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STATE OF MICHIGAN

IN THE SUPREME COURT

NAWAL DAHER and MOHAMMAD JOMMA, as Co-Personal Representatives for the ESTATE OF JAMAW JUMMA, a/k/a JAMWAD JOMAA, Deceased,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

Supreme Court No. 165377

Court of Appeals No. 358209

Wayne County Circuit Court No. 20-004169-NH

_____/

BRIEF *AMICUS CURIAE* ON BEHALF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT REGARDING QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT PLAINTIFF COULD RECOVER LOST EARNINGS CAPACITY DAMAGES IN THIS ACTION BROUGHT UNDER MICHIGAN'S WRONGFUL DEATH ACT?

Amicus Curiae, the Michigan Association for Justice, says "Yes."

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

II. DID THE COURT OF APPEALS ERR IN ITS DETERMINATION OF THE SPECIFICITY NECESSARY TO SUPPORT PLAINTIFF'S CLAIM FOR LOST EARNING CAPACITY?

Amicus Curiae, the Michigan Association for Justice, says "Yes."

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS[1]

Amicus curiae, The Michigan Association For Justice, hereby adopts the Statement of Facts contained in the Brief on Appeal filed in this Court on behalf of plaintiffs-appellees.

On September 22, 2023, this Court issued an order granting leave to appeal from the Court of Appeals December 1, 2022 decision. *Daher v Prime Healthcare Services-Garden City, LLC*, 512 Mich 959; 994 NW2d 789 (2023). In its September 22, 2023 order, the Court identified two issues that the parties were to address: "whether (1) the estate of a child may recover damages for the child's lost future earnings; and (2) to what specificity future earnings need be shown."

[1]Pursuant to MCR 7.312(H)(4), the undersigned represents that no counsel for any of the parties was involved in the preparation of this brief. The undersigned further represents that none of the parties made a financial contribution toward the preparation of this brief.

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ARGUMENT

I. UNDER MICHIGAN'S WRONGFUL DEATH ACT, MCL 600.2922, THE PLAINTIFF MAY RECOVER DAMAGES ASSOCIATED WITH A DECEASED'S FUTURE LOST EARNING CAPACITY.

The defendants argue in response to the first question posed in the Court's September 22, 2023 order that Michigan's Wrongful Death Act, MCL 600.2922, does not allow for the recovery of the deceased's lost earning capacity. In defendants' view, the only future earnings of the deceased that may be recovered in a wrongful death suit are those in which the deceased's survivors can demonstrate a loss of financial support based on those future earnings. The defendants, therefore, request that this Court overturn the Court of Appeals 2016 decision in *Denney v Kent County Road Commission*, 317 Mich App 727; 896 NW2d 808 (2016), which held that the future earnings could be awarded in a wrongful death case without proof of loss of financial support.

Contrary to defendants' arguments, *Denney* correctly interpreted the language of Michigan's wrongful death act.

The answer to the first question presented in this case lies in the language of the wrongful death act in its present form. But, as the parties' briefing in this case makes clear, Michigan's often confusing history in its treatment of death cases does have some impact on an understanding of the present statue.

Until 1939, Michigan had two distinct statutes that might apply where a party's negligence resulted in death – a survival act and a death act. In an action under the survival act, the plaintiff could recover lost earning capacity without the need of proof that lost earnings provided support for any survivors. *Olivier v Houghton County Street-Railway Co*, 134 Mich 367, 369; 96 NW 434 (1903). Recovery of the deceased's lost earning capacity was appropriate in a case premised on the

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survival act, because in such an action "the representatives of the deceased are entitled to recover the same measure of damages that he could have recovered if he lived to bring his suit to a successful issue." *Kyes v Valley Telephone Co*, 132 Mich 281, 284; 93 NW 623 (1903).[2]

Michigan still has a survival act, MCL 600.2921. That statute provides:

> All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.
>
> MCL 600.2921

MCL 600.2921 provides that all claims survive death, but that any claim for damages based on death must be "presented under the next section," Michigan's wrongful death act. This joinder of survival and death claims was first accomplished through the 1939 amendment of the death act. That 1939 amendment did not put an end to survival actions. Rather, it indicated only that, insofar as the provisions of the survival act were inconsistent with the death act as amended, the survival act was repealed. As this Court recognized in *Hawkins v Regional Medical Laboratories, P.C.*, 415 Mich 420; 320 NW2d 729 (1982), "the survival act was not repealed but was incorporated into the new death act to form a single ground of recovery in cases where tortious conduct caused death." *Id.*,

