RECEIVED by MSC 4/15/2024 4:21:02 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

NAWAL DAHER and MOHAMAD JOMAA, as co-Personal Representatives for the Estate of JAWAD JUMAA a/k/a JAWAD JOMAA, Deceased

Plaintiff-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, DO., Jointly and Severally,

Defendants-Appellants.
_____/

Supreme Court No. 165377

Court of Appeals No. 358209

Wayne County Circuit Court No. 20-004169-NH

BRIEF BY AMICI CURIAE MICHIGAN HEALTH AND HOSPITAL ASSOCIATION, MICHIGAN OSTEOPATHIC ASSOCIATION, AND MICHIGAN STATE MEDICAL SOCIETY

CERTIFICATE OF SERVICE

KITCH ATTORNEYS & COUNSELORS, PC

CHRISTINA A. GINTER (P54818)
Attorney for Michigan Health and Hospital Association
Michigan Osteopathic Association, and
Michigan State Medical Society
One Woodward Avenue, Suite 2400
Detroit, MI 48226
(313) 965-7841

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED v

INTEREST OF AMICI CURIAE MICHIGAN HEALTH & HOSPITAL ASSOCIATION, MICHIGAN OSTEOPATHIC ASSOCIATION, AND MICHIGAN STATE MEDICAL SOCIETY vi

STATEMENT REGARDING JURISDICTION viii

STATEMENT OF FACTS 1

INTRODUCTION 2

ARGUMENT 5

I THE COURT OF APPEALS DECISION REGARDING DAMAGES UNDER THE WRONGFUL DEATH ACT IN DENNEY V KENT COUNTY ROAD COMMISSION WAS INCORRECTLY DECIDED, AND IS NOT CONSISTENT WITH THE PLAIN LANGUAGE OF THE WRONGFUL DEATH ACT OR WITH MICHIGAN'S CONSISTENT RECOGNITION OF THE SOLE COMPENSATORY FUNCTION OF TORT DAMAGES. DENNEY SHOULD BE OVERRULED, AND THE LONG-ESTABLISHED RULE LIMITING RECOVERY TO SURVIVORS' "LOSS OF FINANCIAL SUPPORT," AND REQUIRING PROOF OF A "REASONABLE EXPECTATION" BY SURVIVORS OF "LOSS OF FINANCIAL SUPPORT," SHOULD BE RESTORED 5

A. Michigan Common Law Permits Tort Damages Only For The Purpose Of Compensation 7

B. Both The Structure of Death Act And The Construction Of The Act, Prior to *Denney*, Reflect That The Death Act Is A Mechanism For Permitting Recovery Of Compensatory Damages Under Common Law Tort Liability Theories, In Cases Involving Death Or Injuries Resulting in Death 9

1. The wrongful death act permits recovery for damages for death or injuries resulting in death that was not permitted under the common law, and in doing so, recognizes the unique nature of such an action with respect to the losses that have been or will be sustained and the individuals who may sustain such losses 9

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

2. The current wrongful death act explicitly authorizes recovery and distribution of damages only on behalf of, and only to, those who sustain or suffer damages 12

3. Michigan's law regarding recovery of "financial support" under the wrongful death act developed, over a period of almost a century, in a manner consistent with both the view of the function of tort damages as compensatory and the need for nonspeculative proofs of future damages recognized in non-death tort cases 14

C. *Denney*'s Apparent Abandonment Of The Legal Framework For Recovery of Income-Related Losses In Wrongful Death Actions Is Wholly Inconsistent With Both Plain Language Of The Death Act And The Recognized Compensatory Function Of Tort Damages Generally 20

II RECOVERY OF INCOME-RELATED DAMAGES UNDER THE WRONGFUL DEATH ACT SHOULD CONTINUE TO BE SUBJECT TO THE TEST OF "REASONABLE EXPECTATION OF SUPPORT" 25

A. The Court of Appeals' Requirement Of Proof Of Future Damages Beyond Mere Speculation Is Consistent With The "Reasonable Expectation Of Support" Test, Which Should Continue To Apply 25

B. The Test Adopted In This Case And In *Zehel,* Requiring Proof Of The Unique Interests And Abilities Of A Minor Decedent To Support An Award Of Future Income-Related Damages, Is Not Inconsistent With Prior Michigan Law 28

