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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 a/k/a JAWAD JOMAA, deceased,

Plaintiff-Appellee,

vs.

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.

Supreme Court
Case No. 165377

Court of Appeals
Case No. 358209

Wayne County Circuit Court
Case No. 20-004169-NH

Brief of *Amicus Curiae* Michigan Defense Trial Counsel

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Statement of the Basis of Jurisdiction

Amicus Curiae Michigan Defense Trial Counsel, Inc. (MDTC) agrees with the parties' statements of the basis of jurisdiction.

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Statement of Interest of *Amicus Curiae*

MDTC is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. MDTC was established in 1979 to enhance and promote the civil-defense bar. It accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil-defense lawyers. MDTC appears before this Court as a representative for Michigan's civil-defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[1]

[1] This brief was authored entirely by the undersigned counsel and therefore was not authored by counsel for any party in this case. No party or individual other than MDTC made a monetary contribution to the preparation of this brief. MCR 7.312(H)(5). In the interest of disclosure, other members of undersigned counsel's firm represent defendants in cases involving the same issue here, some of which have been held in abeyance pending the outcome of this case.

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Statement of Questions Involved

I. The wrongful death act specifically permits damages for "loss of financial support." This Court, in *Baker v Slack* (1948), held the wrongful death act does not permit damages for lost earning capacity. The operative language of the wrongful death act has not changed since *Baker*, and our courts consistently have limited the damages available under the wrongful death act. Did the Legislature intend the wrongful death act to permit heirs to recover the entire amount of a decedent's lost future earnings/earning capacity?

Defendants-appellants answer, "No."

Plaintiff-appellee answers, "Yes."

The trial court answered, "Yes."

The Court of Appealsjur answered, "Yes."

Amicus Curiae MDTC answers, "No."

II. A plaintiff must prove damages with reasonable certainty. Future damages must be reasonably certain to occur. Remote, contingent, and speculative damages are not recoverable. Assuming the wrongful death act permits heirs to recover the entire amount of a decedent's lost future earnings, to what degree of specificity must the damages be shown?

Defendants-appellants answer that "the evidence must be personalized and account for the decedent's personal consumption and probable taxes"

Plaintiff-appellee answers, "with expert testimony based on reliable statistical averages."

The trial court did not answer this question.

The Court of Appeals answered that future earnings must be proven "with reasonable certainty based on the child's unique and known traits and abilities"

Amicus Curiae MDTC answers "with reasonable certainty based on the child's unique and known traits and abilities" and after deduction of the decedent's personal consumption and probable taxes.

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Statement of Facts

MDTC adopts and incorporates by reference the statement of facts set forth in defendants' brief on appeal.

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Introduction

The term "*Denney* damages" has become ubiquitous for MDTC and its members. This is because the Court of Appeals in *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016) upended almost 70 years of precedent and legal understanding, without discussing any of it. *Denney* held, for the first time, that the wrongful death act permits damages for the entirety of a decedent's lost future earnings or earnings capacity. The Court of Appeals in this case reasoned that *Denney* was correct and these damages had been permitted for decades before *Denney*. The rulings beg the question: if these damages had long been available, why did plaintiffs and defendants alike ignore them for decades?

MDTC will not repeat the parties' extensive and useful discussions of the history of the wrongful death act and decisions applying its language. While they are important, all parties agree the answer to this Court's first question turns on the interpretation of the wrongful death act. In short, MDTC agrees with defendants' proposed interpretation. But MDTC wants to raise three points emphasizing why plaintiffs' and the Court of Appeals' interpretations are both wrong and problematic:

(1) Before *Denney*, Michigan courts, the plaintiffs' bar, and the defense bar all understood that lost earnings/earning capacity were not recoverable under the wrongful death act. This is despite the wrongful death act allowing damages that are "fair and just under all of the circumstances" since 1971. The only thing that changed was *Denney*.

(2) Members of the plaintiffs' bar have already begun using *Denney* to obtain double recovery of lost earnings and loss of financial support damages. Some courts have allowed such recovery. Even if this Court adopts *Denney*'s interpretation of the damages available under the wrongful death act, it should reiterate recovery of both lost earning capacity and loss of financial support damages are not permitted.

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(3) The addition of the word "including" in the wrongful death act cannot have permitted recovery of any and all damages a jury deems justified. Nor can a wrongful death plaintiff recover everything a decedent could have recovered had he or she survived.

Assuming this Court nevertheless holds lost earnings/earning capacity damages are recoverable under the wrongful death act, it should also hold the damages must be proven "with reasonable certainty based on the child's unique and known traits and abilities." Juries must also be permitted, if not required, to reduce damages due to personal consumption and taxes to avoid the damages being non-compensatory.

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Argument

I. The wrongful death act does not permit recovery of the entirety of a decedent's lost future earnings/earning capacity.

A. No one argued lost future earnings were recoverable under the wrongful death act until *Denney*.

Plaintiffs argue amendment of the wrongful death act in 1971 permitted the recovery of all damages which jurors "deem fair and just under all the circumstances," including the entirety of a decedent's future earnings. Plaintiffs also argue this was the Legislature's intent. But between 1971 and 2016, the plaintiffs' bar never sought recovery of these damages. And our appellate courts did not recognize or accept plaintiffs' proposed interpretation. If the effect of the amendment was clear, why did the bench and bar ignore it for more than 45 years? More precisely, why did the plaintiffs' bar ignore a large category of available damages (lost future earning capacity) in favor of a small subset of those damages (loss of financial support)?