---

[2]By contrast, the original death act passed in 1848 provided that "the amount received in every such action, shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin . . . with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person." Act No. 38, 1848; *see Lincoln v Detroit & Mackinaw Railway Co*, 179 Mich 189, 198-199; 146 NW 405 (1914). Thus, in a claim brought under the death act, the focus of damages was not on the injury sustained by the deceased, but on the injury that the death caused to the deceased's survivors. Hence, the damages derived from lost future earnings in a case processed under the death act were limited to the loss of support that would have been provided to the deceased's spouse and next of kin.

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at 432.

This Court's decision in *Hawkins* provides significant illumination in resolving the issue presented in this case. *Hawkins* was a wrongful death medical malpractice action in which the plaintiff died as a result of alleged malpractice that occurred ten months before his death. The issue presented in that case was whether plaintiff's cause of action was barred by the statute of limitations. The plaintiff argued that her suit was timely because a wrongful death action does not accrue until the decedent's death. The defendant contended that the statutory limitations period applicable to a medical malpractice claim, MCL 600.5838, applied and that plaintiff's claim accrued on the date of the malpractice.

This Court rejected plaintiff's argument that the wrongful death act created a new cause of action as it held that the limitations period applicable to malpractice claims would control. In its ruling in *Hawkins*, the Court summarized its holding:

> Plaintiff's cause of action is without question one rooted in the survival aspect of the wrongful death act. The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called "death act", M.C.L. § 600.2922; M.S.A. § 27A.2922, does not change the character of such actions *except to expand the elements of damage available*. Mr. Hawkins had a fully vested cause of action, if at all, on or about April 29, 1975, the date of the alleged wrongful act. He lived until January of 1976. His cause of action, if any, having accrued at the date of the wrongful act, the applicable limitations period began to run from that date.
>
> 415 Mich at 436 (emphasis added).

This Court held in *Hawkins* that the wrongful death act did not alter the character of survival actions, but did serve to expand the scope of damages available. Thus, in a survival action, an action that traditionally allowed for recovery for all damages the deceased would have been entitled to recover if he/she had lived, *Kyes*, 132 Mich at 284; *Olivier*, 134 Mich at 369, this Court in *Hawkins*

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viewed the wrongful death act as *expanding* the elements of damages available. *See also Wesche v Mecosta County Road Comm'n*, 480 Mich 75, 89; 746 NW2d 847 (2008); *Jenkins v Patel*, 471 Mich 158, 165; 684 NW2d 346 (2004).

This Court has adopted this expansive view of the scope of damages recoverable in an action under the wrongful death act in other cases construing the present version of that act. In *Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004), this Court, citing to three subsections of the wrongful death act in its present form, concluded "we believe the Legislature made . . . a policy decision . . . by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived." *Id.*, at 564 (emphasis in original). *Shinholster*'s view of the damages available under the wrongful death act is entirely consistent with the scope of the damages traditionally recoverable in a survival action. And, since a deceased would unquestionably have been able to recover lost earning capacity if he/she had survived, it is clear that such damages must be recoverable in a wrongful death action under *Shinholster*'s analysis of MCL 600.2922.

This "survival-centered" view of the damages available in a wrongful death action was further reinforced by this Court in its decision in *Wesche*. In that case, the Court overruled its prior decision in *Endykiewicz v State Highway Comm*, 414 Mich 377; 324 NW2d 755 (1982), because *Endykiewicz* "erroneously treated a wrongful-death claim as a 'new' cause of action *rather than a continuation of the decedent's underlying claim*. *Wesche*, 480 Mich at 91, n.13 (emphasis added). *Wesche*, like *Shinholster*, instructs that a wrongful death action is properly construed as a "continuation" of the deceased's cause of action, one in which the trier of fact may award the estate all of the damages that the deceased would have been entitled to if he/she had survived.

This expansive view of the damages reasonable under Michigan's wrongful death act that

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was adopted by this Court in *Hawkins*, *Shinholster* and *Wesche* is entirely consistent with the text of the act.

Subsection 1 of the act makes reference to the deceased's ability to file a claim for damages "if death had not ensued":

> 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 notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

MCL 600.2922(1).

