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STATE OF MICHIGAN

IN THE SUPREME COURT

NAWAL DAHER and MOHAMAD JOMAA
As Co-Personal Representatives of the
ESTATE OF JAWAD JUMAA aka
JAWAD JOMAA, Deceased,

Plaintiffs,

v

PRIME HEALTH CARE 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.

Case No.: 165377

Court of Appeals No.: 358209

Wayne Circuit No.: 20-004169-NH

BRIEF OF *AMICUS CURIAE* TRINITY HEALTH

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ORDER APPEALED FROM

Defendants sought leave to appeal from the trial court's July 28, 2021, order denying their motion for partial summary disposition seeking dismissal of Plaintiffs' claims for loss of the decedent's future earnings and earnings capacity. The Court of Appeals granted Defendants' application on October 13, 2021. A lead opinion and concurrence were issued on December 1, 2022, upholding the trial court. A timely motion for reconsideration was denied on January 13, 2023. A timely application was filed in this Court on February 24, 2023, and the Court subsequently granted leave to appeal.

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STATEMENT REGARDING JURISDICTION

Amicus curiae Trinity Health concurs with the statements by the parties to this appeal regarding the basis for jurisdiction.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Trinity Health Michigan is a leading health care provider and one of the state's largest employers. With more than 24,000 full-time employees serving numerous counties, Trinity Health Michigan is composed of eight hospitals, including the five hospitals of Saint Joseph Mercy Health System and the three-hospital Mercy Health System. Trinity Health Michigan has approximately 2,348 beds and 3,400 physicians. Together with numerous ambulatory care locations, three home health agencies, one hospice agency and 17 senior living communities owned and/or operated by Trinity Health, Trinity Health Michigan provides the full continuum of care for Michigan residents. On a national level, Trinity Health includes over 100 hospitals and 121,000 associated providers, and serves patients in 27 states.[1]

[1] Pursuant to MCR 3.212(H)(), the undersigned counsel states that this brief was not authored in whole or in part by counsel for a party to this matter. None of the parties or their counsel contributed monetarily to the authorship of this brief. Trinity Health made the only monetary contribution to the preparation of this brief.

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STATEMENT OF QUESTION PRESENTED

Is lost earning capacity a recoverable element of damages in wrongful death actions?

Plaintiffs answer:	Yes.
Defendants answer:	No.
The trial court answered:	Yes.
The Court of Appeals answered:	Yes.
Amicus Curiae Trinity Health answers:	No.

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STATEMENT OF MATERIAL PROCEEDINGS

Plaintiffs assert medical malpractice resulting in the death of a thirteen-year-old who was suffering from bacterial meningitis. The decedent was not working or providing financial support to any family member. There is no evidence in the record that any family member had any expectation of receiving financial support from the minor decedent in the future. The complaint alleges that the estate is entitled to recover the decedent's future earnings. Plaintiffs' economics expert estimates the decedent's future earnings at between $11 and $19 million.

Defendants moved for partial summary disposition on April 30, 2021, seeking dismissal of Plaintiffs' claim for the decedent's future earnings. The trial court heard oral argument on the motion on July 21, 2021. The trial court entered an order denying the motion on July 28, 2021. That decision led to the appellate proceedings which have brought the matter before this Court.

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ARGUMENT

The primary arguments regarding *Denney v Kent County Road Comm*, 317 Mich App 727; 896 NW2d 808 (2016) and lost earning capacity damages in wrongful death actions have been extensively briefed in the numerous briefs which have been submitted through the course of this appeal. This brief will not repeat that analysis. Three topics will be addressed herein. A review of the remarkably significant impact which *Denney* has had in a relatively short period of time will lead off the discussion. A detailed study of the language and analysis in *Denney* will follow, in order to demonstrate that the award of lost earning capacity in *Denney* was entirely dependent on specific statutory authorization which is not present in wrongful death actions generally. The third topic is an examination of the rationale (if any) which could be used to justify allowing lost earning capacity damages in wrongful death actions under *Denney*. That discussion leads to the conclusion that the only justification which can be found is an award of punitive and/or exemplary damages.

1. ***Denney* Has Produced a Remarkable Change in Wrongful Death Actions.**

Prior to *Denney*, the issue of lost earning capacity in wrongful death cases did not seem controversial. Michigan's survival and death statutes were combined in the modern WDA when it was established in 1939. *Baker v Slack*, 319 Mich 703; 30 NW2d 403 was issued in 1948. The opinion clearly stated that claims for earning capacity were not recoverable in wrongful death actions. This was the settled understanding for almost 70 years. There was some related appellate activity involving claims for the earnings of a deceased minor during the first decade and a half. This Court affirmed that parents could only recover for economic damages due to death of a minor to the extent that the facts demonstrated an established, enforceable expectation of support. See, e.g., *Thompson v Ogema Co Bd of Rd Comm*, 357 Mich 482; 98 NW2d 620 (1959); *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962). Consistent with *Baker*, recovery was limited to loss of support.

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There was some relevant activity in the 1970's, beginning with this Court's opinion in *Breckon v Franklin Fuel Co*, 383 Mich 251; 174 NW2d 836 (1970). Essentially, the Court held that damages for loss of society and companionship were not recoverable under the WDA. The Legislature promptly responded by amending the WDA in 1971 to specifically include loss of society and companionship, along with other already established categories of pecuniary loss. For the next 45 years, it was universally accepted that an estate could recover for loss of support. There was not even a hint of suspicion that loss of earning capacity was recoverable. That changed overnight with the 2016 publication of *Denney*.

Although *Denney* is a relatively recent decision, it has already had a notable impact. Subsequent decisions have developed a legacy which is both significant and surprising. It was a *per curiam* opinion with little fanfare, and it is doubtful that anyone had any suspicion that it would have such a remarkable impact. In just a little over seven years, *Denney* has become the foundation for a new element of damages in wrongful death actions. Examples can be found from cases across the state. A few which are known to this writer will be reviewed. Others will continue to be made as plaintiffs' attorneys continue to invent new arguments based on the *Denney* principle.

The first spin-off from *Denney*, and the most obvious, is a claim for a decedent's lifetime earning capacity regardless of whether the decedent had any dependents and/or had any established pattern of providing support. When *Denney* was published in 2016, this type of financial claim was unheard of. Today, it has become routine. It was prompted by the language in *Denney* to the effect that an estate should be able to recover anything of value which the decedent would have ever obtained. While that concept seems like a reasonable statement in the abstract, it must be implemented in the real world. It is a broad, vague concept, and there is great potential for expansion of the ways in which a person's death deprives the world of something of intrinsic value. Since *Denney*, plaintiffs routinely ask for previously unknown damages. Plaintiff's attorneys no longer feel limited to the loss

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of support which reflects the actual loss experienced by the decedent's heirs. Rather, they now expect to receive every item of intrinsic value which the decedent had to potential to one day obtain, and are limited only by the ability to come up with a way to argue that there is some intrinsic value to the item of damages being claims.

There is another wrinkle to post-*Denney* claims. Plaintiffs no longer limit wage loss claims to the realities of a life. As already noted, loss of support is no longer a guide. It now appears that prior earnings do not matter all that much either. Plaintiffs now seek a decedent's entire earning potential. Loss of the probable earnings a decedent would have made is not enough. Plaintiffs now routinely ask for lifetime earning capacity, the maximum a person could ever have earned. Estates now offer economic loss reports which include 100% of a decedent's projected earning capacity over the balance of his or her life. This is a marked change from the historic approach of awarding an estate the loss of support established by the evidence.

