[a]ll actions and claims survive death." *Id*. at 437-438. A Committee Comment accompanying the 1961 Survival Act stated:

> ***This section drastically changes the present law, CL (1948) 612.32.*** . . . ***There is no good reason for allowing some actions to survive, and not***

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> ***others, apart from cultural inertia.*** Since the actions which have not survived in the past are tort actions, it is pertinent to consider the theory of tort damages.
>
> One purpose of damages in tort is to compensate the injured party. This purpose is defeated if the action does not survive the death of the injured party, or the death of the wrongdoer. ***Damages in tort are also thought to serve an exemplary purpose, even when not denominated 'punitive.' This purpose is defeated if the action does not survive.*** [*Id*. (emphasis in *Hardy*).]

The revised survival act was unambiguous—"all actions and claims survive death." *Id*. In short, "***since 1846 the law in Michigan has evolved to the point where it may now be held . . . a wrongful death action will no longer be regarded as one created at the time of death, but as one that 'survives by law.***' " *Id*. at 440 (emphasis added). Chief Justice Riley, dissenting, stated that *Hawkins* and *Hardy* had departed from the "view [] followed by the vast majority of states . . . ." *Id*. at 446 (RILEY, C.J., dissenting) (concluding, "a wrongful death action is not the same action as one for the underlying wrongful conduct . . . .").

6. *Jenkins, Shinholster, Wesche:* The *Hawkins/Hardy* holding that a Michigan wrongful death action is a continuation of the decedent's action is applied to determine the damages available in a wrongful death action.

In the early 2000s, this Court followed the "survival" logic of *Hardy* beyond the statute of limitations context when addressing the interplay between the WDA and tort reform measures. In each case, the Court held that the damages available in the underlying action controlled over the WDA damages provision because the WDA did not create a "new" action, but continued the decedent's underlying action.

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In *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), this Court reversed a Court of Appeals holding that medical malpractice caps on noneconomic damages, MCL 600.1483, were inapplicable to wrongful death actions. *Jenkins v Patel*, 256 Mich App 112, 119-120; 662 NW2d 453 (2003)(holding that "the WDA mandates recovery in any amount, limited only by the requirement that the amount be fair and equitable, for noneconomic losses."). This Court relied on *Hawkins* for the principle that the analysis of a wrongful death claim starts with the decedent's action, to which the caps applied. *Jenkins*, 471 Mich at 165, quoting *Hawkins*, 415 Mich at 436.

Hardy survival was by now a set principle for interpreting the WDA. *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004) (rejecting the position that death necessarily led to application of the lower medical malpractice cap in a WDA case, reasoning the Legislature made a policy decision to permit the decedent's estate to recover "***everything*** that the decedent would have been able to recover had she lived.").

Hardy survival was front and center in *Wesche*, holding that parents could not recover loss of society damages for the premature birth and death of their daughter following an ambulance accident. The Court of Appeals, citing *Endykiewicz* held that "once the injured person dies and the action becomes an action under the wrongful death act, the wrongful death act controls the damages that may be recovered." This Court overruled *Endykiewicz*, holding that it could no longer be said that " '[a]n action for wrongful death exists . . . as a new action which can be brought, not for the benefit of the

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estate, but solely for the benefit of the beneficiaries named in the statute.' " *Wesche*, 480 Mich at 89-91, overruling *Endykiewicz*, 414 Mich at 387. Because it was ***"now clear that the underlying claim survives by law,***" lost society was barred by immunity in the underlying claim, notwithstanding the WDA's allowance of lost society. *Id*. at 91 (emphasis added).

7. *Thorn* and *Denney* recognize the interaction between the Survival Act and the broad language of the Wrongful Death Act's damages clause.

With *Wesche* cementing the "well-settled principle" that a WDA action is merely a "continuation of the decedent's underlying claim," *Id*. at 91, n 13, the WDA damages provision, MCL 600.2922(6), which had eluded textual scrutiny since the 1971 amendments, came to the Court of Appeals for interpretation in *Thorn*, 281 Mich App at 644. The plaintiff sought future damages for lost household services the decedent would have provided to her children. Defendant argued that lost services were not recoverable because they were not enumerated in MCL 600.2922(6). The Court of Appeals (TALBOT, WILDER, and MARKEY, JJ.) disagreed:

> The word "including" is directly preceded in the statutory subsection by the following language: "In every action under this section, the court or jury may award damages as the court or jury ***shall consider fair and equitable, under all the circumstances*** . . . ." When viewed in context, rather than as a solitary term, the word "including" indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case. As such, the term "including" should be construed as merely providing specific examples of the types of damages available, and not an exhaustive list. . . . [*Id*. at 650-651 (emphasis in original).

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Further, reading the wrongful death damages provision as an exclusive list ignored "well-settled principle" that a Michigan wrongful death action is merely a " 'continuation of the decedent's underlying claim.' " *Thorn*, 281 Mich App at 658-659, quoting *Wesche*, 480 Mich at 91, n 13. If limitations on damages from the decedent's underlying action survive, then "***so too must the damages that are available in the underlying claim be recognized***." *Thorn*, 281 Mich App at 659.[12] The panel also noted the defendant's position did not make any sense:

> Defendants assert that the most serious injury, which results in death, serves to restrict and prohibit claims that would be compensable had the individual survived. Common sense would dictate the opposite—the more egregious the injury, the greater the damages. [*Id*., quoting *Courtney*, 345 at 239 (SMITH, J., dissenting) ("Despite the reasoning of the common-law logicians, our people could not understand this: A wrongdoer who brought his victim to the very brink of human dissolution would have to respond in damages to the full extent of the injury. But if he took the final step and plunged his victim into the abyss, he obtained absolution from damages.")]

Then came *Denney*, 317 Mich App at 727, which requires no lengthy recitation. As Defendants note, albeit critically, the analysis is simple. If "the wrongful death act is essentially a filter through which the underlying claim may proceed," *Wesche*, 480 Mich at 88, and the "filter" "permit[s] the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case," *Thorn*, 281 Mich App

[12] The point is correct. MCL 600.2921(1) does not say "Limitations on all actions and claims survive death."

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at 651, then "damages for lost earnings are allowed under the wrongful death statute" if they are allowed in the underlying claim. *Denney*, 317 Mich App at 732.

The analysis did not need to be more complicated than that. Well over a century of complications and their resolution were reflected in the in the most recent binding precedent.

D. Argument.

1. Michigan's *current* survival and death acts allow recovery of the decedent's lost earning capacity.

Michigan's tortuous case law and statutory history illustrate that looking to a "majority rule" amongst states is of no binding and little persuasive value given the chaotic variations between state statutes and the unique path Michigan has taken.[13] Michigan departed from the "majority rule" when it first interpreting its original survival and death statutes, and it departed again when interpreting the current survival and death statutes in *Hawkins*, *Hardy*, *Jenkins*, *Shinholster*, and *Wesche*.

[13] Defendants' claim–that *Denney* makes Michigan the "only" state that recognizes loss of earning capacity when its statute mentions loss of support–deserves a specific response though. Wrong. A 50-state survey proves the proposition false by the time one gets to Alaska. *See* 3 Rooks, Recovery for Wrongful Death, n 3; Alaska Stat §09.55.580(c) (providing, "the court or jury shall consider all the circumstances and from them fix the award at such sum will fairly compensate" and listing "loss of contributions for support" in a nonexclusive list); *see also North Slope Borough v Bower*, 215 P3d 308, 313 (Ala 2009), quoting *Kulawik v ERA Jet Alaska*, 820 P2d 627, 635, 637-38 (Alaska 1991) (both rejecting the argument that mention of lost support precludes lost earning capacity and concluding "the legislature did not intend to make it cheaper to kill than to injure.").