Plaintiffs cannot answer these questions because the answer is fatal to their position. After the 1971 amendment but before *Denney*, wrongful death plaintiffs did not seek lost earning capacity damages because they were not available under the wrongful death act. Treatises published at this time specifically discussing the wrongful death act and Michigan's interpretative case law agree. See, e.g. Michigan Law of Damages and Other Remedies ch 3, § 3.14 (Patek, Granzotto, et al. eds, ICLE 3d ed 2002) ("The [wrongful death act] provides for recovery of loss of financial support, not for loss of earning capacity."). Wrongful death cases from this period are replete with claims for lost financial support, but silent as to claims for lost future earning capacity. Cases from this period applying the 1971 version of the wrongful death act did not recognize loss of earning capacity as a recoverable category of damages. *Swartz v Dow Chem Co*, 95 Mich App 328; 290 NW2d 135 (1980), overruled on other grounds 414 Mich 433; 326 NW2d 804 (1982).

So either the plaintiffs' bar for half a century left an entire category of recoverable damages worth millions of dollars on the table in favor of a smaller subset of that category, or the damages are not actually permitted under the current version of the statute. Given

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the strength and acumen of the plaintiffs' bar, MDTC finds the former possibility decidedly unlikely. It is impossible to ignore the practical realities weighing heavily against plaintiffs' proposed interpretation of the wrongful death act.

These practical realities, combined with the 1985 amendments to the wrongful death act, further belie plaintiffs' argument. In 1985, the Legislature amended the wrongful death act to specifically list "damages for the loss of financial support" as a recoverable element of damages. 1985 PA 93. Even if, as plaintiffs suggest, the enumerated damages in the wrongful death act are not exclusive, why would the Legislature decide to enumerate this specific category of damages? As set forth above, courts acknowledged the availability of these damages despite the Legislature eliminating the reference to "pecuniary injury" in 1971. Plaintiffs provide no answer.

Nor do plaintiffs explain why, if both lost earning capacity and loss of financial support damages were available starting in 1971, the Legislature amended the wrongful death act in 1985 to enumerate one category of damages and not the other. The only reasonable conclusion regarding the Legislature's intent is that it desired to explicitly describe the only available category of damages that was not expressly listed in the act. And the Legislature did not include lost earning capacity damages. Plaintiffs would therefore add the Legislature alongside the plaintiffs' bar as organizations that failed to realize the wrongful death act permitted lost earning capacity damages beginning in 1971.

Even if the list of damages in the wrongful death act is not exhaustive, the act has always contained a specific reference to each category of damages recognized at law. Beginning with the act's inception in 1939, the act referenced "fair and just" damages for "pecuniary injury," damages for the "reasonable medical, hospital, funeral, and burial expenses, and compensation for "pain and suffering" of the decedent. 1939 PA 297. There is no evidence any other damages were awarded during this period. In 1971, the Legislature eliminated "pecuniary injury" and inserted "loss of society and companionship of the deceased," because this Court held loss of society damages were not permitted. Then, in 1985, the Legislature added damages for "loss of financial support" because those damages were recoverable, but not explicitly listed. Given the lengths the Legislature went to ensure the wrongful death act referenced each element of damage it

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intended to be recoverable, it is unreasonable to conclude the Legislature intended lost earning capacity damages to be recoverable but ignored them completely.

Since *Denney*, claimed damages for lost earning capacity have become the norm in wrongful death cases. *Denney* did not come about due to amendments to the language of the wrongful death act. It is instead the result of a strained, surface-level application of the wrongful death act which has thus far evaded this Court's review. It does not stand up to scrutiny.

B. The plaintiffs' bar has used *Denney* to obtain double recovery of both a decedent's lost earnings/earning capacity and lost financial support to beneficiaries. This result of *Denney* must be avoided.

There is no question that the wrongful death act allows beneficiaries to recover damages for loss of financial support of the decedent. Plaintiffs argue, and the *Denney* Court concluded, beneficiaries may also recover the entirety of a decedent's lost earning capacity. These are different categories of damages but come from the same source—the decedent's future earnings. This is undisputed. A wrongful death plaintiff therefore could not receive damages for both a decedent's lost earning capacity and lost financial support to a beneficiary without obtaining a double recovery, which Michigan law precludes. *Chicilo v Marshall*, 185 Mich App 68, 70; 460 NW2d 231 (1990).

The plaintiffs' bar and some trial courts believe otherwise. In reliance on *Denney*, members of the plaintiffs' bar have sought damages for both a decedent's lost future earnings/earning capacity and lost financial support the decedent would have provided to beneficiaries in the future.[2] They reason the decedent could have recovered lost earning capacity had he or she lived, and beneficiaries are entitled to loss of financial support under the wrongful death act. Therefore, both elements of damages are

[2] See "Plaintiff's Response to Defendants' Ascension Providence Hospital, Southfield Radiology Associates, PLLC, and Sachit Malde, M.D.'s Motion in Limine to Preclude Duplicative and Speculative Damages Claims," filed in *Cairns v Ascension Providence Hosp*, Oakland County Circuit Court Case No. 2022-191952-NH (Exhibit A).

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recoverable. At least one trial court has agreed, allowing recovery of both categories of damages.[3]

This result illustrates the flaw in plaintiffs' reasoning. The *Denney* interpretation of the wrongful death act leads to a conclusion at odds with Michigan law. If lost earning capacity damages are available, damages for loss of financial support—which are explicitly listed in the wrongful death act—are not. The wrongful death act cannot be interpreted in a manner that invalidates its express terms in favor of supposed implied terms. Such an interpretation would be entirely unreasonable, which our courts have long disfavored. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

Only the *Denney* interpretation creates this problem. No other categories of damages available under the wrongful death act overlap, such that the recovery of both would constitute a double recovery. Plaintiffs have ignored this issue, and this Court should not do the same.