Subsection 6 of the act describes the damages that are recoverable under the act. That subsection provides:

> 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.

MCL 600.2922(6).

The first clause of subsection 6 describes the damages recoverable in broad terms. A trier of fact may award all of the damages that it considers "fair and equitable, under all the circumstances." This clause is followed by the word "including," and a list of specific damages that may be recovered in a wrongful death action. The word "including" in this context is significant.

There is no doubt that the word "including" in this context is meant to convey that what

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follows is a nonexhaustive list of the damages that may be recovered as "fair and equitable under all the circumstances." *See e.g. West v Gibson*, 527 US 212, 218 (1999) ("The word 'including' makes clear that 'appropriate remedies' are not limited to the examples that follow the word); *Federal Land Bank of St. Paul v Bismarck Lumber Co*, 314 US 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *cf Wyoming Park Lumber & Fuel Co v Vander Ark*, 291 Mich 496, 501; 289 NW 228 (1939).[3]

In their arguments that the wrongful death act does not allow for the recovery of lost earning capacity, the defendants made much of the fact that in a 1985 amendment to §2922(6), the Legislature added to the (nonexhaustive) list of damages recoverable under the wrongful death act, "damages for the loss of financial support." This, in the defendants' view, exhibits a legislative intent to confine the recovery of future earnings to what it was under the old death act – they were limited solely to the amount of support the deceased would have provided to his/her survivors.

But, the 1985 addition of "loss of financial support" to the list of potential damages in §2922(6) did nothing to change the fact that this language was included in a nonexhaustive list of recoverable damages. Nor did the 1985 amendment alter the fact that this list of potential damages

[3]This Court has recognized in the past that the use of the word "includes" in a statute may be used either as a term of enlargement or of limitation. *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996); *Surowitz v City of Pontiac*, 374 Mich 597, 606; 132 NW2d 628 (1965). A comparison between the provision of the Child Custody Act under consideration in *Frame* and the language contained in MCL 600.6013(1) that had to be interpreted by the Court of Appeals in *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 467-469; 633 NW2d 418 (2001), illustrates how the word "includes" can either serve to enlarge or limit. But the potential ambiguity that might exist in the use of the word "includes" in a statute simply has no application when the word "including" is used as it is in §2922(6). *cf TOMRA of North America, Inc v Dep't of Treasury*, 342 Mich App 388, 401, n.6; 994 NW2d 844 (2022) (emphasizing that the subsection being considered uses the word "includes," not "including.").

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was still introduced by the preposition "including."[4]

The defendants further suggest that the phrase "loss of financial support" in §29226 has to be given the interpretation that they urge or this phrase would be rendered surplusage. But this familiar interpretive tool cannot be applied where the Legislature elects to draft a statute that contains a general category (all damages "fair and equitable, under all the circumstances"), followed by a *nonexhaustive* list of examples of that general category. In such a situation, the specific examples the Legislature supplies will always be a subset of the more general category, *Davidson v Hare*, 351 Mich 4, 8-9; 87 NW2d 131 (1957), which means that these specific examples provided by the Legislature are, in effect, always surplusage.

The Court of Appeals correctly interpreted the scope of damages under the wrongful death act in its decision in *Thorn v Mercy Memorial Hospital Corp*, 281 Mich App 644; 761 NW2d 414 (2008). In that case, the Court of Appeals found that an item of damages – loss of household services – that is not included in §2922(6)'s list of damages, was still recoverable in a wrongful death action:

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

---

[4]The defendants' reliance on language added to §2922(6) in 1985 also suffers from a rather curious legislative "subtraction by addition." To accept the defendants' argument, one would have to assume that before the 1985 amendment, §2922(6) did, in fact, allow the recovery of lost earning capacity in a wrongful death action. But, accepting the defendants' reasoning, when the Legislature *added* the "loss of financial support" language in 1985, that additional language served to limit the dangers "fair and equitable, under all the circumstances" that a trier of fact could award.

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Id., at 650-651 (emphasis added).

Eight years after the Court of Appeals decided *Thorn*, another panel of that Court issued its decision in *Denney*. *Denney* was simply the logical extension of the principles set out in *Thorn* applied to a claim for future lost earning capacity. Citing this Court's holding in *Wesche*, the *Denney* Court correctly held that such damages could be recovered because "if the decedent had not died, he would have been able to recover . . . damages from defendant for earnings lost as a result of the bodily injury." *Denney*, 317 Mich App at 735. The holding in *Denney* is entirely consistent with this Court's decisions in *Wesche, Shinholster,* and *Hawkins,* it is also consistent with the language of the wrongful death act.