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The history also illustrates the two reasons *Denney* is correct. ***First***, there is no legal thread binding *Baker* to the present. The Legislature cut it in 1971 when it replaced the "pecuniary injury" rule with permission for the jury to do equity "under all the circumstances" in consideration of a non-exhaustive list of damages. If the Legislature was presumably aware of *Baker*, then it was also aware of Justice Smith's dissent in *Courtney*, his opinion in *Wycko*, and Justice Adams's dissent in *Breckon*, all of which expressed the view that juries were unreasonably restrained from doing justice by the "pecuniary injury" rule and narrow judicial interpretations thereof. That view unambiguously won out in the 1971 Amendments, and it was not fundamentally altered by the 1985 Amendments. *See People v Betts*, 507 Mich 527, 567; 968 NW2d 497 (2021), citing *United States v Price*, 361 US 304 (1960) ("[T]he intent of a prior legislature cannot be determined by looking at the actions of a subsequent one.")

Second, *Denney* is not the creation of a single Court of Appeals panel. It is a necessary result of: (1) *Hardy* survival; and (2) the broad language of the 1971 Amendments, which somehow eluded textual scrutiny until *Thorn*. If "[a]ll actions and claims survive death" means a WDA is action merely a "continuation of the decedent's underlying claim" such that limitations on the underlying action survive death, *Wesche*, 480 Mich at 91, n 13, then "so to must the damages that are available in the underlying claim be recognized." *Thorn*, 281 Mich App at 659. After all, MCL 600.2921 does not say, "***limitations*** on all actions and claims survive death." If lost earning capacity is available

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in the underlying action, it remains available under the WDA as written, which unambiguously *fails* to "filter" out lost earning capacity.

2. 1971 PA 65 struck the "pecuniary injury" limitation and permitted the jury to award damages as it "shall deem fair and just under all of the circumstances. . . ." The "and also" that used to divide "pecuniary injury" from the two exclusive elements of non-"pecuniary" damages was replaced with a nonexclusive "including."

By 1971, Michigan's death act had required the jury to calculate damages "with reference to the *pecuniary injury* resulting from such death" for 123 years. The 1971 Amendments removed that language and replaced it with broad, equitable language: "***under all the circumstances***." Anywhere the phrase is used, it announces that equity has arrived to displace bright-line rules with the consideration of multiple factors, none of which outweigh the others. There is no legal context in which the phrase "under all the circumstances" denotes limitation or restriction of the factors that can be considered.[14]

The Legislature also replaced the words "and also" with "***including***"—a change that seems small but is important. The 1939 amendments used "and also" to tack on two exclusive categories of non-"pecuniary"[15] damage that had only been allowed under the

[14] The most prominent example is MCL 552.401 (providing a decree of divorce or separate maintenance may "award[] to a party all or a portion of the property [] owned by his or her spouse, as appears to the court to be equitable under all the circumstances . . . ."); *see also* MCL 109.11 (providing for "damages as may be just under all the circumstances, taking into consideration . . ."); MCL 450.1761 (providing for an interest rate that is "fair and equitable under all the circumstances.")

[15] Defendants attempt to define "pecuniary" and non-"pecuniary" according to *Black's Law Dictionary*, 11th ed (2019) (stating "pecuniary" means "of, relating to, or consisting of money"), ignores that "pecuniary **injury**" is a term of art in the wrongful death context,

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survival act: the estate's medical/funereal expenses and the decedent's conscious pain and suffering. There was no open-ended term in the 1939 list of available damages. Ergo, the *Baker* Court could construe the enumerated list as exclusive and hold that the "language could hardly be more explicit" that "[the 1939 damages provision] limits damages to (a) what the court or jury shall deem fair and just with reference to ***pecuniary injuries*** to the surviving spouse or next of kin, (b) reasonable medical, hospital, funeral and burial expenses, (c) reasonable compensation for conscious pain and suffering. . . ." *Baker*, 319 Mich at 713 (emphasis in original).

By 1971, "pecuniary injury" and the "*and also*" dividing line between it and tacked on survival damages were gone, replaced by a grant that a jury "***may***" award what " ***the jury*** shall deem fair and just under all the circumstances," "***including***" the nonexclusive categories of damage that followed.

Defendants admit the 1971 addition of "including" made the list nonexclusive (Defendants' Brief, p 54). They do not contend that the deletion of "pecuniary injury" limited damages to the 1971 enumerated categories (medical/funeral expenses, pain and suffering, and society and companionship), or that loss of support was unavailable until

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specifically referring to lost financial support and lost household services. An ordinary language meaning of "monetary" injury to heirs or survivors would include the losses to an estate recognized in *Grimes* but rejected in *Baker*, 319 Mich at 407-408 (construing the term "'pecuniary injury'" as meaning "only" the recovery of household services after deductions for personal maintenance and lost earnings "to the extent the deceased was legally obligated to contribute to the support and maintenance of" of the beneficiaries.)

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the Legislature added it to the list in 1985. They have not remotely suggested that *Thorn* wrongly decided that lost services are available. Instead, Defendants argue that deleting "with reference to the pecuniary injury" was necessary in order to add "non-pecuniary" damages, i.e., loss of society (Defendants' Brief, p 53). Conscious pain and suffering—which is "non-pecuniary" even by Defendants' definition, *supra* note 15—had existed side by side with "pecuniary injury" since 1939. It was tacked on with "***and also***" and loss of society could have been tacked on just the same. *Wycko* had already interpreted loss of companionship as a valid consideration "with reference to the pecuniary injury."[16] The statement, "damages . . . may also include recovery for the loss of society and companionship," would have been an unambiguous endorsement of *Wycko* without deleting "pecuniary injury." The Legislature went further and gave the jury permission to do justice "under all the circumstances" in consideration of a nonexhaustive list of categories.

Defendants retort that the 1971 Legislature's rejection of an alternative bill with additional language "the amount of damages recoverable by civil action for death . . . shall not be limited" (JA 196) evinces an "intent to retain limitations." (Defendants' Brief, p 42.) That does not mean the Legislature intended to retain the "pecuniary injury" limitation it

[16] Multiple Justices of the *Wycko* era opined that the Legislature had already endorsed *Wycko* in 1961 and 1965, when the Legislature re-enacted and amended the WDA with presumptive awareness of *Wycko*. *Breckon*, 383 Mich at 298 (ADAMS, J., dissenting); *Currie*, 375 Mich at 457 (O'HARA, J., concurring).

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had just deleted all reference to. The potential reasons for rejecting language, "the amount of damages . . . shall not be limited," are myriad. Would such imprecise language override the common-law assumption that punitive damages are unavailable? *Currie*, 375 Mich at 455-456(holding that because "[t]here is no provision in the statute for an award of exemplary or punitive damages, [n]one should be awarded.") Would it make verdicts unreviewable for excessiveness? The one reason that doesn't make any sense for rejecting "all" limits is that the Legislature intended to retain the "pecuniary injury" limit.

3. 1985 PA 93 added "loss of financial support" to the list introduced by the nonexclusive "including." It did not remove the nonexclusive "including" or add the "pecuniary injury" limitation back in. The plain language of current WDA damages section unambiguously fails to "filter" loss earning capacity.