The idea of requesting the theoretical maximum that a decedent might have earned has resulted in changes to other factors related to calculation or conceptualization of financial loss. In the hands of creative attorneys, recovery of anything the decedent might ever have earned can be extended to cover a variety of previously unheard-of demands. Plaintiffs now make claims which defy the realities of real world living. Estates now ask for 52 weeks of earnings each and every year. They make no allowance for vacations or sabbaticals. They assume that no one will ever experience periods of unemployment due to job changes, economic uncertainties, educational opportunities, or personal preference and lifestyle choices. They also claim an earnings curve which continues to rise as retirement approaches, in spite of the reality that the average person's earnings tend to be affected by a variety of factors and no one ever actually attains his or her maximum earning capacity. *Denney* has been so stretched that the reference to lifetime earnings has become an open-ended source of revenue

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for creative attorneys, limited only by their ability to characterize something as a loss of "intrinsic value" with no regard for the longstanding rules and standards applicable to wrongful death actions.

Another significant area of concern which follows from claiming everything that a decedent might ever have obtained is the possibility of a double recovery. When *Denney* was issued, there was some concern within the defense bar that plaintiffs would begin to seek the loss of support which was known to be available in wrongful death actions and, in addition, would begin to also seek lifetime earning capacity as a separately recoverable element of damages. This concern was well-founded. When the present matter was first filed in the appellate courts, there already were a handful of cases which could be cited. As of this writing, claims for both loss of support and loss of earning capacity have become, if not routine, at least quite common. Plaintiffs' attorneys base these claims on the sophistry that loss of support and loss of earning capacity both represent distinct losses. The estate's beneficiaries experience a loss of support, while the decedent (or the estate) experiences a loss of an earnings stream (the earning stream which pays for the support). Economists are offered to testify that both lost support and lost earning capacity have intrinsic value. Plaintiffs then argue that a jury should be allowed to decide if it wishes to award those distinct losses. As of this time, there does not appear to be a clear precedent denying these double recovery claims. This may simply be because such claims defy logic and thus were never made before *Denney*. Whatever the reason, the fact remains that there is limited guidance for trial courts to follow and, until the double recovery issue is resolved, claims for both loss of support and loss of earning capacity will likely continue to be made.

Yet another wrinkle based on the concept that the estate should be able to recover anything which the decedent might have ever received is a change in claims for household services. It was common practice to recover for the services a decedent would have provided to his or her family prior to *Denney*. That claim is still being made, but plaintiffs have begun adding another layer to it. This new claim begins with the testimony of an economist to the effect that the services a person would

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have provided to him or herself would have had intrinsic value. An attorney then argues that someone should recover that value, even though the "loss" of these services would not deprive any living person of anything. There would be no concrete loss to anyone alive to experience the loss. A six-figure amount would nonetheless be added to the economist's report to represent the loss to the estate because the decedent could not perform services for his or her own benefit. Concern that this argument might be raised has been validated. While it is not yet universal, a claim for the value of services the decedent formed for personal benefit has become another common claim.

The last scenario is the most extreme that this writer is aware of. There are likely more surprises in store, more ways in which *Denney* will be applied. Some have raised concerns that truly farfetched claims will come along. For example, some point to medical care which would have been needed but is no longer necessary after of a death. In those cases where a decedent would have required expensive medical care if he or she had lived, a plaintiff could argue that the death deprives the estate of the value of those services. Others have questioned whether a decedent's Social Security benefits could be claimed, as they represent an income stream which is interrupted by a death. Other examples can be found, and still more are sure to come along. For the moment, suffice it to say that, even if no additional variations come along, *Denney* has already been used to take economic damage claims in wrongful death actions to previously unknown frontiers. Whether it be through the now routine claims for lost earning capacity rather than lost support, or the more creative claims for conceptual losses which simply ignore reality, *Denney* has already produced a broad transformation of the wrongful death landscape. It is respectfully submitted that the various unexpected ramifications of *Denney* should not be allowed to stand. This type of wholesale change in civil damages is best left to the Legislature.

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2. ***Denney* Allowed Earning Capacity Under the Authority of a Statutory Provision and It's Reasoning Does Not Support the Argument that Earning Capacity is Available in Wrongful Death Actions Generally.**

Denney has made an impact, but it is not yet firmly established. This Court is now tasked with considering its reasoning and analysis, and determining whether *Denney* is properly cited as the new standard in wrongful death actions generally. Upon close inspection, there is good reason to conclude that, even if it was correctly decided, *Denney* was a very case-specific ruling based upon the complicated framework of tort claims under the GTLA. It was never intended to represent a broad change in wrongful death damages generally, and its analysis does not support the sweeping changes which have followed in its wake.

Denney arose from a single vehicle accident caused by a highway defect which resulted in death. The estate brought a wrongful death action under the highway exception to the Governmental Tort Liability Act. The estate sought to recover the decedent's lost earning capacity, in spite of the fact that the decedent did not provide financial support to anyone. Significantly, loss of support damages are not recoverable under the GTLA. The estate of a decedent who had no dependents therefore cannot recover a portion of the decedent's lost earning capacity through a claim for loss of support. *Denney* found a novel way to award those damages.

As other participants to this appeal have briefed, it is respectfully submitted that *Denney* was incorrectly decided, and that its application herein (as urged by Plaintiff) contradicts established law. More significantly, however, the facts and law applied in *Denney* are such that the decision simply does not apply herein. The right to recover found by the *Denney* Court was based on specific statutory authorization under the GTLA. *Denney* has no bearing on damages which are recoverable in wrongful death actions generally, regardless of whether it represents sound legal analysis within the confines of the specific facts of the case.

Denney must be analyzed in detail in order for its reliance on statutory authorization to be fully

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appreciated. The Court began its analysis with a brief review of the facts and the proceedings in the trial court:

> Plaintiff alleged that on the morning of May 18, 2014, Matthew Denney (the decedent) was riding a motorcycle on Peach Ridge Road NW in Kent County. As he crested a hill, his motorcycle struck two potholes in the road, causing him to lose control of the motorcycle. He sustained fatal injuries. . . Plaintiff, as personal representative of the decedent's estate, sued defendant under the wrongful-death statute, MCL 600.2922 Defendant moved for partial summary disposition, alleging that under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, it was immune from liability for damages beyond bodily injuries suffered by the decedent, including immunity for any loss of financial support (such as the decedent's lost earnings). **Plaintiff argued that damages for lost wages and loss of earning capacity fall within the highway exception to the GTLA as provided in MCL 691.1402(1)**. *Id* at 729 [emphasis added].

The trial court granted the motion, and the Court of Appeals then reversed. The Court began its analysis of the issue before it as follows:

> "[T]he wrongful death act provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death." *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). *Id* at 730.

The Court then noted:

> MCL 600.2922(6) sets forth the damages available in wrongful-death actions. *Wesche v Mecosta County Rd. Comm'n*, 480 Mich. 75, 90; 746 N.W.2d 847 (2008). That provision states, in relevant part, as follows:
>
> > 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 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. *Id* at 731.

Having reviewed this legal framework, the Court then began revealing the building blocks it would use to find that the above statutory language included the right to recover lost earning capacity, without having to first satisfy time honored common law principles (including the principle that economic damages in tort actions are intended to provide compensation to those who depended upon

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the decedent for support). The Court explained:

> The word "including" in MCL 600.2922(6) "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." *Thorn v Mercy Mem'l Hosp. Corp.*, 281 Mich. App. 644, 651; 761 N.W.2d 414 (2008). Under the wrongful-death statute "the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury." *Id.* at 660. [*Id* at 731-732.]

After thus concluding that the WDA was to be given this expansive construction, the Court turned to the GTLA, noting:

> Relevant to this case, our Supreme Court has stated that economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." *Hannay v DOT*, 497 Mich. 45, 67; 860 N.W.2d 67 (2014). [*Id* at 732.]

Immediately following this, the Court did at least recognize the framework of common law principles which must be applied (although it is not at all clear that the Court gave due deference to those principles when arriving at its ultimate conclusion). The Court wrote:

> However, "[b]ecause an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, . . . any statutory or common-law limitations on the underlying claim apply to a wrongful-death action." *Wesche*, 480 Mich. at 89. [*Id* at 732.]