If this Court holds the wrongful death act permits recovery of the entirety of a decedent's lost earnings or lost earning capacity, it must clarify that a plaintiff cannot recover both lost earnings/earning capacity and loss of financial support. Candidly, MDTC strains to think of a situation where a plaintiff would choose to seek recovery of lost financial support instead of lost earnings/earning capacity, but this Court should nonetheless require that choice.

C. The word "including" in the wrongful death act cannot mean what plaintiffs and the Court of Appeals say it means.

Plaintiffs effectively rely on a single word—including—as demonstrating the Legislature intended damages for lost earnings to be recoverable under the wrongful death act. Plaintiffs' argument mirrors the Court of Appeals' reasoning on which the *Denney* decision relied. Plaintiffs and the Court of Appeals are wrong.

The Court of Appeals in this case relied on *Denney* to conclude that damages for lost earnings are recoverable under the wrongful death act. *Denney* relied on *Thorn v*

[3] The trial court in *Cairns* denied defendants' motion. Undersigned counsel represented the moving defendants in *Cairns*.

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Mercy Mem Hosp Corp, 281 Mich App 644; 761 NW2d 414 (2008) for the same proposition. In *Thorn*, the Court of Appeals reasoned these damages are available because the Legislature's use of the word "including" in the wrongful death act "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." *Id*. at 651.

The *Thorn* Court was incorrect because we know the wrongful death act does not permit "any type of damages" the jury deems "justified." As defendants noted in their brief, punitive damages are not available under the wrongful death act.[4] *Amici Curae* Corewell Health and McLaren Health Care cited family members' sorrow and grief as another element of damages that is not available.[5]

Plaintiff, citing *Thorn*, retorts that damages recoverable under the wrongful death act are limited only to the extent damages for the underlying claim are limited.[6] Therefore, because punitive damages are not available for malpractice actions, they would not be available in a wrongful death action based on malpractice. But this argument would negate *Thorn's* conclusions that (1) the wrongful death act expands the damages that are available, and (2) the act allows "any" damages the jury deems "justified." This is because plaintiffs' and *Thorn's* interpretation of the wrongful death act would require the act to permit ***any*** damages that are "justified" by the facts of the case, including those precluded under the underlying claim.

By way of example, in an ordinary malpractice case, the plaintiff's brother could not recover damages for lost financial support or loss of society and companionship. But those damages are available under the wrongful death act. The damages are available because the wrongful death act permits them, even though they would not otherwise be available. If the wrongful death act truly permits "any" damages the jury deems "justified" (which is what plaintiffs contend and *Thorn* concluded), damages are limited only by what

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[4] Defendants' brief on appeal, p 55, citing *Fellows v Superior Prod Co*, 201 Mich App 155, 157; 506 NW2d 534 (1993).
[5] *Amici Curiae* Corewell Health and McLaren Health Care's brief, p 12, citing *Wycko v Gnodtke*, 361 Mich 331, 340; 105 NW2d 118 (1960).
[6] Plaintiffs' brief on appeal, pp 45-46, citing *Thorn*, 281 Mich App at 659.

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a jury deems justified, regardless of any limitations under the common law. Under this interpretation, the wrongful death act does in fact permit punitive damages, which contradicts well-established precedent.

This result obviously is not what plaintiffs argue. But this is the natural and real consequence of their proposed interpretation of the wrongful death act. This is also the result of the Court of Appeals' reasoning in *Thorn*, on which both *Denney* and the Court of Appeals decision in this case are based. Consequently, *Denney*'s and *Thorn*'s conclusion that the wrongful death act permits "any" damages the jury deems "justified," including lost earning capacity damages, cannot be correct.

II. The Court of Appeals correctly held lost earnings/earning capacity must be established "with reasonable certainty based on the child's unique and known traits and abilities." Personal consumption and income taxes should be subtracted from any such award.

MDTC agrees with the Court of Appeals' determination that a plaintiff must prove a child-decedent's lost future earnings/earning capacity "with reasonable certainty based on the child's unique and known traits and abilities." The alternative would eliminate the requirement that damages be based on a factual foundation, rather than speculative assumptions and unprovable contingencies. Michigan law has always required personalized factual evidence to support wrongful death damages based on lost earnings or financial support.[7] Contrary to plaintiffs' argument, statistical averages ***alone*** are insufficient to constitute evidence that damages are reasonably certain to occur. This issue has been well briefed, and MDTC need not say more.

MDTC also agrees with defendants' contention that, if damages for lost earnings/earning capacity are recoverable under the wrongful death act, the damages should be reduced by the decedent's personal consumption and income taxes. There is ample authority indicating this reduction is required to retain the compensatory nature of the damages.[8]

[7] Defendants' brief on appeal, pp 70-71.
[8] *Id.*, pp 73-76.

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Plaintiffs' arguments against these deductions are unpersuasive. Plaintiffs first argue failing to make these deductions would not render the awards "punitive."[9] Rather than quarrel regarding the meaning of "punitive," it is enough to note that failing to make these deductions would render the damages non-compensatory. The reason being a living plaintiff, unlike a decedent, would have expended earnings on personal consumption and taxes. Not reducing these damages would result in a windfall. But outside of specific exceptions not applicable here, Michigan only permits compensatory damages. *McAuley v Gen Motors Corp*, 457 Mich 513, 519-520; 578 NW2d 282 (1998). These reductions are therefore necessary to conform the damages to Michigan law.