The defendants' other principal argument in this case is built around this Court's 1948 decision in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948). The defendants insist that the holding announced in *Baker* retains vitality despite the legislative changes that have been made to the wrongful death act since 1948. The defendants are incorrect.

The Court in *Baker* rejected prior wrongful death decisions of this Court which had held that future earnings could be recovered without the requirement of demonstrating that these earnings would have gone to the support of survivors. *See Grimes v King*, 311 Mich 399; 18 NW2d 870 (1945). *Baker* concluded that the wrongful death act allowed recovery of lost earnings "only to the extent that the deceased was legally obligated to contribute to the support and maintenance" of any survivors. 319 Mich at 714.

But, the Court in *Baker* was construing the 1939 version of the wrongful death act. That statute for the first time unified survival and death actions in one respect by declaring that "[a]ll actions for such death, or injuries resulting in death, should hereinafter be brought only under this

act." The 1939 act also described the damages that could be recovered in a case arising out of death:

> [I]n every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting frm such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period interviewing between the time of the inflicting of such injuries and his death.

The Court in *Baker* read this language as allowing recovery of the amounts "the court or jury should deem fair and just with reference to pecuniary injuries to the surviving spouse or next of kin." 319 Mich at 713. Thus, the *Baker* Court found in the language of the 1939 act that the future earnings of a deceased could be recovered only to the extent that loss of those earnings caused injury to the surviving spouse or next of kin. The *Baker* Court held that the 1939 act contained the requirement from the old death act that the future earnings of the deceased could be recovered only to the extent that those earnings provided support to the deceased's survivors.

But, the language in the 1939 act that proved decisive to the *Baker* Court no longer exists. First, the word "pecuniary" that was in the 1939 act was removed from the wrongful death act in 1971. More importantly for purpose of the *Baker* Court's reasoning, the language in the 1939 act requiring injury "*to the surviving spouse or next of kin*" is not to be found in the present version of the act. There is nothing in the damage subsection of the wrongful death act, §2922(6), limiting the scope of damages to those injuries, pecuniary or otherwise, suffered by the deceased's spouse or next of kin.

Moreover, the subsection of the wrongful death act that identifies who may recover damages under the act, simply identifies three different classes of individuals "who suffer damages and survive the deceased." MCL 600.2922(3). All that is required is that these three classes of

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individuals "suffer damages"; there is no requirement that these individuals suffer an injury associated with the loss of support derived from the deceased's future earnings.

The language of the 1939 act that led to the Court's decision in *Baker* is no longer contained in the present wrongful death act. As a result, the limitation that the *Baker* Court placed on the recovery of the deceased's lost earnings is no longer applicable. What a decedent's estate can recover under the present version of the act is, as this Court recognized in *Shinholster*, "everything that the decedent would have been able to recover had she lived." 471 Mich at 564.

II. THE COURT OF APPEALS ERRED IN ITS DETERMINATION OF THE LEVEL OF SPECIFICITY REQUIRED ON THE SUBJECT OF FUTURE LOST EARNING CAPACITY IN A WRONGFUL DEATH CASE.

The second issue that the Court asked the parties to brief in its September 22, 2023 order was "to what specificity future earnings need to be shown." *Daher*, 512 Mich at 959. In its December 1, 2022 opinion, the Court of Appeals ruled that "a child's future earning potential is not *inherently* too speculative to permit recovery. The touchstone is whether the future earning potential can be proven with reasonable certainty based on the child's unique and known traits and abilities." *Daher v Prime Healthcare Services – Garden City LLC*, 344 Mich App 522, 535-536; 1 NW3d 405 (2022). Based on that reasoning, the Court of Appeals remanded to the circuit court for a determination of whether the deceased, who was 13 years old at the time of her death, could establish future lost earning capacity with reasonable certainty.

On the same day that the Court of Appeals decision in this case was announced, the same panel of the Court of Appeals issued a published decision in another case, *Zehel v Nugent*, 344 Mich App 450; 1 NW3d 387 (2022), in which it applied a similar test of future damages and concluded

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that in a wrongful death action brought on behalf of a baby who died only hours after her birth was foreclosed from recovering future lost earning capacity.[5] According to the *Zehel* panel, "tragically, there is simply no way to know anything about [the deceased's] interests, aspirations, personality, strengths and weaknesses, academic performance, or any other characteristic that could be extrapolated." 344 Mich App at 509.