At this point, the Court proceeded to synthesize its answer to the issue before it, stating (according to some) a new rule of law when it did so. In the process, the Court was unable to escape the need to buttress its holding with reference to the specific rights conferred by the GTLA:

> As previously stated, the damages available under the wrongful-death statute, MCL 600.2922(6), include "any type of damages, economic and noneconomic, deemed justified by the facts of the particular case." *Thorn*, 281 Mich. App. at 651. And economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." *Hannay*, 497 Mich. at 67. Therefore, damages for lost earnings are allowed under the wrongful-death statute. However, as a governmental agency, defendant is immune from tort liability "when . . . engaged in the exercise or discharge of a governmental function," unless an exception under the GTLA applies. MCL 691.1407(1). The GTLA broadly shields government agencies from tort liability and grants immunity to those agencies. The statutory exceptions are narrowly construed. *Id* at 732.

Note that the court relied upon *Hannay v Department of Transp*, 497 Mich 45; 860 NW2d 67 (2014)] in concluding that loss of earning capacity is, as a general rule, an element of economic damages.

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Hannay will be addressed hereinafter. For the moment, suffice it to say that the broad definition of economic damages in *Hannay* was provided in the context of interpreting a different provision under the GTLA, and does not represent a represent a broad rule regarding economic damages in common law tort actions.

Following the analysis of earning capacity, the discussion in *Denney* continues to reveal the extent to which the Court relied on specific statutory provisions in order to justify its decision to award earning capacity:

> **Plaintiff argues that the highway exception to governmental immunity permits her claim for lost earnings**. It states in relevant part that **"[a] person who sustains bodily injury** or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel **may recover the damages suffered by him or her** from the governmental agency." MCL 691.1402(1). Our Supreme Court has defined "bodily injury" as "a physical or corporeal injury to the body." *Wesche*, 480 Mich. at 85. **Although the *Wesche* Court was construing the motor-vehicle exception to the GTLA rather than the highway exception when defining "bodily injury," both exceptions are part of the GTLA, and "[i]dentical terms in different provisions of the same act should be construed identically** . . . ." *The Cadle Co v Kentwood*, 285 Mich App 240, 249; 776 NW2d 145 (2009). Therefore, the phrase "bodily injury" in the highway exception also means "a physical or corporeal injury to the body." *Wesche*, 480 Mich at 85. [*Id* at 732, emphasis added.]

The Court expanded on its reliance on specific statutory authorization before awarding lost earning capacity. A lengthy excerpt highlights the persistent need to find a statute which could serve as an anchor for its analysis:

> In *Hannay*, 497 Mich. at 50-51, our Supreme Court was called on to determine whether **the phrase "liable for bodily injury" in the motor-vehicle exception** to governmental immunity (MCL 691.1405) **allowed a plaintiff** who was injured in a motor vehicle accident **to recover economic damages, such as work-loss damages**, and noneconomic damages, such as pain and suffering. In making its determination, the Court stated that **"'bodily injury is simply the category of harm (i.e., the type of injury) for which the government waives immunity** under [the motor-vehicle exception] and, thus, for which damages that naturally flow are compensable." *Id.* at 64.
>
> > Therefore, **the legal responsibility that arises from "bodily injury" is responsibility for *tort damages* that flow from that injury**. This conclusion is supported by the fact that the GTLA generally grants immunity from "tort liability," and to the extent that this immunity is waived, the resulting liability, logically, is liability for *tort damages*. [*Id.* at 64-65,

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emphasis added]

The *Hannay* Court continued;

> tort damages generally include damages for all the legal and natural consequences of the injury (i.e., the damages that naturally flow from the injury), which may include damages for loss of the ability to work and earn money, as well as pain and suffering and mental and emotional distress damages.

The Court therefore held that a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and for noneconomic damages, such as damages for pain and suffering or emotional distress, against a governmental entity if the requirements of the no-fault act have been met. *Id.* at 51. See MCL 500.3135. The *Hannay* Court also recognized that while damages that naturally flowed from the injury were compensable, the person seeking such damages must have had a bodily injury. *Hannay*, 497 Mich at 71-72. [*Id* at 733-734, italics in original, bold emphasis added.]

The *Denney* Court next offered its summary of *Hannay*:

> What is taken from *Hannay* is that (1**) the tort damages recoverable for bodily injury under the GTLA's motor-vehicle exception and, by extension, its highway exception, are only those damages that the injured person suffered** and (2) the types of tort damages are confined to the limitations of the statute under which the action is brought—the wrongful death act in this case. Put another way, **under MCL 691.1402(1), a person who sustains a bodily injury** as a result of a governmental agency's failure to properly maintain a highway **may recover** from the governmental agency the **damages the person suffered as limited by the wrongful death act**. *Id* at 734-735 [emphasis added].

The Court summarized its conclusion, remaining true to its basic conclusion and, in the process, continuing to reveal its reliance on a statutory basis to award earning capacity rather than the existence of an actual loss which justified compensation:

> When the decedent lost control of his motorcycle on May 18, 2014, he clearly suffered "a physical or corporeal injury to [his] body"—in other words, he suffered a bodily injury. *Wesche*, 480 Mich. at 84-85. Therefore, **if the decedent had not died, he would have been able to recover under MCL 691.1402(1) damages from defendant for earnings lost as a result of the bodily injury**. See MCL 691.1402(1). And, despite the fact that the decedent died, his claim against defendant for lost earnings survived. MCL 600.2922(1). Plaintiff, a representative of the decedent's estate, brought this claim under the wrongful-death statute. **Under the highway exception, MCL 691.1402(1), the decedent could have maintained an action against defendant for lost earnings resulting from the bodily injury** he sustained on May 18, 2014. Because plaintiff was able to bring this **derivative claim under the wrongful-death statute**, MCL 600.2922(2), the trial court improperly granted defendant's motion for partial summary disposition with regard to plaintiff's claim for damages for the decedent's lost earnings. *Id* at 735-736 [emphasis added].

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In wrapping up it its analysis, the Court rejected the argument that 600.2922(6)(d) (the portion of the WDA directing the distribution of an estate's assets) was relevant in determining those damages which could be recovered. In doing so, the Court once again reminded that its decision was based upon the GTLA:

> Finally, defendant argues that MCL 600.2922(6)(d) indicates that plaintiff's claim was not one for damages suffered by the decedent because MCL 600.2922(6)(d) provides that damages are distributed directly to the beneficiaries rather than to the estate. We fail to see how the distribution of damages affects our analysis—**the decedent's lost earnings resulted from the bodily injury he sustained, and therefore, damages for decedent's lost earnings were allowed under MCL 691.1402(1)**. *Id* at 737 [emphasis added].

Denney's reliance on statutory authorization was recognized by Ingham County Circuit Judge James Jamo in *Hinkley v McLaren*, COA #358988 (Ingham Circuit #19-815-NH). The judge issued a written opinion (attached in its entirety at the end of this brief as **Appendix A**) which contains insightful analysis. The estate of a 56-year-old man sought both 1) earning capacity and 2) financial support, arguing that both are separately recoverable loses. Plaintiff relied on *Denney* and *Thorn v Mercy Mem'l Hosp. Corp.*, 281 Mich. App. 644; 761 N.W.2d 414 (2008) in arguing that the estate should be able to recover wrongful death damages *because the decedent did not live* while also recovering everything *as if the decedent did live* to seek those damages. Using this rationale, the estate sought $3.075 million in economic damages for loss of support and earning capacity in spite of the fact that the decedent's total earning capacity was only $1.675 million. The judge rejected this claim, finding that plaintiff's reliance on *Denney* was misplaced and that no other authority supported plaintiff's position.