C. Proof of Personal Consumption and Taxes Also Is Relevant To Any Recovery Of Loss Of Wage Earning Capacity 29

RELIEF REQUESTED 34

STATEMENT REGARDING WORD COUNT COMPLIANCE 35

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

INDEX OF AUTHORITIES

Cases

Allison v Chandler, 11 Mich 542 (1863)..... 7, 8, 28

Baker v Slack,
319 Mich 703; 30 NW2d 403 (1948).....11, 12, 14, 15, 20, 21, 22, 23, 24, 34

Bunda v Hardwick,
376 Mich 640; 138 NW2d 305 (1965)..... 32

Courtney v Apple,
345 Mich 223 (1956)..... 12

Denney v Kent County Rd Comm'n,
317 Mich App 727; 896 NW2d 808 (2016).....5, 6, 7, 9, 15, 20, 21, 22, 26, 34

Gilbert v DaimlerChrysler Corp,
470 Mich 749; 685 NW2d 391 (2004)..... 8, 29

Hawkins v Regional Medical Laboratories, PC,
415 Mich 420; 329 NW2d 729 (1982)..... 10, 22

Hofmann v Auto Club Ins Ass'n,
211 Mich App 55; 535 NW2d 529 (1995)..... 8

In re Olney's Estate,
309 Mich 65; 14 NW2d 574 (1944)..... 10

Jenkins v Patel
471 Mich 158; 684 NW2d 346 (2004)..... 9

Judis v Borg-Warner Corp,
339 Mich 313; 63 NW2d 647 (1954)..... 16

Kirchgessner v US,
958 F2d 158 (CA6, 1992)..... 31, 33

MacDonald v Quimby,
350 Mich 21; 85 NW2d 157 (1957)..... 16

Miller v State Farm Mutual Automobile Ins Co,
410 Mich 538; 302 NW2d 537 (1981)..... 30, 31

Setterington v Pontiac Gen Hosp,
223 Mich App 594; 568 NW2d 93 (1997)..... 19, 21

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN 48226-5485
(313) 965-7900

Shivers v Schmiege,
285 Mich App 636; 776 NW2d 669 (2009)..... 8

Sipes v Michigan Central Railroad Co,
231 Mich 404 (1925)..... 32

Sizemore v Smock,
430 Mich 283; 422 NW2d 666 (1988)..... 14

Swartz v Dow Chemical Co,
95 Mich App 328; 290 NW2d 135 (1980)
rev'd on other gds 414 Mich 433; 326 NW2d 804 (1982) 18

Thompson v Ogemaw Cty Bd of Rd Comm'rs,
357 Mich 482; 98 NW2d 620 (1959).....16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 29, 34

Thorn v Mercy Mem'l Hosp Corp,
281 Mich App 644 NW2d 414 (2008) 22, 23

Veselenak v Smith,
414 Mich 567; 327 NW2d 261 (1982)..... 8

Woodruff v USS Great Lakes Fleet,
210 Mich App 255; 533 NW2d 356 (1995)..... 31

Wright v Genesee Cty,
504 Mich 410, 934 NW2d 805 (2019)..... 8

Zehel v Nugent,
344 Mich App 490; 1 NW2d 387 (2022).....6, 7, 20, 21, 26, 27, 28, 34

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

STATEMENT OF QUESTIONS PRESENTED

I WHETHER THE COURT OF APPEALS DECISION REGARDING DAMAGES UNDER THE WRONGFUL DEATH ACT IN *DENNEY V KENT COUNTY ROAD COMMISSION* WAS INCORRECTLY DECIDED, AND IS NOT CONSISTENT WITH THE PLAIN LANGUAGE OF THE WRONGFUL DEATH ACT OR WITH MICHIGAN'S CONSISTENT RECOGNITION OF THE SOLE COMPENSATORY FUNCTION OF TORT DAMAGES. DENNEY SHOULD BE OVERRULED, AND THE LONG-ESTABLISHED RULE LIMITING RECOVERY TO SURVIVORS' "LOSS OF FINANCIAL SUPPORT," AND REQUIRING PROOF OF A "REASONABLE EXPECTATION" BY SURVIVORS OF "LOSS OF FINANCIAL SUPPORT," SHOULD BE RESTORED?

II WHETHER RECOVERY OF INCOME-RELATED DAMAGES UNDER THE WRONGFUL DEATH ACT SHOULD CONTINUE TO BE SUBJECT TO THE TEST OF "REASONABLE EXPECTATION OF SUPPORT"?