The Court of Appeals approach to this issue runs contrary to over 150 years of this Court's precedents on the subject of damages available in a tort action.

This Court laid the framework of this component of the law of damages in its early and highly influential[6] decision in *Allison v Chandler*, 11 Mich 542 (1863). *Allison* was a tort action in which one of the elements of damages that the plaintiff claimed was future lost profits. The issue that came before the Court in *Allison* was whether the plaintiff's proofs as to these future profits were sufficient to present the issue to the jury. Justice Isaac Christiancy, speaking for a unanimous Court in *Allison,* noted that "the case is one which, from its very nature, affords no element of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible." 11 Mich at 554. Thus the *Allison* Court acknowledged at the outset that there was substantial uncertainty as to the amount of the future damages that the plaintiff was claiming.

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[5]The plaintiff in *Zehel* has filed an application for leave to appeal in this Court. *Zehel v Nugent*, Supreme Court No. 165379. On September 22, 2023, the Court issued an order holding a decision in *Zehel* in abeyance pending the outcome of this case. *Zehel v Nugent*, ___ Mich ___; 994 NW2d 787 (2023).

[6]To get a sense of just how influential this Court's decision in *Allison* has proven to be, the Court need only examine the Supreme Court of the United States decision in *Story Parchment Co v Paterson Parchment Paper Co*, 282 US 555, 563-564 (1931), which borrowed liberally from this Court's decision in that case. *See also Routsaw v McClain,* 365 Mich 167, 171; 112 NW2d 123 (1961).

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The Court in *Allison,* however, recognized that the uncertainty in the proofs bearing on the future profits that the plaintiff was claiming was directly due to defendant's tortious conduct. But, the question for the *Allison* Court was which of the parties should bear the burden of that uncertainty, the plaintiff or the tortfeasor who caused the plaintiff's injuries. The answer to this question, according to the *Allison* Court, was simple:

> The nature of the case is such that the wrong-doer has chosen to make it; and upon every principle of justice, *he* is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case, and the difficulty of accurately estimating the results of his own wrongful act. *Upon what principle of right can courts of justice assume–not simply to divide this risk, which would be thus far unjust–but to relieve the wrong-doer from it entirely, and throw the whole upon the innocent and injured party? Must not such a course of decision tend to encourage trespasses, and operate as an inducement for parties to right themselves by violence, in cases like the present?*
>
> *Id*. (emphasis added)

The *Allison* Court held that recovery of these uncertain damages should be allowed even if it might result in the overcompensation of the injured party:

> we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injuries, thought the amount thus excluded an not be estimated with accuracy by a fixed and certain rule.
>
> *Id*.

To require certainty in the proofs related to damages in these circumstances thereby denying all recovery would, as the *Allison* Court observed, result only in the "certainty of injustice":

> Certainty is doubtless very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract. Such is quite generally the case in

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> trespass and trover for the taking or conversion of personal property; if the property (as it generally is) be such as can be readily obtained in the market and has a market value. *But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he can not show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice.*
>
> *Id.*, at 554-555 (emphasis added).

The Court in *Allison* then set out the following principle of damage law that has been repeatedly echoed in later decisions of this Court:

> *The law does not require impossibilities*; and can not, therefore, require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. *Juries are allowed to act upon probable and inferential, as well as direct and positive proof.* And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and a probable estimate which the nature of the case will permit.
>
> *Id.* (emphasis added).

Eight years after *Allison* was decided, Justice Christiancy, in another unanimous opinion of this Court, expanded on his opinion in that case in *Gilbert v Kennedy*, 22 Mich 117 (1871). Returning to the theme that the uncertainty on the amount of plaintiff's damages that were the result of the defendant's tortious conduct must not be assumed only by the injured party, this Court held in *Gilbert*:

> [I]s he only to recover so much as can be measured with certainty, though it may be *equally certain* that this does not cover the tithe of the damages really sustained? This might be well enough if the want of certainty inherent in the nature of the case were properly attributable to the fault of the plaintiff. But *he* did not make the case; this was made against his will by the defendant, who chose his own time, place and manner of committing the wrong, and the plaintiff is compelled to grapple with the

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> case thus made for him; and, therefore, such a rule, as one of universal application, can only become just when trespassers become so considerate of the rights of others as to commit their trespass only in cases and under circumstances where the damages can be calculated by a fixed and certain rule.
>
> 22 Mich at 129-130

The Court in *Gilbert* found that a contrary rule under which the uncertainty in the amount of damages would relieve a tortfeasor of all responsibility for his wrongdoing,"would be little less than legalized robbery," *id.*, at 131, and it added:

> Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced.
>
> *Id.*, at 131.