Judge Jamo began his analysis by reviewing *Denney*. He then noted that *Baker*, being both earlier and a Supreme Court opinion, was the controlling authority. He followed with thoughtful commentary on *Baker*, and then reconciled *Baker* and *Denney* by pointing out that *Baker* reflected the

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common law while *Denney* relied upon a statutory basis for recovery. The judge explained why the two decisions do not conflict. His comments are insightful and instructive:

> However, there is older, binding case law that is applicable in the interpretation of the wrongful death statute: *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1949). The US District Court in *White* specifically addressed *Baker* and, following *Brown v Department of State Highways*, 126 Mich App 392, 395; 337 NW2d 76, 77 (1983), found that *Baker* had been superseded by the 1971 amendment to the wrongful death statute because the amendment removed the phrase "pecuniary injury resulting from such death" and replaced it with "under all the circumstances." But this change only allowed non-economic losses to be made recoverable, such as lost society or companionship; it did not change the compensable pecuniary losses. This Court therefore finds that *Baker* was not superseded by the statutory amendment of 1971 and *Baker*, being the binding Michigan Supreme Court case, cannot be abrogated by a Court of Appeals determination absent an acceptance by Supreme Court case law, and thus still controls in determining which pecuniary losses are compensable by the wrongful death statute. Under *Baker*, lost earning capacity is not recoverable as a part of the wrongful death statute alone.
>
> This is not in contradiction to *Denney* altogether, however: in *Denney*, the plaintiff recovered damages through the "filter" of the wrongful death statute as applied to the highway exception to the GTLA, which allowed broad "economic losses" that had been previously interpreted, in the context of the highway exception, to include lost earning capacity. Although this Court recognizes that the wrongful death statute identifies recoverable damages using inclusive language that serves to provide certain examples and not as an exclusive list of recovery areas, as our Supreme Court stated, " (t]he wrongful-death act is essentially a ' filter' through which the underlying claim may proceed." *Wesche v Mecosta County Rd Comm 'n*, 480 Mich 75, 88; 746 NW2d 847. "As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries." *Id*. at 90 (quotation marks and citation omitted). Pursuant to *Wesche*, Plaintiffs here have not identified a statutory scheme beyond the wrongful death statute by which Plaintiffs would be entitled to recover lost earning capacity had the decedent lived, and therefore cannot rely solely on the wrongful death statute to "stand in his shoes" with regards to lost earnings damages.
>
> Judge Jamo recognized the significance of *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1949).

Baker correctly noted that the merger of the death and survival statutes resulted in a new act which, among other things, repealed the former survival act and the remedies it provided for. As the Court explained: “Section 3 expressly repeals the survival act insofar as its provisions are inconsistent with this act.” *Id* at 713. Similar analysis is found in *Hawkins v Regional Medical Laboratories, PC*,

> Confusion in the application of these two statutes was ended when the Legislature, by the enactment of a new wrongful death act, 1939 P.A. 297, combined the two acts, requiring that

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> all actions for injuries resulting in death be brought thereunder. 1939 P.A. 297 actually took the form of an amendment to the existing wrongful death act and provided for the repeal of any inconsistent provisions of the "survival act".

With the repeal of the former survival act, the only basis to award earning capacity in death actions was as authorized by the WDA. To the extent that the former survival act allowed earning capacity because it was a claim which the decedent could have pursued if he or she had lived, that authority was abolished by the adoption of the WDA. Judge Jamo correctly recognized this.

Judge Jamo's thoughtful approach remains true to the rule noted in *Baker*. It also acknowledges *Denney* without reading it so expansively that it sacrifices the long-established rule from *Baker*. This interpretation of *Denney* deserves studied consideration.

The discussion of *Denney* is not complete without addressing a related opinion. *Denney* relied heavily on *Hannay v Department of Transp*., 497 Mich. 45; 860 NW2d 67 (2014). Analysis of the opinion reveals that, just as in *Denney*, the economic damages award in *Hannay* was based upon statutory authority. *Hannay* arose from an accident caused by an MDOT salt truck driver who hit the plaintiff's vehicle, and a dispute over wage loss claims developed. A companion case involved a wage loss dispute arising from an accident caused by a City of Flint truck driver. The *Hannay* Court framed the issue before it as follows:

> In these cases, **we are called upon to interpret a provision of the Governmental Tort Liability Act** (GTLA), MCL 691.1401 *et seq.*, commonly referred to as the motor vehicle exception to governmental immunity, MCL 691.1405. *Id* at 50 [emphasis added].

The Court's resolution of the issue was succinct:

> We conclude that the phrase "liable for bodily injury" contained in the motor vehicle exception means legally responsible for damages flowing from a physical or corporeal injury to the body. More simply, **"bodily injury" is merely the category of harm for which governmental immunity from tort liability is waived under MCL 691.1405** and for which damages that naturally flow are compensable. Moreover, **the restrictions on damages recoverable in third-party tort actions involving motor vehicle accidents set forth in MCL 500.3135 of the no-fault act, MCL 500.3101 et seq., apply** to cases permitted by the waiver of governmental immunity provided for in the motor vehicle exception. We therefore hold that a **plaintiff may bring a third-party tort action for economic damages, such as work-loss**

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> **damages**, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity **if the requirements of MCL 500.3135 have been met**. *Id* at 51.

This analysis demonstrates the extent to which the *Hannay* Court relied on statutory provisions including both the GTLA and the No-Fault Act. The balance of the lengthy opinion remains consistent with this reliance on statutory authority. Additionally, the Court included some discussion of tort damages and the basis for them. Significantly, *Hannay* at 61 recognized that tort damages are compensatory in nature. The Court wrote:

> We concluded that "'tort' as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages."38 Looking at the phrase as a whole, we explained:
>
> Specifically, we were called on to decide whether a particular cause of action sought to impose "tort liability" within the meaning of MCL 691.1407(1), thus, triggering governmental immunity pursuant to that provision. **We concluded that "'tort' as used in MCL 691.1407(1) is a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages."** Looking at the phrase as a whole, we explained:
>
> > Our analysis, however, requires more. MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim," nor to a "tort action," but to "tort liability." The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable." To be "liable" means to be "legally responsible[.]" Construing the term "liability" along with the term "tort," it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. **We therefore hold that "tort liability" as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages.** *Id* at 61 (footnotes omitted; emphasis added).

These comments should be kept in mind when evaluating *Denney's* groundbreaking interpretation of wrongful death damages.

Denney is subject to the same limitation as *Hannay*. Both found a right to recover under specific statutory provisions describing specific damages. *Denney* is a fact-specific decision which depended on the GTLA provision providing recovery for bodily injury. Whether it was rightly or wrongly decided, *Denney* does not apply beyond the four corners of that case. To the extent that it is

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being argued to establish a rule on a wider scale, studied analysis is in order. *Denney* represents a significant change in wrongful death damages, the type of change which has historically been the province of the Legislature. It seems unwise to make such a sweeping change in the scope of tort damages based only on the questionable analysis found in *Denney*.

3. **Allowing Lost Earning Capacity as an Element of Economic Damages in Wrongful Death Actions Effectively Constitutes an Improper Punitive Damage Sanction.**

A basic philosophical question is raised by the revision of wrongful death damage claims which *Denney* has brought about. If this change is to be made (or even if one concludes that the *Denney* approach has always been the law), there must be a rationale supporting the decision to award those damages. It seems important to be able to identify that rationale, especially in light of the significant change which has followed in the wake of *Denney*. It seems important to know whether these damages are being awarded for the same reasons which have historically been allowed, or whether there is some other principle on which to base this award of damages. Assuming there is such a basis, that basis should be identified and plainly stated. It is respectfully submitted that the inevitable conclusion is that an award of a decedent's earning capacity without regard to the loss actually experienced by anyone is a punitive award.

The historical foundation for tort damages is compensation. As noted in *Wilson v Bowen*, 64 Mich 133, 141-142; 31 NW 81 (1887):

> It is summed up by saying that the purpose of an action of tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant; that compensation to the plaintiff is the purpose in view; and, when that is accorded, anything beyond, by whatever name called, is unauthorized. It is not the province of the jury, after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff, as a punishment for the wrong he has done to the plaintiff.