Defendants argue that even if the 1971 Amendments abrogated *Baker* by striking "pecuniary injury," the 1985 Amendments revived *Baker* by adding "loss of financial support" to the (undisputedly) nonexclusive list. Again, Defendants do not contend the "including," unchanged from 1971, suddenly became exclusive. They argue the 1985 addition of "loss of financial support" is surplusage unless it is read to silently exclude loss of earning capacity, a "grave offense for Courts." *Thorn*, 281 Mich App at 651, already rejected this argument: "Interpreted in the manner suggested by defendants, the statute's language would mandate both the award of damages considered 'fair and equitable under all the circumstances' while simultaneously limiting a plaintiff's recovery to those items specified in the list following the term 'including.' " In other words, the negative implication Defendant reads into "loss of financial support" renders "fair and

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equitable under all the circumstances including" surplusage—a "grave offense for courts" in Defendants' estimation.

The mention of "loss of financial support" only comes into conflict with "fair and equitable under all the circumstances including" under Defendants' negative-implication reading of "loss of financial support."[17] Read as written—as a single item in a nonexclusive list of what the jury "may" award—"loss of financial support" simply means **the jury** "may" find lost support, and not lost earning capacity, to be the "fair and equitable" measure "under all the circumstances" of a particular case. Neither phrase is surplusage when read in harmony. Defendants can present to a jury the same supposed inequities of lost earning capacity damages that it presents to this Court, and the jury "may" agree. But the statute also allows the jury to agree with *Olivier* that "inequitable is the suggestion that the plaintiff's damages ought to be reduced because the defendant, by the severity of the injuries inflicted, succeeded in relieving the deceased of the burden of supporting himself . . . ." 138 Mich at 244.

Finally, attempting to make a plain reading of "fair and equitable under all the circumstances including" seem absurd, Defendants argue there must be unwritten limitations, as "[t]he Estate isn't seeking future medical expenses [or future pain and

[17] Defendants also argue the reference to "loss of financial support" must exclude lost earning capacity because the two cannot "coexist" "without creating a double recovery." (Defendants' Brief, p 62). Plaintiffs decline to guess how the statute might apply to any given grandparent with any given will and investment assets, but agree that double recoveries are always inequitable and outside the bounds of what the jury "may" award.

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suffering] that would have been incurred had Jawad survived" (Defendants' Brief, p 63). The argument conflates the test for whether a category of damages is available (would the category of damage be available if the deceased survived that same negligent act?) with the test used to measure an available category (what would be different if the deceased had never been subject to the negligent act?). Plaintiffs are not seeking lost future medical expenses and lost future pain and suffering because a negligently-injured-but-living son capable of racking up extensive tort damages is not their desired state of affairs. A life not cut short by negligence is what Jawad and his parents were entitled to, and it is by that baseline that the law measures damages.

4. The eligibility, MCL 600.2922(3), and distribution, MCL 600.2922(6)(d), provisions do not silently insert the phrase "but not lost earning capacity" in the damages provision, MCL 600.2922(6). The distribution *does* provide a method for distributing lost earning capacity damages: "as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate."

Unable to locate their desired exclusion in the damages provision, Defendants turn to the distribution provision, MCL 600.2922(6)(d), arguing the Legislature *must have* intended to exclude lost earning capacity because "[t]he statute doesn't give trial courts the authority to distribute" lost earning capacity (Defendant's Brief, p 57). *Denney* has been around for 7 years and there are no published cases suggesting that courts have had trouble with distribution. That is because MCL 600.2922(6)(d) *does* provide for distribution of lost earning capacity: "***as the court or jury considers fair and equitable*** considering the relative damages sustained by each of the persons [who suffered

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damages] and the estate of the deceased." (Emphasis added.) History demonstrates how the Legislature came to the conclusion that "[u]ltimately, under subsection 6(d), the [trial] court must decide the appropriate distribution." *Matter of Thornton*, 192 Mich App 709, 715; 481 NW2d 828 (1992); *Reed v Breton*, 279 Mich App 239; 756 NW2d 89 (2008) (reviewing a trial court's distribution of death damages for clear error); *McTaggart v Lindsey*, 202 Mich App 612; 509 NW2d 881 (1993) (same).

Before 1939, the death act provided for distribution according to the intestacy statute, which created inequities. *See In re Venneman's Estate*, 286 Mich 368, 370-371, 376-377; 282 NW 180 (1938), in which damages had been assessed entirely according to the decedent's widow's losses, but the decedent's adult son, inserting himself into the proceedings after judgment entered, was entitled to half the widow's recovery under the intestacy statute. This Court was forced to reverse the trial court's opinion that the plaintiff was entitled to 100% of her recovery.

In response, the 1939 Amendments added a new procedure for distribution, requiring the trial court to advise the probate court of its opinion as to "the proportion of such total pecuniary loss suffered by the surviving spouse and each next of kin . . . ." *Breckon*, 383 Mich 260-263. Sections were added to the probate code providing that proceeds were to be distributed according to the ***trial court's*** opinion if there were no objections. If there were, the probate court was to distribute "only to those persons who were dependents of the decedent and in such amounts as to said court shall seem fair

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and equitable considering the relative damages sustained by each of such dependents . . . ." *Id*. (Emphasis added).

In 1965, shortly after Justice Black's *Currie* dissent had read "dependents" in the probate code to feed back into the WDA and disallow damages to non-dependents, the Legislature replaced "dependents" with "persons specifically designated in [MCL 600.2922], i.e., 'those entitled to inherit the personal property of the deceased had he died intestate'." *Breckon*, 383 Mich at 276

In *Crystal v Hubbard*, 414 Mich 297; 324 NW2d 869 (1982), questions arose over who was eligible for damages under the WDA, that is, the proper members of "that class who would be entitled to inherit the personal property of the deceased had he died intestate." Former MCL 600.2922(2). The Court of Appeals held the decedent's siblings were not "entitled" to any WDA damages because the decedent's father was the only person who would actually inherit under the intestacy statute, the siblings taking only if he were deceased. This Court reversed, holding the WDA allowed damages for all persons who could *potentially* inherit under the intestacy statute, even if other persons were higher in intestate priority.

In 1985, the Legislature adopted House Bills 4486 and 4487 (JA 199-209) to avoid *Crystal*'s implication that the WDA recognized lost society damages for relatives all the way down the line of intestate priority (JA 199). To create "a clearer definition of those entitled to recover damages in a wrongful death action, which reflects both kinship and

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suffering due to the loss of a loved one," (JA 199) the 1985 Amendments added an ***eligibility*** subsection (3) to the WDA, which provides:

> [T]he person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
>
> > (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
> >
> > (b) The children of the deceased's spouse.
> >
> > (c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

The ***distribution*** provision in the probate code was amended and duplicated in MCL 600.2922(6)(a)-(e), including (6)(d):

> [T]he court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. . . . The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, ***in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.*** [Emphasis added.]

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Neither the "eligibility" provision nor the "distribution" provision feeds back into the damages provision to silently exclude any category of damage. ***That is not their function within the statutory scheme.*** The eligibility provision was passed to limit the persons entitled to *any* WDA proceeds to the enumerated classes. The distribution provision was passed in 1939 to provide the courts equitable leeway over distribution, which was only broadened by subsequent amendments. ***Neither one inserts the phrase "but not lost earning capacity" into subsection (6).***

Consider Defendants' argument that MCL 600.2922(1) (providing, "the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages") "doesn't say the defendant is liable for the 'same' damages" the decedent could have recovered "because "[i]t just says, "an action for damages." (Defendants' Brief, p 62). Plaintiffs agree. The unmodified term "damages" in that section does not function to define what categories of damages are available.[18] The same applies to the entitlement and distribution provisions. MCL 600.2922(3) provides that to qualify for distribution of *any* damages, a person must: (1) belong to one of the classes enumerated in (3)(a)-(c); and (2) have suffered "[some category of] damages."