The law reflected in this Court's early decisions in *Allison* and *Gilbert* remains the law in this state. This Court recognized much more recently in *Byer v Smith*, 419 Mich 541; 357 NW2d 644 (1984), that "[t]he tort measure of damages requires the fact finder to make *a prediction* regarding future damages." *Id.*, at 545 (emphasis added). *See also Pike v City of Wyoming*, 431 Mich 589, 606-607; 433 NW2d 768 (1988) (J. Brickley concurring); *Sherrell v Bugaski*, 169 Mich App 10, 15; 425 NW2d 707 (1988). Since future economic damages are, by necessity, based on a prediction of future events, such damages are to be awarded regardless of whether the actual amounts to be awarded may be imprecise.

The law with respect to the precision required in damage awards first discussed in this Court's decisions in *Allison* and *Gilbert* was the subject of the Court's later decision in *Muskegon Agency, Inc. v General Telephone Company of Michigan*, 350 Mich 41; 85 NW2d 170 (1957). In that case, the Court emphatically ruled that damages may be awarded by a trier of fact even though

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the exact amount of such damages cannot be determined with precision. This Court ruled in *Muskegon Agency*:

> Certainty is doubtless very desirable in estimating damages in all cases: and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract . . . *But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice*. . .
>
> *The law does not require impossibilities; and cannot therefore require a higher degree of certainty than the nature of the case admits*. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. *And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit*.
>
> *Id*., at 50-51 (emphasis added).

As this Court reemphasized in *Muskegon Agency*, the law of damages in Michigan "does not require impossibilities"; it does not demand a level of precision in assessing damages that simply does not and cannot exist. *See also McCullagh v Goodyear Tire & Rubber Company*, 342 Mich 244, 254; 69 NW2d 731 (1955). Instead, as found in *Fera v Village Plaza, Inc.*, 396 Mich 639; 242 NW2d 372 (1976) and *Godwin v Ace Iron & Metal Co.*, 376 Mich 360, 368; 137 NW2d 151 (1965), in those cases in which *some* degree of injury is found, a court may not deny all recovery merely because the exact amount of those injuries may be the subject of some conjecture:

> But where injury to some degree is found, we do not preclude recovery for lack of precise proof. *We do the best we can with what we have*. We do not, 'in the

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> assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable.' *Particularly is this true where it is defendant's own act or neglect that has caused the imprecision*.
>
> *Godwin*, 376 Mich at 368; *Fera*, 396 Mich at 648.

The general principles with respect to damages set forth by this Court in *Allison, Gilbert, Muskegon Agency, McCullagh, Godwin* and *Fera* must apply here. What this Court first held in *Allison* and what it has confirmed in its later cases is that, "[t]he law does not require impossibilities, and cannot therefore require a higher degree of certainty than the nature of the case admits. *Muskegon Agency,* 350 Mich at 50; *McCullagh,*342 Mich at 254. As this Court succinctly put it in *Godwin*, in awarding damages, "[w]e do the best we can with what we have." 376 Mich at 658.

The Court of Appeals in its December 1, 2022 opinion at first appeared to grasp at least some aspects of this basic Michigan law on the subject of damages. It correctly noted several important aspects of Michigan law bearing on the question of damages challenged as speculative:

> Although "there is inherent uncertainty regarding what the future may hold," "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, and the jury's award will not be disturbed if reasonable and within the range of the testimony and proofs presented." *Id.*, at 104, citing *Vink v House*, 336 Mich 292, 296-297; 57 NW2d 887 (1953). Recovery of damages is not precluded "for lack of precise proof," nor must a plaintiff 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).
>
> 344 Mich App at 531.