This principle holds true throughout our history. Tort damages are compensatory. If the lost earning capacity damages being claimed under *Denney* are compensatory, then the loss being

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compensated must be identifiable. However, that becomes problematic when awarding lost earning capacity in a wrongful death action. In such actions, the lost earning capacity is suffered by the decedent who, of course, is not alive to experience the loss. It therefore becomes necessary to determine whether the goal is to compensate the economic losses actually experienced by some person who is alive? Or are we actually compensating someone else? If we are compensating someone, should not that someone have experienced the economic loss which is being compensated? Where is the economic loss to any living person? The only economic loss related to earning capacity which is not compensated under the WDA would be the loss experienced by the decedent him or herself. As the decedent cannot experience the loss, and no one else has experienced an economic loss, can an award of earning capacity be said to be compensatory?

If earning capacity damages in wrongful death actions are not compensatory, as it appears, it seems reasonable to assume that some other basis or rationale can be readily identified. A study of the case law discussing the grounds commonly relied on to award damages in civil actions should reveal one or more candidates. If a basis for an award of lifetime earning capacity cannot be found, the logical conclusion is that we are indeed breaking new ground and creating an element of wrongful death damages which did not previously exist.

When searching for a rationale other than compensation, one obvious possibility is the concept of punitive/exemplary damages. This seems like the obvious explanation, given the fact damages would be awarded without regard to actual loss. The obvious question which follows is whether punitive damages have been allowed in the past in civil tort actions and, if so, within what parameters. *Wilson, supra* recognized the distinction between damages which compensate and damages which punish. The Court noted that the latter were generally not recoverable in the 1800's. A chronological review of other decisions demonstrates that the case law has consistently rejected punitive damages in civil actions for damages except, with few exceptions.

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A century ago, *Wise v. Daniel*, 221 Mich. 229, 233; 190 N.W. 746 (1922) was published. This Court provided the following commentary:

> Defendant insists that this instruction gave the jury leave to award punitive damages. It is also claimed that the declaration made no claim of exemplary damages and therefore none could be awarded. Probably no more difficult subject confronts the *nisi prius* judge in this state than giving the jury instruction with reference to exemplary damages.
>
> We are not inclined to be overtechnical in considering this instruction. We do not approve of the term 'added or cumulative damages,' but feel the jury was left in no doubt as to the meaning when **such damages were limited to plaintiff's sense of outrage by reason of the malicious act of defendant**.
>
> **Exemplary damages** are of necessity intangible in nature and therefore, cannot well be considered apart from those matters which are capable of exact pecuniary valuation. They may enlarge the compensatory allowance, but they **are not to be considered as authorizing a separate sum by way of example or punishment**. [Emphasis added.]

A few decades later, the Court issued *McFadden v. Tate*, 350 Mich. 84; 85 N.W.2d 181 (1957). The limited circumstances under which exemplary damages have been awarded are readily apparent in the following analysis:

> In discussing the matter of damages in his charge to the jury the trial judge stated in substance that if the assault and battery was determined as occurring without justification or reasonable excuse, and to be '**wilful, wanton and malicious'**, **the plaintiff was entitled to recover** damages for necessary expenses, loss of wages, pain and suffering, and '**exemplary damages**.' Further statements in the charge indicated that **by the term exemplary damages was meant 'just compensation' resulting from the sense of outrage, mortification, humiliation and indignity caused by the manner in which the attack was made**. There is nothing in the charge from which the jury might have inferred that an allowance of damages could properly be made by way of punishment of the defendants. Rather, **emphasis was placed on the matter of compensation**. In this connection the jury was specifically told that:
>
> > 'Now, sympathy plays no part in your deliberation in any manner. It is a hard and cold business proposition. **Neither are you interested in punishing anyone. It is a matter of recompense for injuries sustained and that only**.'
>
> Where an assault and battery is committed wantonly and maliciously plaintiff is entitled to compensation for the humiliation, sense of outrage, and indignity resulting therefrom. *Id* at 88-89.

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> The trial judge was not in error in advising the jury with reference to the computing of damages by way of compensation if the injury inflicted on plaintiff was determined to have been so inflicted maliciously, wilfully and wantonly. *Id* at 89.

A relevant court of appeals opinion was issued in *Ray v. City of Detroit, Dept. of St. Railways*, 67 Mich.App. 702, 704-705; 242 N.W.2d 494 (1976). The court's analysis provides a good understanding of the appropriate role for exemplary damages:

> The issue before this court is whether a municipal corporation can be held liable for exemplary damages awarded for injuries sustained as the result of the intentional tortious conduct of its employee. Essential to our resolution of this issue is an understanding of the nature of exemplary damages under Michigan law.
>
> The terms 'exemplary' damages, 'punitive' damages and 'vindictive' damages have frequently been confused or used interchangeably. However, in Michigan **only exemplary damages which are compensatory in nature are allowable**. **They are recoverable for injury to feelings and for the sense of indignity and humiliation resulting from injury maliciously and wantonly inflicted**. **Recovery is restricted to the party who has received the physical injury.** They are never allowed, however, for the purpose of punishing or making an example of a defendant. *Smith v. Jones*, 382 Mich. 176, 169 N.W.2d 308 (1969) (concurring opinion of Justice Adams); *Ross v. Leggett*, 61 Mich. 445, 28 N.W. 695 (1886); *McFadden v. Tate*, 350 Mich. 84, 85 N.W.2d 181 (1957); *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447 (1868); *Hyatt v. Adams*, 16 Mich. 180 (1867).
>
> Although in many cases Michigan courts have attempted to distinguish between 'actual' damages and 'exemplary' damages (see for example, *Ross v. Leggett*, *supra*), it seems obvious that since exemplary damages must be compensatory in nature, and not punitive, they are in effect but another item of 'actual' damage. As stated above they are not awarded by way of example although they may be called exemplary. They are not awarded by way of punishment although they may be called punitive. They are recoverable only for injury Actually sustained by a party although that injury is to the feelings rather than physical in nature. In the early case of *Welch v. Ware*, 32 Mich. 77 (1875), the Court said:
>
> > 'When the law gives an action for willful wrongs, it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental, and not physical. And it assumes further that this is Actual, and not metaphysical damage, and deserves compensation.' (Emphasis added.)
>
> And in *Scripps v. Reilly*, 38 Mich. 10 (1878), the court set forth a summary of rules relating to damages which included the following:

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> '5. Where, however, the elements exist in a case, entitling a party to recover damages for injured feelings, the amount to be allowed for shame, mental anxiety, insulted honor, and suffering and indignation consequent on the wrong, may be increased or aggravated by the vindictive feelings, or the degree of malice, recklessness, gross carelessness or negligence of the defendant, as the injury is much more serious where these elements, or either of them, are shown to have existed.
>
> '6. This increase of damages dependent upon the conduct of the defendant Must be considered in this State as actual damages, although usually spoken of as exemplary, vindictive or punitory * * *.' [Emphasis added.]

A pertinent opinion was issued in *Kewin v. Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 419; 295 N.W.2d 50 (1980), where we find the following:

> In Michigan, **exemplary damages are recoverable as compensation to the plaintiff, not as punishment of the defendant**. *Ten Hopen v. Walker*, 96 Mich. 236, 240, 55 N.W. 657 (1893); *McChesney v. Wilson*, 132 Mich. 252, 258, 93 N.W. 627 (1903). Our review of the precedent indicates that those cases which permit recovery of exemplary damages as an element of damages involve tortious conduct on the part of the defendant. See, e.g. *McFadden v. Tate*, 350 Mich. 84, 85 N.W.2d 181 (1957) (assault and battery); *Scripps v. Reilly*, 38 Mich. 10 (1878) (libel); Welch v. Ware, 32 Mich. 77 (1875) (assault and battery). **An award of exemplary damages is considered proper if it compensates a plaintiff for the "humiliation, sense of outrage, and indignity" resulting from injuries "maliciously, willfully and wantonly" inflicted by the defendant**. *McFadden*, supra, 350 Mich. 89, 85 N.W.2d 181. The theory of these cases is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feelings. [Emphasis added.]