The distribution provision, MCL 600.2922(6)(d), plainly says, "the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial

[18] The same damages the decedent could have recovered are available to the personal representative, not because of MCL 600.2922(1), but because MCL 600.2921 ("All actions and claims survive death") as interpreted in *Hardy, Jenkins, Shinholster, and Wesche*.

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expenses of the decedent for which the estate is liable." What happens with the rest of the proceeds depends on what "the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased." *Id*. There is no provision strictly limiting "the persons designated in subsection (3) who suffered damages" to any particular category or measurement of damages, and there is no provision strictly limiting the estate to conscious pain and suffering. If there were, there would be no reason for the court or jury to come up with an "amount" to distribute which is "fair and equitable considering the relative damages sustained by each."

Regardless of whether conscious pain and suffering damages *must* enter the estate,[19] the "fair and equitable" language in the distribution provision is the same as the "fair and equitable language" in the damages provision, and there can be no doubt that the jury can, by special verdict, override the distribution provision. There is no reason to read in conflict between the broad language of the damages provision and the broad language of the distribution provision on grounds that the distribution provision does not provide for distribution of lost earning capacity damages. It does.

[19] Consider the facts of *McTaggart*, 202 Mich App at 614. Would it be "clearly erroneous" for the trial court to distribute conscious pain and suffering to the mother, who was present when the child died in a fire, rather than to the estate, which would give the absentee father a recovery despite an obvious disparity in the relative damages sustained by each parent? Plaintiffs think subdivision 6(d) is worded precisely to allow the trial court to avoid such a *Venneman*-esque result.

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5. Damages are not "punitive" unless the jury is instructed to punish the defendant. Under Defendants' reasoning, damages for the decedent's pain and suffering are disallowed "punitive" damages simply because the decedent is not around to directly receive compensation.

According to Defendants, lost earning capacity damages without deduction for personal consumption are "punitive" because the decedent will not be around to personally consume. Such a result is "perverse" because it puts the survivors "in a better position" than if the decedent had lived (Defendants' Brief, p 34, quoting a federal district court opinion). Plaintiffs take offense to the suggestion that *Denney* puts them "in a better position" than if Jawad had lived, i.e., that they would rather sue a hospital for their son's death than have their son. And as this Court forcefully stated in *Olivier*, it is far more perverse for a defendant to assert the excessiveness of their tort as a boon to the decedent—"relief" from the burden of maintaining his life.[20] That courts and legislatures in other states have allowed defendants to so assert is of no moment. As reflected in the committee comment emphasized in *Hardy*, the Legislature is cognizant of the deterrent function of compensatory damages. All compensatory damages are "punitive" to a defendant who would rather pay nothing. That is all Defendants' argument amounts to.

[20] *See* McClurg, *It's a Wonderful Life*, 66 Notre Dame L Rev 57 (1990) for a persuasive deconstruction of "the perverse pecuniary loss rule."

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Consider the difference between instructing a jury to consider "the *(loss of earning capacity after the plaintiff has reached the age of eighteen)," M CIV JI 50.0, and instructing a jury to punish:

> [I]f you believe that justice and the public good require it, you may award an amount of money which will punish [(Defendant's name)] and discourage [it/him/her] and others from similar conduct. [Illinois Pattern Instruction 35.01.]

The two instructions lead to two different thought processes and two different awards. The Michigan instruction asks the jury to determine if an economist has accurately estimated what the decedent probably would have earned if he had lived. It does not become the Illinois instruction simply because the person who most directly suffered the element of damage is, thanks to the defendant, not around to directly receive compensation. If that were the dividing line between allowable "compensatory" damages and disallowed "punitive" damages, then damages for the decedent's conscious pain and suffering would be "punitive" and disallowed because they put his estate in a "better" position than if he had never suffered.

"[P]unitive damages are available in Michigan *only* when ***expressly*** authorized by the Legislature." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 765; 685 NW2d 391 (2004). The Legislature knows how to expressly provide for "punitive damages," which defeats any argument that conscious pain and suffering damages are expressly authorized to punish. *See,* e.g., MCL 15.240(7) Further, Michigan defines "punitive" damages narrowly, even distinguishing "exemplary damages," which are recoverable "not as

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punishment of the defendant" but as compensation for "the humiliation, sense of outrage, and indignity resulting from injuries maliciously, willfully and wantonly inflicted by the defendant." *Kewin v Mass Mut Life Co*, 409 Mich 401, 419; 295 NW2d 50 (1980). Exemplary damages are generally not recoverable outside of assault and defamation cases as they require a showing of willful and wanton misconduct.

Thorn and *Denney* do not create a punitive damages free-for-all, as Defendants suggest. "Punitive" damages in the narrow Michigan sense may not be expressly excluded by the WDA, but they are not expressly authorized. The same limitations on exemplary damages that apply to the underlying action apply to its continuance under the WDA. *See Thorn*, 281 Mich App at 653 (explaining exemplary damages are prohibited because they are unavailable in the underlying action, not because they are excluded by the WDA damages clause).

6. The *Denney* panel made the only possible decision that complied with: (1) this Court's binding interpretations of "All actions and claims survive death," MCL 600.2921; and (2) the plain text: "the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including . . ." MCL 600.2922(6).

With all that background, it is necessary to return to *Denney*. In *Denney*, defendant was not merely arguing the WDA allows loss of financial support and not lost earning capacity; it was arguing lost support and lost services damages were the same as the lost society damages excluded in *Wesche*—that is, unrecoverable ***under the highway exception*** because they were nonbodily injuries not "suffered by" a person who had

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"sustain[ed] bodily injury." That interpretation was correct because Michigan's analysis starts with the underlying claim.

The *Denney* parties also apparently disputed whether death was instantaneous for the purpose of conscious pain and suffering damages. Assume arguendo death was instantaneous and no conscious pain and suffering could be shown—a scenario likely to occur in the future. If the WDA filters out lost earning capacity, there is no recovery *at all* for a death caused by a defective highway. But if the decedent had survived, he would have been able to recover his lost earning capacity. Thus, the *Denney* panel was confronted with a defense argument that would have rendered *two* statutes nugatory: MCL 600.2921 ("All actions and claims survive death") and MCL 691.1402(1) (providing a government agency having jurisdiction over a highway remains liable for "bodily injury.").[21]

The *Thorn* panel recognized, "[f]or symmetry and continuity, if 'the limitation on damages [of an underlying claim] must apply in [a] wrongful death action,' so too must the damages that are available in the underlying claim be recognized." *Thorn*, 281 Mich App at 659, quoting *Wesche*, 480 Mich at 91. That has to be correct. MCL 600.6921 does not say "Limitations on all actions and claims survive death." This Court had recognized

[21] Defendant may reply that the statutes are not rendered nugatory because such a plaintiff's survivors are free to maintain an action for no damages at all. But, as this Court has recognized, a right cannot be said to exist without a remedy. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 691; 983 NW2d 855 (2022).

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the same in *Shinholster*, 471 Mich at 564 ("[W]e believe that the Legislature . . . permit[ed] a decedent's estate to recover ***everything*** that the decedent would have been able to recover had she lived.") (emphasis in original).