Yet after acknowledging that the recovery of damages is not to be precluded because of the absence of precise proofs, the Court of Appeals proceeded to find that the plaintiff who died at 13 years-of-age could recover future lost earnings only through proof "with reasonable certainty based

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on personal characteristics and influences known at the time . . .” *Id.*, at 536. But, as the panel’s decision in *Zehel* demonstrates, under this reasoning, there will be a substantial number of cases in which the plaintiff will recover nothing because the “reasonable certainty” that the panel required does not exist.

Michigan law does not require that a plaintiff establish his/her damages to a mathematical certainty. Instead, Michigan courts have recognized that where some amount of injury is found, precision in the proofs regarding damages is not and, in many instances, cannot be expected. *See Lorenz Supply Company v. American Standard, Inc.*, 100 Mich App 600, 611-612; 300 NW2d 335 (1980) *aff'd* 419 Mich 610 (1984). This basic principal of law is also embodied in a model jury instruction, SJI2d 50.01.

Under Michigan law, “it is the uncertainty as to the *fact* of legal damages that is fatal to recovery, but not uncertainty as to the amount.” *Wolverine Upholstery v. Ammerman*, 1 Mich App. 235, 244; 135 NW2d 572 (1965); *Bonelli v Volkswagen of America,* 166 Mich App 483; 421 NW2d 213 (1988).

The Court of Appeals erred in failing to follow this Court’s long established principles governing plaintiff’s claim for future economic damages arising out of Rowyn Vasquez’s death. The Court of Appeals compounded that error when it concluded that there was little clear authority in Michigan law regarding a child’s claim for loss of earning capacity. 344 Mich App at 532-533. The Court of Appeals suggestion that there was no case law from this Court addressing whether a child could recover for future loss of earnings was wrong. This Court has, in fact, considered this issue on several occasions.

For example, in *Love v Detroit, J. & C.R. Co.,* 170 Mich 1; 135 NW 963 (1912), the Court

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considered an action under Michigan's survival act based on the death of a five-year-old child. Among the damages that the plaintiff sought to recover in *Love* was the deceased child's lost earning capacity. This Court, confronted with an argument comparable to that offered by the defendants in this case, rejected the claim that the future economic damages sought in the case were too speculative:

> From the nature of the case, the amount of damages cannot be estimated with certainty either as to the element of pain and suffering or the element of future earnings after the age of 21; but this does not, as we have repeatedly held, deprive the injured person or all damages. *Hart v Village of New Haven*, and cases cited, 130 Mich 181, 89 NW 677.
>
> The measure of damages is well settled in cases for negligent injuries under the survival act. *Olivier v St Ry,* 138 Mich 242, 101 NW 530 ; *Davis v Railroad Com,* 147 Mich 479, 111 NW 76; *Rouse v M.U.R.,* 164 Mich 475, 129 NW 719. The fact that the child's death has occurred before he has become a wage-earner does not foreclose inquiry as to the probable value of his services for the years ensuing his death. *Black v Railroad Co.*, 146 Mich 568, 109 NW 1052, *Braasch v Stove Co.,* 153 Mich 652, 118 NW 366, 20 L.R.A. (NS) 500.
>
> *To enable the jury to determine the probably earning capacity of the child for the period of his probable life after arriving at the age of 21, a wide latitude must necessarily be allowed in the admission of testimony as the child's status and future prospects and the vocations and their remuneration which might reasonably be expected to be open to him.* We are therefore of the opinion that the rulings complainted of were not erroneous. *Snyder v Railway Co.,* 131 Mich 418, 91 NW 643; *Jeffries v Air Line Ry,* 129 NC236, 39 SE 366*, Walters v Railway Co.,* 41 Iowa 71; *Fishburn v Railway Co.,* 127 Iowa 483, 103 NW 481.
>
> 170 Mich at 7-8 (emphasis added).

The Court approved the potential recovery of loss of economic opportunity in another case arising out of the death of a five year old boy in *Bos v Gaudio,* 267 Mich 517; 255 NW 349 (1934). The Court noted in *Bos* that the jury had been properly instructed that the measure of the plaintiff's damages "was the present worth of what the boy likely would have earned for the probable balance of his life, from and after the time he reached the age of 21 years." 267 Mich at 520. The Court

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further acknowledged in *Bos* the uncertainty associated with that determination:

> It is impossible to say with any degree of certainty how long the boy would have lived, were it not for the accident, or how much he would have earned had he survived his twenty-first birthday, or whether such earnings would have increased or diminished as he grew older.
>
> *Id.*

Yet, despite this recognized uncertainty, this Court in *Bos* did not conclude that the plaintiff was foreclosed from recovering all of the potential damages for his decedent's lost earnings.