The Court's discussion in *Bailey v. Graves*, 411 Mich. 510; 309 N.W.2d 166 (1981) is on point to the present discussion:

> The principal cases setting forth the grounds for exemplary damages are *Wise v. Daniel, supra*, and *McFadden v. Tate*, 350 Mich. 84, 85 N.W.2d 181 (1957). *Id* at 513-514.
>
> ****
>
> These cases stand for the proposition that **an award of exemplary damages is justifiable only where it is first shown that defendant's conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff's rights**. *Id* at 515 (emphasis added).
>
> ****
>
> In the instant case, the trial court failed to charge the jury, in accordance with defendants' request, that a determination of malicious or willful and wanton conduct on the part of the defendants was a sine qua non to the award of exemplary damages. This was error.

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> Furthermore the plaintiff is not correct in asserting that, when the trial judge instructed the jury on the issue of liability that the tort was intentional, that the required malice, fraud or willful and wanton conduct on the part of the defendants to establish entitlement to exemplary damages was adequately covered. **The fact that a tort is committed intentionally does not mean that it was committed with malice or reckless disregard of the rights of others, or wantonly, as necessary to permit exemplary damages**. *Id* at 515 (emphasis added).

Perhaps most notable is the final sentence in the above quotation. Even an intentional tort is not necessarily eligible for punitive damages. They are clearly less applicable in negligence actions.

A frequently cited opinion was issued in *Veselenak v. Smith*, 414 Mich. 567, 575, 327 N.W.2d 261 (1982). Before commencing its discussion of the historical treatment of punitive/exemplary damages in civil actions, the Court framed the issue before it as follows:

> This is an unusual medical malpractice action. It owes its uniqueness to a jury award of $350,000 for exemplary damages. Thus, the issue before us is whether the availability of ordinary damages for mental distress makes exemplary damages for injury to feelings redundant. *Id* at 568.

The holding was then succinctly stated:

> As the analysis which follows will make clear, we hold that exemplary damages should not have been awarded in this case because we conclude that **the award of exemplary damages for injury to feelings is duplicative of the award of ordinary damages for mental distress and anguish. We perceive no principled reason for allowing a double recovery for the same injury**. *Id* at 572 (emphasis added).

After this introduction, the Court then began its analysis of the situation before it with a lengthy and instructive review of prior case law:

> This Court has grappled with the problem of allowing or of disallowing the award of exemplary (formerly called punitive) damages in numerous cases over the last 120 years. Although systematic development of this area may seem to be the exception, certain consistent principles have emerged.
>
> In 1868, after a discussion of the policy reasons supporting the award of exemplary damages, the Court concluded that the only "proper application of damages beyond those to person, property or reputation, is to make reparation for the injury to the feelings of the person injured". *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 453 (1868). Nevertheless, the rationale persisted that punishment was a legitimate basis for the award of these unusual damages for

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> injury to feelings. It was finally interred by two cases written by Justice Cooley. In *Watson v. Watson*, 53 Mich. 168, 18 N.W. 605 (1884), and in *Stilson v. Gibbs*, 53 Mich. 280, 18 N.W. 815 (1884), Justice Cooley examined the classic common-law arguments opposing the award of exemplary damages for purposes of punishment, found them convincing, and articulated the idea that exemplary damages are merely a class of compensatory damages. These two "rules" summarized by the phrase "compensation for injury to feelings", retain their vitality today. *Kewin v. Massachusetts Mutual Life Ins. Co*., 409 Mich. 401, 295 N.W.2d 50 (1980); *Ray v. Detroit*, 67 Mich. App. 702, 242 N.W.2d 494 (1976).
>
> A close reading of the early exemplary damages cases also suggests that these unusual damages may have been used to supply a remedy for mental injury not otherwise recognized. Actual damages compensated for economic loss, but not for non-economic loss. In addition, the award of actual damages seemed to preclude the award of additional compensation for non-economic loss. *Warren v. Cole*, 15 Mich. 265 (1867); Hyatt v. Adams, 16 Mich. 179 (1867). Assuming actual damages were not provable but mental injury certain, exemplary damages became available to compensate the injured party. *Fay v. Swan*, 44 Mich. 544, 7 N.W. 215 (1880).
>
> As proof of actual damages is no longer a bar to the award of exemplary damages, so too actual damages, where properly pled, now include compensation for shame, mortification, mental pain and anxiety, *Beath v. Rapid R. Co*., 119 Mich. 512, 78 N.W. 537 (1899), and for annoyance, discomfiture and humiliation, *Grenawalt v. Nyhuis*, 335 Mich. 76, 55 N.W.2d 736 (1952). In short, actual damages now include compensation for mental distress and anguish. *Id* at 572-574 (footnotes omitted).

In this analysis, the *Veselnak* Court provided a thorough review of the role for punitive and/or exemplary damages in tort actions. That role is quite limited. As the Court noted:

> As a practical matter, **the conduct we have found sufficient to justify the award of exemplary damages has occurred in the context of the intentional torts, slander, libel, deceit, seduction, and other intentional (but malicious) acts. Due to the required mental element, negligence is not sufficient to justify an award of exemplary damages**. *Id* at 575 (footnote omitted; emphasis added).

The second sentence in this quotation deserves additional emphasis. It includes a clear statement that, in the tort setting, "negligence is not sufficient to justify an award of exemplary damages." As recovery for the noneconomic damages associated with tortious injuries is available under the WDA, exemplary damages are not also allowed.

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The *Veselnak* Court concluded its holding regarding punitive/exemplary damages (in the process, also addressing the double recovery problem which is intertwined with any discussion of a claim for "*Denney* damages"):

> From the instructions given, it is clear that the injury sought to be compensated by defendants alleged concealment is Anna Veselenaks pain, suffering, mental distress and anguish. It is equally clear that, i**f the jury deliberated as instructed, it also considered Anna Veselenaks pain, suffering, mental distress and anguish as part of her claim for ordinary damages.** Thus, our analysis in the preceding section and the record before us both support the idea that the **giving of an exemplary damages instruction permitted Anna Veselenak to be doubly compensated for one injury**. *Id* at 576 (emphasis added).

In *Hayes–Albion Corp v. Kuberski*, 421 Mich. 170, 187, 364 N.W.2d 609 (1984) the Court provided a succinct statement:

> Since *Ross v. Leggett*, 61 Mich. 445, 28 N.W. 695 (1886), the purpose of exemplary damages in Michigan has not been to punish the defendant, but to render the plaintiff whole. **When compensatory damages can make the injured party whole, this court has denied exemplary damages**. [Emphasis added.]