Denney was not wrongly decided. It was the only correct decision. Other states, either expressly or by judicial gloss, have limited their survival acts to the damages sustained by the decedent between the time of injury and the time of death. That has never been the case in Michigan. Prior to the 1939 Amendments, a survival action allowed recovery of the decedent's earning capacity throughout his whole life expectancy, not his life as shortened by the defendant's negligence. *Olney* held the 1939 Amendments had incorporated, rather than destroyed, survival of the decedent's action. *Baker* did not overrule *Olney* on that point; it simply held that the 1939 Amendments "filtered" all but the enumerated categories of damage, "pecuniary injury" to dependents chief among them.

In the years between *Olney* and *Endykiewicz*, and the survival act got lost somehow. This Court returned to it in *Hawkins*, 415 Mich at 437 (overruling *Coury v General Motors Corp*, 376 Mich 248; 137 NW2d 134 (1965) on grounds that it "in light of the majority opinion in *In re Olney*, supra, it cannot stand for the proposition that the post-1939 death act created a new and special remedy accruing to those who suffer loss by the death). *Hardy* then recognized the 1961 Legislature's passage of a new survival act even broader in scope. 429 Mich at 440 ("We, therefore, believe that since 1846 the law

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in Michigan has evolved to the point where it may now be held that the right to recovery for wrongful death "survives by law.") That was, as recognized in the dissent, a departure from the "view [] followed by the vast majority of states . . . ." *Hardy*, 429 Mich at 446 (RILEY, C.J., dissenting).

Jenkins, *Shinholster*, and especially *Wesche*, recognized that *Hardy's* interpretation of the survival act was not limited to statute of limitations issues, but affected the categories of damage available in a wrongful death action. *Thorn* applied a text-focused analysis of the WDA damages provision for the first time since the 1971 Amendments, which since that date has provided a jury "may" award what it considers "fair and just [or equitable] under all the circumstances," followed by a nonexclusive list of considerations. The Legislature and this Court had already done all the work for the *Denney* panel, and it was binding. The panel was not free to ignore this Court's plain reading of "all actions survive death" or apply unique, defendant-favorable rules of statutory interpretation to one term ("loss of financial support") in an exemplary list.

If the plain language of a statute governs, then it must govern—even when it results in greater liability than what a defendant thinks the Legislature "must have" (silently or impliedly) intended. The 1985 addition of "loss of financial support" to the list introduced by the unamended "fair and equitable under all the circumstances including" language is not "the most direct expression of legislative intent [to exclude lost earning capacity] possible." (Defendants' Brief, p 58). The most direct expression possible would

be "loss of financial support ***but not the decedent's earning capacity***," and the statute does not say that. If that was what the 1985 Amendments meant to say, the Legislature has had over seven years since *Denney* to add the phrase. While several capable lobbies have presumably not remained silent, the Legislature has.

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ARGUMENT II

A PARTY SEEKING TO RECOVER THE FUTURE LOST EARNING CAPACITY OF A CHILD, DECEASED OR NOT, MUST PRODUCE: (1) EVIDENCE OF AN INJURY REASONABLY CERTAIN TO RESULT IN A LOSS OF FUTURE EARNING CAPACITY; AND (2) ADMISSIBLE EXPERT TESTIMONY TO ASSIST THE FACT-FINDER IN QUANTIFYING THE LOSS.

A. Standard of Review.

The issue presented is legal in nature, and thus reviewed *de novo*. *See* Argument I standard. As applied to this case, the issue is also reviewed *de novo* under MCR 2.116(C)(10). *El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). At the summary disposition stage, the question is whether the plaintiff has met the burden of *producing* evidence for each element of his claim, and a Court may not grant summary disposition simply because it finds the plaintiff's production *unpersuasive*.[22]

B. Summary.

In both *Zehel v Nugent*, 344 Mich App 490; 1 NW3d 387 (2022) and *Jumaa* (issued the same day by the same panel), the Court found "little clear authority in Michigan regarding a claim for a child decedent's lost wages or lost earning capacity." *Jumaa*, 344 Mich App at 533; *Zehel*, 344 Mich App at 506 (same). The panel apparently assumes that the current WDA imposes a unique burden of proof for future economic damages which

[22] *In re Madrigan Estate*, 502 Mich 154, 165 n 5; 917 NW2d 325 (2018) ("The term 'burden of proof' encompasses two distinct concepts: (1) the burden of producing evidence, satisfactory to the judge, of a particular fact in issue; and (2) "the burden of persuading the trier of fact that the alleged fact is true.") (Quotation marks and citations omitted).

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differs from the burdens: (1) under prior death and survival statutes; and (2) in non-death cases. *See Jumaa*, 344 Mich App at 506 (finding *Lincoln*, 179 Mich at 193-195 "unhelpful" because it was decided under "a significantly different statutory scheme."). Yet the Court of Appeals found guidance in *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482, 488-489; 98 NW2d 620 (1959) (decided under the "pecuniary injury" version of the death statute) and *Hannay v Dep't of Transp*, 497 Mich 45, 86-88; 860 NW2d 67 (2014) (involving a living adult's claim under the no-fault act).

The panel correctly recognized that: (1) the question was governed by "[t]he general rule [] that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action," *Jumaa*, 344 Mich App at 531 (quotation marks and citation omitted); (2) how long a decedent would have lived is uncertain but nonetheless left to the jury's judgment; (3) "loss of earning capacity permits much greater latitude [than showing wage loss from a particular job];" and (4) the law does not require "'mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable, particularly in circumstances in which the defendant's actions created the uncertainty.'" *Id*., quoting *Hannay*, 497 Mich at 86-88. Thus, the panel recognized that the burden of proof in a child death case is the largely the same as when an adult plaintiff survives. That is sensible, as today's survival and death acts, like their prior versions, do not provide a death-specific burden of proof and do not distinguish between child and adult decedents.

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Yet, the panel treated the burden in a child death case as a matter of first impression and turned to foreign caselaw[23] to decide that future earning capacity cannot go to the jury unless the decedent was "old enough" to have developed "unique and known traits and abilities." *Jumaa* at 536. The panel "decline[d] to specify how old is 'old enough'," but the cut off is somewhere around "the end of middle school." *Id*. At that time, it can be discerned whether the child "shows promise," "has any particular aspirations," and is "conscientious" or "socially adept." *Id*. Until that time, we are effectively told in *Zehel*, the law presumes the child would have lacked those traits and had the capacity to earn $0 over a normal life expectancy. *Zehel*, 344 at 509 (holding that because "there is simply no way to know anything about Rowyn's interests, aspirations, personality, strengths and weaknesses . . . we must agree with defendants that there is ***no possible that evidence*** of Rowyn's potential for [any] future earnings.") (Emphasis added).

While the *Jumaa* Plaintiffs are not currently aggrieved by the panel's decision (which was limited to whether "lost earning potential was *inherently* impermissible or speculative for a 13-year-old," *Jumaa*, 344 Mich App at 536), the accompanying opinion in *Zehel* raises concerns about the new "personal characteristics" test to which Plaintiffs

[23] *Howard v Seidler*, 116 Ohio App 3d 800 (1997); *Mecca v Lukasik*, 366 Pa Super 149, 153-154 (1987). It is unclear why these cases were selected as persuasive authority over any of the others listed in the Addendum. Neither holds a plaintiff's productions are too speculative as a matter of law in the absence of evidence about the child's "interests, aspirations, personality, strengths and weaknesses . . . ." *Zehel*, 344 Mich App at 509.