Plaintiffs next argue reduction is not required because it is not specifically mandated by the text of the wrongful death act.[10] Plaintiffs' argument is hypocritical. The text of the wrongful death act does not specifically permit lost earning capacity damages, but both plaintiff and the Court of Appeals argue they are recoverable. The wrongful death act does not reference a host of legal limitations otherwise applicable to damages, whether under statutory or common law. See *Shinholster v Annapolis Hosp*, 471 Mich 540, 559; 685 NW2d 275 (2004) (statutory damages cap applies to medical malpractice wrongful death actions). The lack of an express requirement in the wrongful death does not preclude these reductions.

Plaintiffs' final argument—that deduction is improper because recovery is available for the "full injury to the decedent"—is wrong for the same reason lost earning capacity damages are not available. As explained above, wrongful death plaintiffs are not entitled to the same damages that would have been available to the decedent had he or she survived. As defendants emphasize, damages for future pain and suffering or future medical expenses that would have occurred had the decedent survived are not available under the wrongful death act. That is because these damages would not be compensatory, even if they would be available had the decedent survived. The lack of deductions for a living plaintiff does not eliminate the need for deductions for a wrongful death plaintiff.

[9] Plaintiffs' brief on appeal, p 62.
[10] *Id.*, pp 62-63.

Finally, should this Court not wish to mandate reduction in lost earnings/earning capacity damages, it should at least clarify a jury ***may*** consider reductions in determining the damages that are "fair and equitable under all the circumstances." MCL 600.2922(6). If, as plaintiff argues, the jury may award any damages that are "fair and equitable," the jury must also be able to conclude that reduction in lost earnings/earning capacity damages for personal consumption and taxes is "fair and equitable."

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Conclusion

The Legislature never intended to allow lost earnings/earning capacity damages in wrongful death actions. If it had, this issue would not have gone unresolved for more than 45 years. Before *Denney*, the bench and bar universally agreed these damages were not available. *Denney* changed that without engaging in the analysis the issue demands. The full and proper analysis shows *Denney* was wrong.

Should *Denney* stand, it will have drastic consequences. It will allow wrongful death plaintiffs to recover punitive, non-compensatory damages. It will allow plaintiffs to claim double recovery, which they already have obtained in lower courts. The unavailability of these damages is the only reasonable reading of the wrongful death act when considering the act as a whole and its historical development. This Court should overrule *Denney*.

If this Court does not overrule *Denney*, it should affirm the Court of Appeals' holding that factual evidence regarding a child's individual earning capacity is required to prove damages for the loss of that capacity. It should also permit, if not require, those damages to be reduced based on personal consumption and income taxes.

Respectfully submitted,

TANOURY, NAUTS, McKINNEY
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By: /s/ *Jesse M. DePauw*

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EXHIBIT A

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STATE OF MICHIGAN

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IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ROSEMARY CAIRNS, as Personal Representative
for the ESTATE OF MICHAEL JOHN CAIRNS, a/k/a
MICHAEL J. CAIRNS, Deceased,

Plaintiff,

v

Case No. 2022-191952-NH
Hon. Daniel P. O'Brien

ASCENSION PROVIDENCE HOSPITAL, SOUTHFIELD
RADIOLOGY ASSOCIATES, P.L.L.C., INDEPENDENT
EMERGENCY PHYSICIANS, P.C., ~~ALULA HAILU TESFAY, M.D.~~,
SACHIT MALDE, M.D., and ROBERT JORDAN EDWARDS, M.D.,
jointly and severally,

Defendants.

CONSOLIDATED WITH

ROSEMARY CAIRNS, as Personal Representative
for the ESTATE OF MICHAEL JOHN CAIRNS, a/k/a
MICHAEL J. CAIRNS, Deceased,

Plaintiff,

v

Case No. 2023-199094-NH
Hon. Daniel P. O'Brien

INFINITY PRIMARY CARE, PLLC,
SARAH S. BURKETT, M.D. AND
ASCENSION MEDICAL GROUP MICHIGAN,
jointly and severally,

Defendants.

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PLAINTIFF'S RESPONSE TO DEFENDANTS ASCENSION PROVIDENCE HOSPITAL, SOUTHFIELD RADIOLOGY ASSOCIATES, P.L.L.C., ASCENSION MEDICAL GROUP MICHIGAN, AND SACHIT MALDE, M.D.'S MOTION IN LIMINE TO PRECLUDE DUPLICATIVE AND SPECULATIVE DAMAGES CLAIMS

NOW COMES Plaintiff, ROSEMARY CAIRNS, as Personal Representative for the ESTATE OF MICHAEL JOHN CAIRNS, a/k/a MICHAEL J. CAIRNS, Deceased, by and through her attorneys, MEYERS LAW, PLLC, and in Response to Defendants Ascension Providence Hospital, Southfield Radiology Associates, P.L.L.C., Ascension Medical Group Michigan, and Sachit Malde, M.D.'S Motion in Limine to Preclude Duplicative and Speculative Damages Claims states as follows:

1. Plaintiff admits that this is a complex medical malpractice case generally involving the professional negligence of Defendants in failing to appropriately suspect, diagnose, workup and treat Mr. Cairns' dissecting aorta during his presentation to Ascension Providence Hospital and subsequent presentation to Dr. Burkett.

2. Plaintiff admits that Mr. Cairns was employed by FCA at the time of his death and provided financial support to his family.

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3. Plaintiff admits that *inter alia* she has properly pleaded and seeks recover of Mr. Cairns' future lost earnings capacity and loss of financial support. By way of further response, Plaintiff denies that recovery of such damages constitute a "double recovery."

4. Denied.

5. Plaintiff denies that damages relating to Mr. Cairns' lost earning capacity relating to a future consultant-type job are speculative. By way of further response there is sufficient evidence for a jury to conclude that Plaintiff is entitled to such damages.