The Court of Appeals issued *Fellows v Superior Products Co*, 201 Mich App 155; 506 NW2d 534 (1993) a few years later. The case arose from a tragic accident when a 13-year-old boy was fatally injured while playing on some large concrete pipes at a manufacturing plant. The case is relevant for its consideration of exemplary damages. The pertinent legal analysis from *Fellows* begins as follows:

> The primary issue on appeal concerns the admissibility of certain evidence introduced by plaintiff to support the claim for exemplary damages. We begin by noting that, contrary to plaintiff's position on cross appeal, **exemplary damages are not recoverable in a wrongful death action**. The various authorities supporting this rule were summarized recently by the federal district court in *In re Disaster at Detroit Metropolitan Airport on August 16, 1987*, 750 F. Supp. 793, 805 (E.D. Mich., 1989):
>
> In Michigan, the courts of that State refuse to allow the recovery of punitive damages. See *Kewin v. Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50 (1980); *Currie v. Fiting*, 375 Mich. 440, 134 N.W.2d 611 (1965); *Hicks v. Ottewell*, 174 Mich. App. 750, 436 N.W.2d 453 (1989); *Kirk v. Ford Motor Co.*, 147 Mich. App. 337, 383 N.W.2d 193 (1985); *Association Research & Development Corp. v. CNA Financial Corp.*, 123 Mich. App. 162, 333 N.W.2d 206 (1983), lv. den. 418 Mich. 858 (1983). **While exemplary damages are distinct from punitive damages and are designed to compensate plaintiffs for humiliation, outrage, and indignity resulting from a defendant's willful, wanton, or**

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> **malicious conduct**, see *CNA Financial*, 123 Mich. App. at 171, 333 N.W.2d at 211, **neither form of damages is available under the Michigan Wrongful Death Act**, MCLA 600.2922 [M.S.A. § 27A.2922] (West 1986). This act has been construed by the Michigan Supreme Court as the statute which provides the exclusive remedies for those injuries which result in death, see *Endykiewicz v. State Highway Commission*, 414 Mich. 377, 387–88, 324 N.W.2d 755 (1982); *Courtney v. Apple*, 345 Mich. 223, 228, 76 N.W.2d 80, 83 (1956), and that statute does not provide for punitive or exemplary damages. See *Bernier v. Board of County Road Commissioners*, 581 F.Supp. 71, 80 (WD Mich, 1983); *cf. Currie*, 375 Mich. 440, 134 N.W.2d 611.
>
> We believe that this analysis represents a correct application of Michigan precedent. Accordingly, we agree with defendant that the trial court did not err in striking the $500,000 exemplary damage award from the jury's verdict. *Id* at 157-158.

In *McCauley v General Motors Corp*, 457 Mich 513, 519-520; 578 NW2d 282 (1998), this Court cited to a number of earlier decisions in the process of restating the distinction between compensatory and punitive damages (also nothing the double recovery problem):

> It is well established that **generally only compensatory damages are available** in Michigan and that **punitive sanctions may not be imposed**. See *Hayes–Albion Corp. v. Kuberski*, 421 Mich. 170, 187, 364 N.W.2d 609 (1984), *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 419, 295 N.W.2d 50 (1980), *Hicks v. Ottewell*, 174 Mich. App. 750, 755, 436 N.W.2d 453 (1989), and *In re Disaster at Detroit Metropolitan Airport on August 16, 1987*, 750 F.Supp. 793, 805 (E.D.Mich., 1989). **Because the purpose of compensatory damages is to make the injured party whole for the losses actually suffered, the amount of recovery for such damages is inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery**. *Stilson v. Gibbs*, 53 Mich. 280, 284, 18 N.W. 815 (1884); 22 Am.Jur. 2d, Damages, § 27, pp. 54–56; 4 Restatement Torts, 2d, §§ 903, 906, 908, pp. 453, 460, 464. [Footnote omitted; emphasis added.]

The following year, the Court provided a similar statement in *Rafferty v. Markovitz*, 461 Mich. 265, 270-271; 602 N.W.2d 367 (1999):

> We further observed that **only compensatory damages generally are available** in Michigan, and that **punitive sanctions may not be imposed**. Because the **purpose of compensatory damages is to make an injured party whole** for losses actually suffered, the amount of **recovery for such damages is thus limited by the amount of the loss**. The fact that litigants who represent themselves may not recover attorney fees as an element of costs or damages underscores that a party may not make a profit or obtain more than one recovery. [Emphasis added.]

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A more recent summary of the law demonstrates that the above analysis remains current. In *Unibar Maintenance Services, Inc v Saigh*, 283 Mich App 609, 630; 769 NW2d 911 (2009) the court of appeals provided the following discussion:

> The purpose of exemplary damages is to make the injured party whole. *Hayes–Albion Corp. v. Kuberski*, 421 Mich. 170, 187, 364 N.W.2d 609 (1984). Exemplary damages are recoverable only for intangible injuries or injuries to feelings, which are not quantifiable in monetary terms. *Ray v. Detroit*, 67 Mich. App. 702, 704–705, 242 N.W.2d 494 (1976); *Ass'n Research & Dev. Corp. v. CNA Financial Corp.*, 123 Mich. App. 162, 171–172, 333 N.W.2d 206 (1983). "[W]here the grievance created is purely pecuniary in its nature, and is susceptible of a full and definite money compensation," exemplary damages are not permitted because the party may be made whole through monetary compensation. *Durfee v. Newkirk*, 83 Mich. 522, 526, 47 N.W. 351 (1890); *Hayes–Albion Corp., supra* at 187, 364 N.W.2d 609. "An award of exemplary damages is considered proper if it compensates a plaintiff for the 'humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, wilfully and wantonly' inflicted by the defendant." *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 419, 295 N.W.2d 50 (1980).

The Court clearly laid out some of the restrictions on the imposition of exemplary damages. It is only available following certain types of tort claim, and even then only when losses are not otherwise compensated.

These opinions reflect a consistent theme. Except in limited circumstances which are not applicable herein, punitive/exemplary damages are not available as compensatory damages in tort actions. The concept of punitive/exemplary damages has never been a proper basis to allow recovery of earning capacity damages in tort actions.

When punitive/exemplary damages are removed from the equation, another tort theory must be found. However, there simply do not seem to be any ready candidates. A review of common tort claims serves more to establish the absence of a plausible theory, rather than to reveal any viable candidates.

One might suggest unjust enrichment, but this theory can be quickly disposed of. Unjust enrichment does not apply to a claim that the capacity to earn income is lost. An essential element of

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a lost enrichment claim is that the defendant must have been enriched at the expense of another. Enrichment does not happen in the situation where a person passes away and his or her earning potential is thus lost to all. No party is enriched.

Another possibility one might consider is one of the intentional torts. A number of them exist. However, they simply to not apply when the issue up for debate is whether earning capacity damages are generally recoverable in wrongful death actions based on negligence. One universal, and essential, factor in any intentional tort is obviously intent. There is no basis for concluding that lost earning capacity should be awarded generally in wrongful death actions when no intentional tort is involved.

We also have various legal torts (malicious prosecution, abuse of process, etc.). None of them can justify a broad rule allowing recover of lost earning capacity in all wrongful death actions. Torts related to personal interests such as defamation or invasion of privacy likewise provide no such justification. Conversion has no role to play. There is no logical reason to consider these torts as a basis for a broad rule regarding earning capacity in wrongful death actions.

One might argue that there is an available theory. Deterrence is a recognized factor in civil litigation, although its role seems far more prominent in the criminal sphere than in common law tort actions. However, while deterrence is an accepted concept, there is no obvious reason to conclude that a new rule allowing lost earning capacity in all wrongful death actions would be the solution to negligence behavior. There are already a host of reasons to act non-negligently, just as there are already significant sanctions for wrongly causing a death. Criminal penalties, licensing sanctions, and a variety of civil remedies are already available. Liability in tort action is already a significant deterrent. This is not to say that deterrence has no place. Rather, it is to point out that there is simply no logical basis to conclude that an expansion of damages by adding claims for lost earning capacity would somehow transform an inadequate deterrent into an adequate one. Further, the mere fact that an increased sanction would have an increased deterrent effect cannot serve as a basis to award an

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element of damages. If this alone were sufficient justification, then the judiciary would have *carte banche* authority to expand damages anywhere, as long as it would increase the deterrent effect. While deterrence may be a factor to consider, it should not, standing alone, be used as the basis to create a new class of economic damages which can be recovered in wrongful death actions.

When considering whether earning capacity is to be awarded based on the deterrent effect it would have (or, indeed, on any basis other than compensation), another philosophical question is raised: is this the proper function of the judiciary? It seems that we are contemplating a big step. There is a compelling case to be made that *Denney* represents a departure from long-prevailing standards and principles. In light of the long tradition in the law limiting economic damages in tort actions to compensation for actual losses, the decision to award lost earning capacity for its deterrent effect would seem to be a task best left to the Legislature. This type of significant change should not be the result of *Denney,* a controversial decision which has proven to be a game changer in the wrongful death damages arena.