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may be subject upon remand, the panel having "express[ed] no opinion regarding Jawad specifically." *Jumaa*, 344 Mich App at 536. The panel seems to have announced a new rule that statistically-sound estimates of a child's lost future earning capacity are insufficient and cannot go to the jury unless: (1) the decedent was "old enough" (2) to "show promise."

That "personal characteristics" test: (1) conflicts with a longstanding Michigan rule of future damages in ***all*** cases: that recovery cannot depend upon a showing the defendant's negligence has made impossible; and (2) declares a plaintiff's production "too speculative" because it lacks evidence that does not add very much certainty to a lost earnings calculation.

Plaintiffs have produced the unrebutted Affidavit of economist Nitin Paranjpe, Ph.D. (JA 29-52), citing earnings data from the Census Bureau, the Department of Education, and the Department of Labor, to project lost future earnings for Jawad over his reasonable life expectancy: (1) if he only graduated from high school or (2) if he went on to earn a bachelor's degree. As foundation for his opinion that Jawad was reasonably certain to have obtained one of these two education levels, Dr. Paranjpe explained:

> Jawad Jumaa's mother has a Bachelor of Science degree in nursing (BSN) and his father is a mechanic. Nationally representative data from the National Center for Education Statistics, Statistically Analysis Report, January 1995, titled "High School and Beyond: 1992 Descriptive Summary of 1980 High School Sophomores 12 Years Later" indicates that if a parent has a Bachelor's degree, it is more likely than not, that the child would meet or exceed the Bachelor's degree, and even if a parent does not have a high

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> school diploma, it is more likely than not that the child would obtain or exceed a high school level a of educational attainment. [JA 31-32.]

Dr. Paranjpe's testimony, standing alone, is sufficient to submit the issue of lost earning capacity to a jury. Defendants never challenged the reliability of Dr. Paranjpe's data and methods. There is no evidence that something other than Defendants' negligence would have ended Jawad's life prematurely, so the injury of death caused a loss of earning capacity not just with reasonable, but absolute, certainty. Evidence concerning Jawad's interests, aspirations, and personality will be admitted to help a jury decide which educational path was most likely. But a lost earning capacity claim should not fail as a matter of law for lack of such evidence when: (1) the injury more probably than not caused a loss of earning capacity in some amount; and (2) the plaintiff produces expert testimony to assist the fact-finder in quantifying that amount.

C. Governing Law.

The personal characteristics test of *Zehel* contradicts the statement of binding law in the very same opinion that this Court does not require the impossible "in situations of injury where, from the very nature of the circumstances, precision is unattainable, particularly in circumstances in which the defendant's actions created the uncertainty.' " *Zehel*, 344 Mich App at 505, quoting *Hannay*, 497 Mich 45, 79; 860 NW2d 67 (2014).

Problems arise when no distinction is made between: (1) reasonable certainty that a particular item of damage was sustained in *some amount*; and (2) reasonable certainty as to what that amount is. When (1) is established; and (2) is impossible thanks to the

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defendant's wrongful act, "[w]e do the best we can with what we have," and the defendant bears the risk of over (or just as likely, under) compensation. *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965). That principle has been followed in all Michigan cases (except *Zehel*) since *Allison v Chandler*, 11 Mich 542, 554 (1863), in which the defendant tore down a store on land ultimately found to be in the plaintiff's rightful possession. This Court could "not resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which . . . will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury . . . ." *Id*. at 554. The United States Supreme Court cited *Allison* with approval in *Story Parchment Co v Paterson Parchment Paper Co*, 282 US 555 (1931), concerning the lost profits of a new business injured by an unlawful monopoly:

> Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for [lost future profits], cannot stand because it was based upon mere speculation and conjecture. . . . It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. ***The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.*** [*Id*. at 562 (emphasis added).]

The rule has been applied to child injuries in Michigan, and in numerous other states and federal jurisdictions. It applied to the death of a 5-year-old in *Love*, 170 Mich at 8 ("[T]he amount of the damages cannot be estimated with certainty either as to the

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element of pain and suffering or the element of future earnings after the age of 21; but this does not, as we have repeatedly held, deprive the injured person of all damages). Numerous other child injury cases before the widespread availability of labor-market statistics show that the common-law approach was to place all ***knowable*** facts before a jury and let them arrive at a number, subject to judicial review for excessiveness.[24] It is in this era, in which the reports never mention the testimony of an economist, that courts came to stress "facts relating to the age, sex, physical and mental characteristics of the child," *but also* "the position in life and earning capacity of its parents, as bearing upon the conditions in which the child would probably have been reared and educated . . . ." *Gill v Laquerre*, 51 RI at 159 (collecting authorities).

It is telling that Defendants cannot cite a case from the harsh contributory-negligence era in which the question of an injured child's earning capacity was kept from the jury after a showing of liability and the fact of adequate injury. That overwhelming common-law trend has continued to the present, albeit in modified form. Labor statistics and economists are abundant now, and because "we do the best we can with what we have," their omission should not be excused. According to the Restatement 3d of Torts:

[24] *See,* e.g., *Sadlowski v Meeron*, 246 Mich 306; 215 NW2d 422 (1927) (11-year-old); *Bos v Gaudio*, 267 Mich 517, 521; 255 NW 349 (1934) (deceased 5-year-old); *see also Rosenkranz v Lindell Ry Co*, 108 Mo 9 (1891); *JS Betts Co v Hancock*, 139 Ga 198 (1912); *Miami v Finley*, 112 Okla 97 (1925) (4-year-old); *Jackiewicz v United Illuminating Co*, 106 Conn 310 (1927) (3½-year-old); *Goldberg v PRT Co*, 299 Pa 79, 85 (1930); *Gill v Laquerre*, 51 RI 158 (1931).

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d. The special case of permanently disabled or deceased children. The most difficult cases are those involving the catastrophic permanent injury or death of a young child. In such cases, reliance upon statistical data about average earning capacity is an appropriate measure, and if the child is too young to have demonstrated individual aptitudes or potential, no better measure may be available. Expert testimony on average earning capacity should be required.

Predicting lifetime future earnings of a young child cannot realistically be done on an individualized basis, but courts necessarily attempt the task. Denying all recovery for future earning capacity on the ground that the amount is speculative would unjustly refuse compensation in a whole class of cases for a harm that is both certain in fact and large in amount, and it would create insufficient incentives to take care to avoid injuring children. ***A few courts have denied recovery,[25] but most have not.[26]*** If the child is too young to have demonstrated any individual aptitude or potential, average earning capacity for all adults is the most equitable measure.

Litigants often offer evidence of the parents' income and educational achievement, and they argue that the injured child's adult income would likely have been similar. There is force to such predictions in our society, and many courts have admitted such evidence, often with little explicit consideration of the issue. Basing damages on such predictions is problematic and in some cases unfair, because it penalizes or rewards the child without regard to anything the injured child has done, based only on what the uninjured parents have done. But allowing such evidence is clearly the majority rule, and while it is not very accurate, courts that allow it appear to view it as more nearly accurate than assuming that every injured child would have earned the average income. ***Either approach is more accurate than assuming that the child would have had zero lifetime earning capacity. Assuming zero lifetime earning capacity is grossly undercompensatory.***

In cases of older children with above average academic achievement or some other demonstrable skill or aptitude, evidence of such achievements is admissible to show a higher-than-average earning capacity but for the injury. Similarly, an older child who has dropped out of high school, or

[25] *See* Addendum, citing 2 jurisdictions.