WHEREFORE, Plaintiff respectfully requests that this honorable Court deny Defendants' motion in its entirety.

Respectfully Submitted,

MEYERS LAW, PLLC

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DATED: January 5, 2023.

BRIEF IN SUPPORT

INTRODUCTION AND BRIEF FACTUAL BACKGROUND

This is a medical malpractice action, arising generally out of the professional negligence of Defendants in failing to appropriately workup and treat Mr. Cairns' dissecting aorta during his presentation to Ascension Providence Hospital on or about August 31st, 2020 and his subsequent September 2nd, 2020 presentation to Dr. Burkett.

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As a result of Defendants' negligence Mr. Cairns expired on September 2nd, 2020. At the time of his death, Mr. Cairns was married with four children, and was the Global Head of Design Integrity at FCA Fiat Chrysler.

Plaintiff's expert economist, Michael Thomson, Ph.D., has generated reliable opinions regarding, *inter alia*, three categories, or elements, of damages: (1) Mr. Cairns' lost earnings, defined as the income Mr. Cairns' *would* have earned; (2) lost earnings capacity, defined as the income Mr. Cairns' *could* have earned (i.e., what he was *capable* of earning); and (3) Mr. Cairns' *wife's and children's* loss of financial support brought on their own behalf, as provided by the Wrongful Death Act ("WDA").

LEGAL ARGUMENT

Defendants first argue that Plaintiff cannot, ***as a matter of law***, recover for both, Mr. Cairns' lost earnings capacity, and his heir's lost financial support. It is Defendants' burden as the moving party to set forth, and meet, the appropriate legal authority for the relief requested, and they fail to do so. Notably, Defendants do not cite or rely on a single evidentiary rule in support of that position, because it is not an evidentiary issue, **it is an issue of law seeking to summarily dismiss an element or category of Plaintiff's damages**. Defendant's requested relief is untimely as the deadline for filing dispositive, pursuant this Court's order and MCR 2.119(E)(3), motions has long-since passed. Defendants failed to timely seek the dispositive relief they now request. They should not now be permitted to do so less than two weeks before trial and to the extreme prejudice of Plaintiff having less than a week to respond.

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"The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Health Call of Detroit v Atrium Home & Health Care Servs., Inc.*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Michigan law has long recognized that there is inherent uncertainty with future projections in determining damages, but maintains that "the measure of damages attributable to the loss of future earnings is left to the sound judgment of the jury despite the time element being uncertain. . . ." *Id*. at 104. Plaintiffs are not precluded from recovering damages "for lack of precise proof," and a plaintiff is not required to provide "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 v Dep't of Transp*, 497 Mich 45, 79; 860 NW2d 67 (2014).

Stellantis (formerly FCA Fiat Chrysler) retained counsel to represent its employees in depositions that were taken to address Mr. Cairns' wages and employment benefits. The attorney who was leading that effort, Mari Eble, has left the firm and Plaintiff's counsel has attempted to get someone from that firm to deal with the issue. Those efforts are continuing. Dr. Thomson's conclusions that the cash payout that was received by Mrs. Cairns effectively reduced her pension benefit over her lifetime because the benefit was based upon a survivor's benefit designation. Dr. Thomson's economic analysis is based on reliable methods in consideration of, *inter alia*, substantial past earnings records, including Mr. Cairns' past taxable income, history of deferred income, fringe benefits, FCA's profit sharing records, his human capital, or ability to earn, and application of accepted economic and econometric principles to forecast Mr. Cairns' future damages.

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There is sufficient factual support for a jury to conclude that Mr. Cairns would have began working in a consultant-type position to support Plaintiff's claim of damages relating to Mr. Cairns lost earnings capacity. Mr. Cairns had achieved incredible success during his employment in the automotive industry, and his close familial ties to the world of consultant work through his brother-in-law, Steven Jakubiec, further buttresses Plaintiff's claim. At deposition, Mr. Jakubiec testified:

> Q With regard to this, and I'll call it industry of consultants post retirement, do you have an opinion as to whether or not Michael would have been qualified, given his background, to move into a consulting position had he chosen to?
>
> * * *
>
> A Okay. Absolutely. There's no doubt. He had a wealth of knowledge. He was recognized, especially knowledge in the truck industry, which everybody knows is a very, very fast – not fast growing, but it's growing segment within the industry. It's highly profitable. A lot of people want them. And his background and knowledge and the fact that he ran the Ram program for so long.
>
> And, by the way, during his phase of tenure, the volume of Ram program – we call it market share. The most important thing is market share. If there's a – I'll just make up numbers. If there's a million vehicles being sold, what's your percentage of those million people? And the Ram brand went from – I won't quote numbers, but the Ram brand went from like very, very low to close to competing with some of the Chevy products. So, I mean, they grew – it grew – you know, I can't quote numbers. It grew dramatically.
>
> And everybody started to take notice of the Ram brand and – from a styling standpoint, an execution standpoint, a capability standpoint. And it just grew and grew and grew in numbers to where people started getting worried about – you know, the Fords and the G.M.'s ill say, because there's only like four truck players, right, Toyota, Nissan and then the Big Three and everybody took notice of the Ram. And it just kept growing and growing under Mike's tenure. Now, I'm not saying he was responsible for that, but he was – he owned it so – [(**Exhibit 1,** Jakubiec dep, 33-36)]

Plaintiff has properly supported her damages in fact and law, and it is for the jury to determine the scope and amount of damages if finds are justified by the facts and circumstances of the case.