If deterrence is not a proper basis, it would appear that known tort theories have been exhausted with no viable candidate being found. The conclusion which follows is that *Denney* cannot be characterized as anything other than punitive in nature. There is no other explanation for this type of money damages award, and it is inconsistent with the basic principles of tort law. Money damages are awarded in civil actions when the harm done causes specific financial losses. Money damages are also awarded to compensate for intangible losses. Money damages are intended to restore or make whole those who are injured, to the extent that money can do so. However, a decedent cannot be brought back to life, regardless of the amount of money awarded. There are some losses which money does not fully compensate. It has never been the law that, in such cases, the wrongdoer should pay for all tangible economic losses, and for all intangible losses to the extent that money could compensate

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them, and then also pay money into a fund to be divided up among the decedent's survivors. This amounts to punitive damages, regardless of the label used.

CONCLUSION

Denney is a controversial decision. The arguments against *Denney* damages are numerous. *Amicus curiae* Trinity Health thanks the Court for allowing it to contribute to the discussion. It is respectfully submitted that *Denney's* already remarkable legacy demonstrates that it marks a significant change. This change is based upon analysis in *Denney* which turned on a statutory authorization for damages which is not present in wrongful death actions generally. *Denney* damages are recoverable only if we acknowledge that we are creating a new element of wrongful death damages, one not known prior to *Denney*. As this new element of damages is not based on compensation, the only rationale is that these are punitive/exemplary damages. For these reasons, Trinity Health respectfully requests that the manner in which *Denney* is being argued herein be rejected, and that this Court hold that lost earning capacity is not a recoverable element of damages in wrongful death actions generally.

Respectfully submitted:

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CERTIFICATION OF WORD COUNT

Pursuant to MCR 7.312(A) and MCR 7.212(B), the writer certifies that, using the word count feature in Microsoft Word, this brief contains 11,051 countable words.

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APPENDIX A – OPINION BY INGHAM CIRCUIT JUDGE JAMES JAMO

ST ATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

KAREN STEWART-HINKLEY, Individually and as Personal Representative of the Estate of HAYDEN RAYMOND TIMOTHY HINKLEY, Deceased,

Plaintiffs,

v

MCLAREN HEALTH CARE CORPORATION, MCLAREN MEDICAL GROUP, MCLAREN GREATER LANSING, and DR. AMY FEDERICO, Jointly and Severally,

Defendants.

OPINION & ORDER

CASE NO. 19-815-NH

HON. JAMES S. JAMO

At a session of said Court
held in the city of Lansing, county of Ingham,
this 28 day of June, 2021.

PRESENT: HON. JAMES S. JAMO, Circuit Court Judge

This matter comes before the Court on Defendants McLaren Health Care Corporation, McLaren Medical Group, and McLaren Greater Lansing's Motion Regarding Support and Earnings Claims. Defendant Amy Federico filed a concurrence in the motion.[2] Oral argument was held on the motion on May 19, 2021. This Court, being fully apprised of the premises, GRANTS Defendants' motion.

Plaintiffs have brought a wrongful death action arising out of the death of Hayden Hinkley seeking, in part, economic damages arising out of both the loss of the decedent's lifetime lost

[2] Defendants will be referred to collectively throughout this Order.

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earning capacity and the loss of support of decedent's dependents as two separate and distinct recoverable damages. Defendants now bring the present motion, asking this Court to (1) prohibit Plaintiffs from presenting argument and evidence that lost earning capacity and loss of support are two separate and distinct recoverable damages; (2) prevent Plaintiffs from actually recovering both sets of damages as distinct figures during trial; and/or (3) reduce any award oflost earning capacity to reflect the loss of support as well as personal consumption and taxes.

The wrongful death act allows for recovery of damages after a "wrongful act, neglect, or fault of another," by certain eligible persons. MCL 600.2922(1) and (3). Among other things, the statute specifically allows for damages for loss of financial support. MCL 600.2922(6). The relevant portion of the statute states:

> 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 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.

The Michigan Court of Appeals interpreted the wrongful death statute in *Denney v Kent County Road Comm'n*, 317 Mich App 727, 736-37; 896 NW2d 808 (2016), and found that damages for a decedent's lost earning capacity were recoverable through the highway exception to the governmental tort liability act (GTLA). The Court in *Denney* distinguished between lost earning capacity damages and the loss of financial support damages in terms of the party who could collect: that is, lost earning capacity damages are collectable by the decedent or the decedent's estate standing in the decedent's shoes, and loss of financial support damages are collectable by the dependents of the decedent. *Id.* Following the decision in *Denney*, the US District Court of the Eastern District of Michigan in *White v FCA US, LLC*, 350 F Supp 3d 640 (ED Mich 2018), proceeding under state law, found that *Denney* should be binding on Michigan

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courts because *Denney* has not been criticized by the Michigan Supreme Court and because there is an absence of a "strong showing that the [state's supreme court] would decide the issue differently." *Id.* at 643, quoting *Auburn Sales, Inc v Cypros Trading & Shipping, Inc*, 898 F3d 710, 715 (6th Cir 2018).[2]

However, there is older, binding case law that is applicable in the interpretation of the wrongful death statute: *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1949). The US District Court in *White* specifically addressed *Baker* and, following *Brown v Department of State Highways*, 126 Mich App 392, 395; 337 NW2d 76, 77 (1983), found that *Baker* had been superseded by the 1971 amendment to the wrongful death statute because the amendment removed the phrase "pecuniary injury resulting from such death" and replaced it with "under all the circumstances." But this change only allowed non-economic losses to be made recoverable, such as lost society or companionship; it did not change the compensable pecuniary losses. This Court therefore finds that *Baker* was not superseded by the statutory amendment of 1971 and *Baker*, being the binding Michigan Supreme Court case, cannot be abrogated by a Court of Appeals determination absent an acceptance by Supreme Court case law, and thus still controls in determining which pecuniary losses are compensable by the wrongful death statute. Under *Baker*, lost earning capacity is not recoverable as a part of the wrongful death statute alone.

This is not in contradiction to *Denney* altogether, however: in *Denney*, the plaintiff recovered damages through the "filter" of the wrongful death statute as applied to the highway exception to the GTLA, which allowed broad "economic losses" that had been previously interpreted, in the context of the highway exception, to include lost earning capacity. Although this Court recognizes that the wrongful death statute identifies recoverable damages using

[2] Notably, the Michigan Supreme Court denied Defendant's leave to appeal in *Denney*.

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inclusive language that serves to provide certain examples and not as an exclusive list of recovery areas, as our Supreme Court stated, "[t]he wrongful-death act is essentially a 'filter' through which the underlying claim may proceed." *Wesche v Mecosta County Rd Comm'n,* 480 Mich 75, 88; 746 NW2d 847. "As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries." *Id.* at 90 (quotation marks and citation omitted). Pursuant to *Wesche,* Plaintiffs here have not identified a statutory scheme beyond the wrongful death statute by which Plaintiffs would be entitled to recover lost earning capacity had the decedent lived, and therefore cannot rely solely on the wrongful death statute to "stand in his shoes" with regards to lost earnings damages.

Even had Plaintiff identified such statutory scheme, the Court finds that Plaintiffs will not be able to recover *both* the loss of support and the loss of earning capacity as two separate and distinct damages, because doing so would be to allow Plaintiffs to recover an economic fiction. Earning capacity and support are inherently interrelated concepts: support paid to dependents by an individual would come from the earnings of the individual, and those monies would not be equally available to the individual and his dependents. Therefore even if Plaintiffs could sustain a claim for lost earning capacity in this case, lost earning capacity damages would be reduced by the loss of support damages, along with reduction for consumption and taxes by decedent.

IT IS SO ORDERED.

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