[26] *See* Addendum, citing over 14 jurisdictions.

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> accumulated other evidence of limited earning capacity, may be found to have had a lower-than-average earning capacity. [§18, comment d (2023)] (emphasis added).

D. Argument.

1. When there is preponderate evidence of an injury reasonably certain to cause lost future earnings in some amount, only a reasonable basis is required to quantify the amount. Reliable statistical averages supported by expert testimony are necessary and sufficient to establish the lost earning capacity of a catastrophically injured child.

The common-law consensus for proving lost future earnings—whether the plaintiff is a surviving or deceased child, a surviving or deceased adult, or a surviving or deceased business—is that plaintiff must produce evidence of: (1) an injury reasonably certain to cause lost future earnings in *some* amount; and (2) a reasonable basis for *quantifying* the amount.

While preponderate evidence of an injury from which lost earnings follow is *always* necessary, evidence of quantification is *always* speculative, as the very existence of an adequate injury means direct evidence from a universe in which the injury never occurred is unobtainable. Therefore, in ***all*** cases of demonstrated injury, "[w]e do the best we can with what we have" when it comes to quantification. *Godwin*, 376 Mich at 368. Excusing a defendant who has caused an injury so complete that it is impossible to say what an uninjured plaintiff might have looked like is to make a wrong a right. Doing so effectively grants a right to cause such an injury and may even inspire the injured or their loved ones to "right themselves by violence" when the law will not do so by reason. *Allison*, 11 Mich at 554.

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Cases involving catastrophically injured children do not fall outside of this general framework; they just present different circumstances for application. With widely available labor statistics, "the best we can with what we have" is better than when the Court was content to place soft data about a child's background and personal characteristics before the jury, and then review for excessiveness. But that does not mean the governing principle has changed. The goal is still to "[p]lace before the jury all the facts and circumstances of the case . . . so as to enable them to make the most intelligible and probable estimate which the nature of the case shall permit." *Allison*, 11 Mich at 555. This Court does not, however, "preclude recovery [of damages] for lack of precise proof or require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable, particularly in circumstances in which the defendant's actions created the uncertainty." *Hannay*, 497 Mich at 79 (alteration in original).]

The ideal modern formulation of the reasonable certainty framework applied to catastrophically injured children was stated in *Andrews v Reynolds Mem Hosp*, 201 W Va 624, 632 (1997):

> [A] jury award for the lost future earnings of an infant . . . will not be set aside by this Court as speculative: (1) where the award of lost future earnings is within the range of estimated future earnings, based upon various life scenarios, reduced to present value, established by the expert testimony of an economist at trial and (2) where the economic and medical evidence of the plaintiff at trial indicates that the infant in question . . . would statistically have had an average life expectancy . . . but for the alleged [negligence].

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The Court of Appeals has reached similar conclusions in nondeath cases. *May v William Beaumont Hosp*, 180 Mich App 728, 747; 448 NW2d 497 (1989), cited but not discussed by the panel in this case and *Zehel*, was a birth trauma case. The infant sustained "impaired intellectual and language functioning . . . with a ballpark IQ of about sixty." *Id*. "Evidence was presented at trial showing that, had Robert not been injured, he could have been a construction worker or a factory worker" and "that an average construction worker earned $14.80 per hour in 1984." *Id*. at 753. The Court of Appeals rejected defendant's argument that the evidence was too speculative, applying a familiar principle:

> When the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount. In this case, the future lost earnings of the injured minor could not be ascertained with complete certainty. ***Thus, under the facts and circumstances of this case, it was not improper or unreasonable to present evidence on what an average semi-skilled or skilled laborer earns***. [*Id*. at 762 (emphasis supplied), citing *Allison*, 11 Mich at 554.]

In *Craig v Oakwood Hosp*, 249 Mich App 534, 542-543 (2002), rev'd on other grounds, 471 Mich 67 (2004), the Court explained that while predicting a particular career path may be too speculative, "the minimum earning capacity for someone with a high school education could be accounted for by "the national data . . . [which] included high school graduates who were unemployed and underemployed, as well as those who aspired . . . ." *Id*. at 542.

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Comparing *May* and *Craig* with the Court's opinions in *Zehel* and this case raises several questions. Here, the injury is certain as is the loss of earning capacity in *some* amount. There is no evidence Jawad's life would have ended prematurely by means other than Defendants' negligence. Must Plaintiffs conclusively disprove the statistically-unlikely possibility that Jawad would have dropped out of high school and gone on to have absolutely no gainful employment for the rest of his life? Assuming arguendo that Plaintiffs are required to disprove that hypothesis, would soft, unscientific factors like childhood personality traits even be sufficient to do so? Do they really add any certainty to quantification? Has Michigan law ever struck an economic analysis of quantifiable data for failure to consider nebulous "personality" traits in any other context?

As a notable opponent of judicial hostility to statistics has stated:

> This is how damages are calculated in personal-injury cases; and a judge is not free to say, in my court we do not allow statistical inference. Knowledge increasingly is statistical, and judges must not let themselves lag too far behind the progress of knowledge. As a matter of fact, they have not lagged. The kind of evidence that the district court rejected in this case, evidence of probability of survival, invariably based on studies of a group of people rather than just the individual plaintiff, is an increasingly common basis for awarding damages. [*DePass v US*, 721 F2d 203, 209 (CA 7, 1984) (POSNER, C.J., dissenting).]

The Court of Appeals opinion in *Craig* reflects the correct understanding of the law of future damages when a child is catastrophically injured. It is the same understanding the vast majority of courts have reached, probably by following the simple principle that when the fact of damage is reasonably certain, "we do the best we can with what we have" when it comes to quantification. Unless there is some strong reason to believe a

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child would have chosen a particular career, national average incomes at different levels of educational achievement, coupled with information about the child's family background[27] to help the fact-finder choose between them, is the best evidence possible. The likelihood that an award based on such averages will be over-compensatory is unknown and unknowable, and therefore equal to the likelihood that it will be under-compensatory. Defendants can challenge the reliability of an economist's data and methods. They can offer their own economist. The alternative—assuming a lifetime earning capacity of zero unless the child was "old enough" to "show promise"—is not only grossly undercompensatory, but also wildly speculative according to the best available data. And while it is unclear if the panel intended to limit *Zehel* to death cases, it is more than "reasonably" certain to spill over to all cases in which a child is injured, leaving courts the unenviable task deciding how old is "old enough" and whether an individual child has displayed enough positive personality traits to "show promise." The alternative of using reliable statistical averages to establish economic damages is not foreign to Michigan law. *See* MCL 600.2946a(4).[28]

[27] Such evidence ***is*** "personalized" to the child.

[28] "(4) If damages for economic loss cannot readily be ascertained by the trier of fact, then the trier of fact shall calculate damages for economic loss based on an amount that is equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer in the same manner as provided in subsection (1)."

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2. There is no basis in the text of the Wrongful Death Act or Michigan common law for reducing an injured person's award for personal consumption or tax liability he would have incurred in the absence of injury. Defendants should not receive a set off for taxes Jawad would have paid because he never would have owed taxes to Defendants.

Finally, Defendants argue there must be unique deductions in death cases for the cost of personal maintenance and for taxes the decedent would have paid, or the award is punitive. As previously explained, damages calculated to compensate ascertainable damage (here, Jawad's lost-earning capacity) do not become "punitive damages" simply because the defendant has rendered the person who most directly sustained the damage unable to enjoy compensation. Under that logic, a decedent's conscious pain and suffering, as well as the lost earning capacity of a person who survived in a comatose state, would be "punitive" and hence unrecoverable.