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I. Michigan Law Has Long Afforded an Estate to Stand in Its Decedent's Shoes for Purposes of Collecting Damages. Such Damages Include the Lost Earning Capacity of the Decedent.

The Wrongful Death Act (WDA) provides that a plaintiff may stand in the shoes of her decedent when claiming damages for wrongful death. Michigan law has long allowed an estate to stand in the shoes of his or her decedent when claiming damages. *See*, e.g., *Jorgenson v Grand Rapids & I R Co*, 189 Mich 537, 541; 155 NW 535 (1915). When the Wrongful Death Act (WDA) was subsequently enacted, the Legislature enumerated a non-exhaustive list of those damages which a decedent's estate could claim as damages. The most recent version of the WDA, MCL 600.2922, provides in pertinent part:

> (1) **Whenever the death of a person, injuries resulting in death**, or death as described in section 2922a **shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages**, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages….
>
> * * *
>
> (6) 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. [emphasis added]

"All actions and claims survive death." MCL 600.6921. Michigan's Wrongful Death Act, MCL 600.2922, is an "integrated" act that combines the two remedies of "**survival**" and "**wrongful death**" claims. Before passage of the WDA, the "survival" and "wrongful death" actions were separate acts. The WDA combined them, created a single integrated act,

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and all claims for wrongful death are brought under it. There are two classes of potential claims within each WDA claim: 1) Those suffered by the Deceased, who is represented through the Personal Representative standing in their shoes, and 2) The damages suffered by survivors of the Deceased, who are a defined class of individuals expressly created under §(3) of the WDA. See *Denney v Kent Cnty Rd Comm'n*, 317 Mich App 727, 737; 896 NW2d 808 (2016) ("a claim for lost financial support under the wrongful-death statute is not the same as a claim for lost earnings. Specifically, lost earnings are damages that the decedent could have sought on his own behalf had he lived, whereas damages for lost financial support would be sought by one who depended on the decedent for financial support.")

The Model Civil Jury Instruction for Wrongful Death Damages (MCJI 45.02) provides further guidance, stating that the jury must give amounts as they decide to "be fair and just, under all the circumstances." MCJI 45.02 lists examples of survivors' damages, then gives the jury two blank spaces for "other" damages, offering the jury the opportunity to assess other damages beyond those listed in the WDA. MCJI 45.02 directs the jury to consider all categories of damages that both the deceased and the survivors suffer. It further instructs the jury that "the amount of money to be awarded for certain of these elements of damages cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment."

Courts have consistently ruled that the WDA neither limits nor precludes the type of damages recoverable in a death case. *See, e.g.*, *Thorn v Mercy Mem'l Hosp Corp*, 281 Mich App 644, 660; 761 NW2d 414 (2008). In *Thorn*, the Court held that the Legislature intended an expansive view of the WDA:

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> **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**. **Any other result would be contrary to the history of litigation in this area of the law, which sought to assure that wrongdoers would be held accountable to their victims**.
>
> * * *
>
> We find it inconceivable, as argued by defendants, that a child would be precluded from recovering damages … following the harsher and irreversible outcome of a parent's death, but that these same damages would be recoverable by a parent who is injured but survives. **Such a position is inconsistent with the stated purpose of the WDA, MCL 600.2921, to assure that "[a]ll actions and claims survive death," and contrary to the language of MCL 600.2922(1)**. **The statutory language leads to the inescapable conclusion that 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**. [*Thorn,* 281 Mich App at 659-660. (emphasis added)]

Expressly rejecting the defendants' arguments that the WDA's listing of damages excludes other kinds of damages traditionally allowed for tort victims, *Thorn* held that the term "including" in section 600.2922(6) that preceded the list of possible damages must "be construed as merely providing specific examples of the types of damages available, and not an exhaustive list." *Thorn*, 281 Mich App at 651. *Thorn* explained that under the defendants' interpretation, "the statutory language would mandate both the award of damages 'consider[ed] fair and equitable, under all the circumstances' while simultaneously limiting a plaintiff's recovery only to those items specified in the list following the term 'including.'" *Ibid*. The court found that "such an interpretation conflicts with rules of statutory interpretation." *Id*.

The guiding principle from *Thorn* is that "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.

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Similarly, the Supreme Court affirmed in *Wesche v Mecosta County Rd Comm* that: "The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act' does not change the character of such actions except to expand the elements of damage available." 480 Mich 75, 89; 746 NW2d 847 (2008), quoting *Jenkins v Patel,* 471 Mich 158, 165-166; 684 NW2d 346 (2004), quoting *Hawkins v Regional Med Laboratories PC*, 415 Mich 420, 436; 329 NW2d 729 (1982). These principles were further discussed by the Supreme Court in *Estate of Shinholster v Annapolis Hosp,* 471 Mich 540, 564-565 (2004); 685 NW2d 275:

> These provisions [MCL 600.2922(1),(2), and (6)], state that 'the personal representative of the estate of the deceased person' be able to 'maintain an action and recover damages [against] the person who or the corporation that would have been liable, if death had not ensued . . . .' Accordingly, while we agree with the Chief Justice that the Legislature is free to make 'a policy decision that the survivors of dead medical malpractice victims are entitled to lesser damages than are living medical malpractice victims … we see no indication in the statute that the Legislature, in fact, made such a decision; rather, we believe that the Legislature made a quite contrary policy decision in §2922(1),(2), and (6) by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived. [Emphasis in original].