In cases comparable to *Love* and *Bos,* this Court has also approved the recovery of future lost income in cases involving the death of a seven-year-old, *Black v Michigan Central R. Co.,* 146 Mich 568; 109 NW 1052, 1055 (1906) ("Where the deceased was a minor, and left a father who would have been entitled to his services had he lived, the law implies a pecuniary loss, for which compensation under the statute may be given."), for the death of a fourteen year old, *Nicholas v Maxwell Motor Corp,* 237 Mich 612; 213 NW2d 128 (1927) (relying on its prior decision in *Love* to conclude that earnings after the decedent reached the age of 21 were recoverable), for the death of a 15 year old, *Thompson v Ogemaw County Board of Road Commissioners,* 357 Mich 482, 490; 98 NW2d 620 (1959) ("It must be recognized at this point that some uncertainty of proof is implicit in the terms of the statute we seek to interpret."), and also for injuries sustained by an eleven-year-old boy, *Sadlowski v Meeron,* 240 Mich 306, 312; 215 NW422 (1927) ("The amount of such damages could not be estimated with certainty, 'but this does not, as we have repeatedly held deprive the injured person of all damages.'").[7]

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[7]There are also cases from around the country recognizing that lost future income may be recovered by a child. *North Broward Hosp Dist v Johnson*, 538 So 2d 871, 874 (FlaApp 1988); *Zhao v United States*, 963 F3d 692 (7th Cir 2020) (applying Illinois law); *Louisville SW Hotel, LLC v Lindsey*, 636 SW3d 508, 517 (Kent 2021); *Lewin Realty III, Inc v Brooks*, 138 MdApp 244; 771 A.2d 446, 467-468 (2011), overruled on other gds, *Ruffin Hotel Corp of Maryland, Inc*

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In the circumstances of a case like this, "[w]e do the best we can with what we have." *Godwin*, 376 Mich at 368. That is what the plaintiffs did in this case through the material prepared by their economist expert, Dr. Nitin Paranjpe. Dr. Paranjpe provided the court with statistical evidence derived from unquestionably reliable sources as to various earning capacities based on educational levels achieved.

Under the Michigan damage law outlined above, Dr. Paranjpe's statistical approach is sufficient to support the award of future lost earning capacity in this case and in any other wrongful death action that arises out of the death of a minor.

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v Gasper, 418 Md 594 (2011); *Univ of Md Medical Sys Corp v Gholston*, 203 MdApp 321; 37 A3d 1074, 1085-1086 (2012); *Greyhound Lines, Inc v Sutton*, 765 So2d 1269-1277 (Miss 2000); *Lesniak v County of Bergen*, 117 NJ 12, 563 A2d 795 (1989); *Lopez v Gomez*, 305 AD2d 292; 701 NYS2d 601 (2003); *Fox-Kirk v Hannon*, 142 NC App 267; 542 SE 2d 346, 351; *Roberts v Williamson*, 52 SW3d 343 (Tex.App 2001), rev'd in part on other grounds, 111 SW3d 113 (2003); *Pipgras v. Hart*, 832 S.W.2d 360, 366 (Tex.App.—Fort Worth 1992, writ denied); *Musick v Dorel Juvenile Group, Inc*, 818 F Supp 2d 960, 962-964 (WD Va 2017); *Sherman v City of Seattle*, 57 Wn 2d 233; 356 P2d 316 (1960); *Andrews v Reynolds Memorial Hosp, Inc*, 201 WV 624; 499 SE2d 846, 852-855 (1997).

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RELIEF REQUESTED

Based on the foregoing, amicus curiae, the Michigan Association for Justice, requests that this Court conclude that plaintiff could recover lost earning capacity damages and remand this matter to the Wayne County Circuit Court for further proceedings.

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CERTIFICATION PURSUANT TO MCR 7.312(A)

Mark Granzotto, attorney for amicus curiae, the Michigan Association For Justice, hereby certifies pursuant to MCR 7.312(A) that this brief was typed using the Corel Word Perfect word processing program. That program has a function which can calculate the total number of words contained in a document. According to that program function, there are 7,426 allowable words in this brief.

/s/ Mark Granzotto
Counsel for Amicus Curiae