Nothing in the WDA's text that requires a deduction for personal consumption or taxes. The personal maintenance/consumption deduction only existed in this Court's cases in connection with the "pecuniary injury" limitation that was removed by 1971 PA 65. Some federal courts have determined a failure to deduct income taxes results in a punitive award against the United States, which is forbidden by the Federal Tort Claims Act, 28 USC §2674 (the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively.") *See,* e.g., *Felder v US*, 543 F 2d 657 (CA 9, 1976). Others have held just the opposite. *Palmer v US*, 146 F 3d 361 (CA 6, 1998), adopting *Hollinger v United States*, 651 F 2d 636, 642 (CA 9, 1981) (" In excluding "punitive" damages from the coverage of the

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Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together.") These federal cases are inapposite. Unlike a plaintiff suing the federal government, Jawad never would have owed any taxes to Defendants.

Next, while such a deduction may be sensible when the Legislature has ***expressly*** limited the measure of damages to survivors' loss,[29] it makes no sense when the Legislature has allowed a jury to recognize the full injury *to the decedent*. As many scholars in the law and economics tradition have noted, it is not punitive to make defendants pay the full value of injuries they have caused; rather, it is economically efficient to deny defendants the privilege of externalizing costs they create.[30] It is also just. Like the railroad in *Olivier*, Defendants fundamentally misunderstand the injury they are required to compensate: "The action is to recover the damages which have resulted as a present loss to [Jawad], in being deprived of a capacity to earn money, which capacity he had before the injury, and which he now has not." *Olivier*, 138 Mich at 245. "If we

[29] *See Miller v State Farm Auto Ins Co*, 410 Mich 538, 562-569; 302 NW2d 537 (1981) (upholding a deduction for taxes the decedent would have paid under the survivor's loss provision of the no-fault act, but rejecting a deduction for personal consumption as impractical given the extreme overlap between "personal" and "family" expenses.).

[30] *See, e.g.*, Landes & R. Posner, *The Economic Structure of Tort Law*, p 187 (1987); McClurg, *supra*, n 20; E. Posner & Sunstein, *Dollars and Death*, 72 U Chi L Rev 537 (2005); Hannon Williams, *Dead Children*, 67 Ala L Rev 739 (2016).

subtract nothing from such expectancy, we have as a result the period of earning capacity of which [Jawad] is deprived." *Id*.

Does the perspective of a person wrongfully denied everything count for nothing because he can no longer speak for himself? We cannot ask Jawad "should there be a discount for ending your life?" But it isn't "too speculative" to conclude that he would answer the same as those of us still living.

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RELIEF

WHEREFORE, Plaintiffs-Appellees request this Court affirm, adopt Plaintiffs' position on each issue, and enter any other relief the Court deems appropriate under the circumstances.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & HARRINGTON, P.C.

By: /s/ Robert G. Kamenec
Robert G. Kamenec (P35283)
Lead Attorney for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555; (248) 233-3560 (f)
(313) 268-9875 (cell)
r.kamenec@fiegerlaw.com

FIEGER, FIEGER, KENNEY & HARRINGTON, P.C.

By: /s/ Adam G. Winn
Adam G. Winn (P84137)
Attorney for Plaintiffs-Appellees
19390 West Ten Mile Road
Southfield, MI 48075-2463
(248) 355-5555; (248) 233-3560 (f)
a.winn@fiegerlaw.com

Dated: February 23, 2024

CERTIFICATE CONCERNING COMPLIANCE WITH ADM FILE NO. 2019-16

Audra A. Arndt states that the foregoing document does not comply with 6/29/22 Order in ADM File No. 2019-16, effective 9/1/22, and the word count requirements contained therein (namely a limit of 16,000 words). Using the word count feature in Microsoft Word (the word processing software used to prepare this document) and including or excluding certain sections as provided for in the applicable court rules, the number of countable words in the foregoing document is 17,720. Therefore, Plaintiffs' have filed a Motion to Exceed Word Count with this Brief on Appeal.

/S/ Audra A. Arndt
Audra A. Arndt

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ADDENDUM: SURVEY OF JURISDICTIONS DENYING AND ALLOWING RECOVERY OF FUTURE EARNINGS OF A YOUNG CHILD

Disallowed:

Michigan: *Zehel/Vasquez v Nugent, MD*, 344 Mich App 490; 1 NW3d 387 (2022); MSC Docket No. 165375, Application held in abeyance pending *Daher/Jumaa*, 994 NW2d 787 (9/22/2023).

North Carolina: *DiDonato v Wortman*, 320 NC 423 (1987) (holding "that lost income damages normally available under [NC's wrongful death act] cannot be recovered in an action for the wrongful death of a stillborn child.").

Virginia: *Bulala v Boyd*, 239 Va 218 (1990) (holding that "statistical averages are too remote from the plaintiff's personal situation . . . .").

Allowed:

California: *Zhao v US*, 963 F 3d 692 (CA 7, 2020) (no abuse of discretion in awarding lost earnings calculated on assumption that 5-year-old would have graduated high school).

District of Columbia: *Wheeler Tarpeh-Doe v US*, 771 F Supp 427 (DDC 1991) (given family background, newborn's lost earnings were properly calculated by considering average income of college graduates).

Georgia: *Childs v US*, F Supp 1570 (SD Ga 1996) (dueling experts "at liberty to make assumptions consistent with the interests of the party."); *Murray v Sanford*, 226 Ga App 591 (1997) (jury's "enlightened collective conscience" sufficient).

Illinois: *Alvis v Henderson Obstetrics, SC*, 227 Ill App 3d 1012 (1992) (allowing jury to infer lost earnings award from fact of injury).

Maryland: *Meunstermann v US*, 787 F Supp 499 (1992) (same as *Wheeler:* given family background, newborn's lost earnings were properly calculated by considering average income of college graduates).

Mississippi: *Greyhound Lines v Sutton*, 765 So2d 1269 (Miss 2000) (creating "rebuttable presumption that the deceased child's income would have been the equivalent of the national average.")

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Missouri: *Vincent v Johnson*, 833 SW2d 859 (1992) (allowing economist's estimate)

New Jersey: *Lesniak v Cty of Bergen*, 117 NJ 12 (1989) (holding evidence of quantification unnecessary for infants).

New York: *Kavanaugh v Nussbaum*, 514 NYS2d 55 (1987) (newborn's lost earning capacity established by economist's testimony regarding average wages of high school graduate), aff'd 523 NE2d 284 (NY 1988) (rejecting as "without merit" argument that award so calculated was "bloated.")

Ohio: *Jones v MetroHealth*, 89 NE3d (Ohio App 8 Dist 2017) (holding that award for future economic damages to premature child was "at a minimum $1.7 million" based on economist's unrebutted testimony).

Pennsylvania: *Slavin v Gardner*, 274 Pa Super 192 (1979) (accepting extrapolation to 2-year-old from parent's earnings and educational background).

Texas: *Roth v Law*, 579 SW 2d 949 (Tex Civ App 1979) (economist's "guesstimate" sufficient evidence of 6-year-old's lost earning capacity).

Wisconsin: *Thoreson v Milwaukee Transp Co*, 56 Wis2d 231 (1972) (economist's testimony regarding wages of "average working man" sufficient to show lost earning capacity of 3-year-old).

West Virginia: *Andrews v Reynolds*, 201 W Va 624 (1997) (approving award "within range of estimated future earnings" established by economist for deceased newborn).