The *Denney* decision

In 2016, our Court of Appeals issued its published decision in *Denney*, a case which involved the wrongful death of a man in a motorcycle accident. In *Denney*, the plaintiff sought to recover the decedent's lost future earnings. Although that action involved the Government Tort Liability Act (GTLA), the Court provided an extensive analysis of the WDA. In analyzing the arguments, the court stated:

> 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." Under the wrongful-death statute "the intervention of death neither limits nor

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> precludes the type of damages that could have been recovered by the person had the person survived the injury." 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 . . . ." 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."
>
> 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." **And economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." Therefore, damages for lost earnings are allowed under the wrongful-death statute**. *Denney* at 731-732, with emphasis added and internal citations omitted.

The *Denney* Court further noted, citing Supreme Court precedent, that:

> **'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.' '[T]he cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued . . .** .' [*Id.* at 734 (internal citations omitted and emphasis added)]

The Denney defendants appealed to the Michigan Supreme Court, and leave was denied. No dissent to the denial of leave was authored. *Id*. Denney is consistent with Supreme Court precedent that, "permit[ting] a decedent's estate to recover everything that the decedent would have been able to recover had she lived*," Shinholster, supra,* at 565. This is consistent with Michigan's long-standing legal doctrine, "effecting a continuance of the right of action that had vested in the decedent, with such damages as he could have recovered, including the present worth of his probable future earning had he lived." *Jorgenson*, 189 Mich at 541.

White v. FCA US, LLC

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The Honorable David Lawson issued an opinion in *White v FCA US, LLC*, 350 F Supp 3d 640, 686 (ED Mich, 2018) (**Exhibit 2**), a products liability case. In *White*, the defendants sought to exclude all damages involving decedent's lost wages, lost compensation, and lost earning capacity. Plaintiffs responded by arguing that such damages were available pursuant to *Thorn* and *Denney*. Judge Lawson, in an opinion which thoroughly analyzed and examined Michigan precedent on this issue, stated:

> **The defendant contends that *Thorn* and *Denney* are novelties that ought to be disregarded by this Court as poorly reasoned and in tension with earlier decisions of the state's appellate courts**. The Court does not see it that way. **Those decisions have not been criticized by Michigan courts, and they are binding on Michigan's trial and intermediate appellate courts**. See Mich Ct R 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."). Moreover, the older, conflicting intermediate appellate decisions relied upon by the defendant are not even regarded by Michigan's own courts as controlling law. See Ibid. **The panel in Thorn also considered and rejected the same position advanced by the defendant here, based on the same authorities on which it principally relies, finding that the restrictive language in those cases was mere dicta and contrary to the subsequent development of the law by the Michigan Supreme Court**. *Thorn*, 281 Mich App at 652-653, 761 NW2d at 419-420 ("In contrast to the case law relied on by defendants, we note that our Supreme Court has issued numerous rulings expressing an expansive interpretation of the damages available under the WDA.") [*Id*. at 646 (emphasis added)]

The same analysis is equally applicable to this matter.

More recently, in *Zehel v Nugent*, __NW2d__, 2022 WL 17365601 (Mich Ct App, Dec 1, 2022) (slip opinion) (**Exhibit 3**), the Court of Appeals, again, took the opportunity to reaffirm its prior decision in *Denney*, and its authority as controlling law regarding the inclusive language of the Wrongful Death Act, as amended by the Michigan Legislature, to permit an estate's recovery of its decedent's lost future earnings, to the same extent

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the decedent could have had he survived the injury, as a separate category of damages from lost financial support. See *Id*. at 3-4 (lv held in abeyance).

A. Application of Thorn, Shinholster, and Denney to this case allows for Plaintiff's claim of decedent's loss of earning capacity to be heard by the jury

The conclusion reached in *Thorn, Shinholster, Denney* and *White*, *supra*, allowing an Estate to recover all damages that could have been recovered by the decedent had he lived, is equally applicable to this case. Under the statute and this line of binding precedent, Mr. Cairns' Estate may stand in his shoes for purposes of recovering all damages that he could have recovered had he lived. Were Mr. Cairns kept alive by artificial means, there is no doubt that his Estate would have been statutorily entitled to obtain his loss of earning capacity as an element of future damages. Thus, those damages are equally recoverable by his Estate, which is standing in his shoes. *See* MCL 600.6301(a) (future damages by definition include loss of earnings and loss of earning capacity), and MCL 600.6303(1) (discussing plaintiff's right to seek recovery for lost wages and loss of earning capacity). *See* also MCL 600.6305:

> (1) Any verdict or judgment rendered by a trier of fact in a personal injury action subject to this chapter shall include specific findings of the following:
>
> (a) Any past economic and noneconomic damages.
>
> (b) Any future damages and the periods over which they will accrue, on an annual basis, for each of the following types of future damages:
>
> (i) Medical and other costs of health care.
>
> (ii) **Lost wages or earnings or lost earning capacity and other economic loss**.
>
> (iii) Noneconomic loss.
>
> (2) The calculation of future damages for types of future damages described in subsection (1)(b) shall be based on the costs and losses during the period of time the plaintiff will sustain those costs and losses. **In the event of death, the calculation of future damages shall be based on the losses during the period of time the**

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> **plaintiff would have lived but for the injury upon which the claim is based**. [emphasis added]

Through the interplay of MCL 600.2921 and MCL 600.2922, and the case law interpreting these provisions, the Legislature has preserved Mr. Cairns' loss of earning capacity claim for the time he would have lived, despite his resulting death.

The language of the WDA, Survival Act, and MCL 600.6305 are unambiguous, and the construction adopted by the Court of Appeals effectuates the express intent of the Legislature. The Survival Act, MCL 600.2921, is unambiguous in this regard: ***All actions and claims survive death***. This intent is further reinforced by the provisions of the WDA itself. The WDA states that an injured party's right to maintain an action ***and*** recover damages is preserved "notwithstanding the death of the person injured." The WDA then establishes that the court and jury may award all damages that are considered to be "fair and equitable, under all the circumstances." MCL 600.2922(6).

The Defendants may argue that loss of support and loss of future earning cannot exist in tandem because they *could* result in a double recovery. Dr. Bartlett made that argument. In that same vein, they may argue that the WDA only provides a vehicle for survivors to collect loss of support. These arguments, if believed, would require a suspension and disregard of the rules set forth in *Thorn, Shinholster*, and *Denney*, as well as MCL 600.6305(2).

The *Denney* Court went to great pains to discuss how loss of future earnings is an alternate and separate theory of damages from loss of support:

> …a claim for lost financial support under the wrongful-death statute is not the same as a claim for lost earnings. Specifically, lost earnings are damages that decedent could have sought on his own behalf had he lived, whereas damages for lost financial support would be sought by one who depended on the decedent for financial support. Because the damages are

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> distinct, the fact that the wrongful-death statute allows for recovery of lost financial support does not change the character of plaintiff's claim for damages for the decedent's lost earnings. *Denney* at 737.

Had Mr. Cairns survived, he would have been able to pursue a claim to recover damages for loss of income and earning capacity. MCL 600.6303(1) provides in part:

> In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, **loss of earning capacity**, or other economic loss…

Our courts have long held that it is the policy of this State to preclude tortfeasors from benefitting from their tortious conduct if that conduct has resulted in the injured party's shortened life expectancy or death. *See May v William Beaumont Hospital*, 180 Mich App 728, 755; 448 NW2d 497 (1989), holding that is well established that an injured plaintiff's loss of earning capacity extends to his life expectancy independent of his injuries, even though his damages likely include lost income or earning capacity beyond the injured party's shortened life expectancy. *May, supra,* at 755.

Michigan follows the prevailing American view that the calculation of lost earning capacity is based upon what the life expectancy of the injured party was "undiminished by" the defendant's misfeasance; *i.e.*, life expectancy is computed based on the individual's life expectancy immediately before the injury. The prevailing American rule holds that, "a tort victim suing for damages for permanent injuries is permitted to base his recovery 'on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury.'" *Sea-Land Services, Inc v Gaudet,* 414 US 573, 595; 94 S Ct 806, 819; 39 L Ed. 2d 9 (1974) (citations omitted, emphasis in original).

> Damages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury, and the difference in the actual

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earning of plaintiff before and after the injury does not constitute the measure; hence the amount which plaintiff is capable of earning and not that which he has actually earned since the injury is to be taken for the purpose of comparison with his previous earnings as showing the diminution of earning capacity, evidence as to actual earnings subsequent to the injury being received not as tending to mitigate damages but to establish plaintiff's earning powers. Accordingly, recovery may be had for impairment or diminution of earning ability or power, even though it should not be shown that plaintiff has in the past earned anything or been engaged in a remunerative or compensable pursuit.
Miller v Pillow, 337 Mich 262, 272-273; 59 NW2d 283 (1953), quoting 25 CJS at 620.

B. Michigan Has Long Rejected Calls to Reduce Future Economic Damages for Personal Consumption.

Dr. Bartlett attempts to reduce Plaintiff's future economic damages by Mr. Cairns' consumption. Michigan has not adopted any instruction requiring a jury to reduce a plaintiff's recovery for "personal consumption," nor is there any binding case law requiring such an instruction. Historically, Michigan Courts have not included an offset for personal consumption in death cases where loss of earning capacity is claimed, nor should that be the case now. The Supreme Court in *Walker v McGraw*, 279 Mich 97; 271 NW 570 (1937), when faced with a request to reduce damages by the amount the decedent would have personally consumed, declined to do so:

> The only other question involved in this case relates to the method used in determining the amount of damages to be assessed. Defendant contends that the amount for decedent's personal use and maintenance should be deducted in determining the amount to be assessed under the survival act. In *Olivier v Houghton County Street-Railway Co*, we said:
>
> 'The trial judge correctly interpreted and applied the decision of this court given on the former hearing of this case. In that case it was held that the plaintiff might recover for the loss of earnings which the evidence fairly shows that deceased would have made during the period which he would have lived, but for the injury.' [*Walker*, 279 Mich at 102-103 (internal citations omitted)]

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More recently, the Court of Appeals adopted this reasoning in *Clerc v Chippewa County War Mem Hosp*, unpublished per curium opinion of the Court of Appeals, issued November 14, 2013 (Docket No. 307915), p 17, lv denied 497 Mich 902; 856 NW2d 11 (2014), where it refused to reduce damages for personal consumption in a medical malpractice death case. *See* also *Wycko v Gnodtke*, 360 Mich 331, 105NW2d 118 (1960).

CONCLUSION

At the outset, Defendants' untimely requested dispositive relief should not be entertained by this Court.

It is well established that the Wrongful Death Act, reflects the Legislature's "policy decision in § 2922(1), (2), and (6) by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived." *Shinholster, supra,* 471 Mich 564 (Italics in original). The statutory and binding case law of this State permits Plaintiff to claim the full value of the income which his Decedent would have earned but for his death due to Defendants' negligence. S*tare decisis* precludes an argument that *Denney* be ignored. *Denney* has been the law for seven years. Our Michigan Legislature clearly could have acted in the interim if the legislative interpretation set forth in *Denney* was misplaced. The Legislature has not acted to set its holding aside and neither has our Supreme Court. The Defendants here may not like the decision in *Denney*, but it is the law.

WHEREFORE, Plaintiff respectfully requests that this honorable Court deny Defendants' motion in its entirety.

Respectfully Submitted,

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