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

INTEREST OF AMICI CURIAE MICHIGAN HEALTH & HOSPITAL ASSOCIATION, MICHIGAN OSTEOPATHIC ASSOCIATION, AND MICHIGAN STATE MEDICAL SOCIETY

The Michigan Health & Hospital Association (MHA) is a statewide advocacy organization representing numerous hospitals, health systems, and other health care providers, such as rehabilitation facilities, throughout Michigan.

Established in 1919, the MHA represents the interests of its member hospitals and health systems on key issues and supports their efforts to provide quality, cost-effective and accessible care. The mission of the MHA is to advance the health of individuals and communities. Through its leadership and support of hospitals, health systems and the full care continuum, the MHA is committed to achieving better care for individuals, better health for populations and lower per-capital costs. In addition, the association provides members with essential information and analysis of health care policy and offers relevant education to keep hospital administrators and their staff current on statewide issues affecting their facilities. Using its collective voice, the MHA advocates for its members before the legislature, government agencies, the media and the public.

Michigan State Medical Society (MSMS) is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has frequently been afforded the privilege of acting as *amicus curiae* with respect to legal issues of significance to the medical profession.

Michigan Osteopathic Association (MOA) is the largest statewide osteopathic organization representing osteopathic physicians, interns, residents, and medical

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

students in Michigan. Since 1898, the MOA has been dedicated to the promotion of quality patient care and to the educational, informational, and legislative needs of its members.[1]

Important issues involving the interpretation of the wrongful death act and this State's approach to damages under the wrongful death act, and particularly the scope of damages recognized for economic loss for death of minor children, are of great importance to MHA, MSMS, MOA, and their members, who provide obstetric and pediatric medical care and who are required to defend wrongful death actions involving claims for economic damages. The significant shift in the approach to damages represented by *Denney* and its application to cases involving minor decedents affects the ability of physicians and members of these organizations to provide such care.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

[1] Pursuant to MCR 7.312(H)(4), Amici Curiae state that neither party's counsel authored this brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae has contributed money intended to fund the preparation and submission of this brief.

STATEMENT REGARDING JURISDICTION

Amici curiae Michigan Health & Hospital Association, Michigan Osteopathic Association, and Michigan State Medical Society adopt defendants-appellants' statement regarding jurisdiction.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

STATEMENT OF FACTS

Amici curiae Michigan Health & Hospital Association, Michigan Osteopathic Association, and Michigan State Medical Society adopt defendants-appellants' statement of material proceedings and facts.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

INTRODUCTION

The 2016 Court of Appeals decision in *Denney v Kent County Rd Comm'n,* 317 Mich App 727; 896 NW2d 808 (2016), represented an enormous shift in the approach to recovery of damages in tort actions brought under the wrongful death act.

Over 70 years before *Denney* was decided, in 1939, the Legislature rejected an artificial distinction between "instantaneous" and "non-instantaneous" death, and created a single, unified remedy under the wrongful death act, MCL 600.2922. The unified remedy permitted recovery of damages in all tort cases involving a "wrongful act, neglect, or fault" that causes either the "death of a person," or "injuries resulting in death." Over the course of the more than 70-year period between the creation of that unified remedy and the 2016 Court of Appeals decision in *Denney,* this Court and the Court of Appeals repeatedly have held that the wrongful death act permits the personal representative of the estate of a deceased person to recover only three types, or categories, of damages as compensation for loss due to death or injuries resulting in death.

The three types or categories of compensatory damages permitted to be recovered under the wrongful death act, prior to *Denney,* were: (1) compensation for noneconomic damages for the decedent's conscious physical and/or mental pain and suffering that the decedent suffered as a result of physical injuries, prior to death; (2) compensation to the decedent's estate for economic loss for certain out of pocket expenses that were incurred before or after death, and for which the estate is liable (medical and hospital expenses incurred to treat the decedent's injuries, as well as funeral and/or burial expenses); and (3) compensation to the decedent's beneficiaries or

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan
48226-5485

(313) 965-7900

survivors for economic and noneconomic damages that the survivors sustained or incurred in the past, or are reasonably certain to sustain or incur in the future, as a result of the decedent's death (the survivors' noneconomic loss of the society and companionship of the deceased, and/or the survivors' economic loss of household services and financial support that would have been provided by the decedent, but for death).

The recovery of only these types or categories of damages is fully consistent with both the plain language of the unified remedy created by the Legislature under the wrongful death act in 1939, and the longstanding recognition by Michigan courts of the analogous function, at common law, of damages in civil tort actions (to compensate for losses already incurred, or for losses reasonably certain to be incurred in the future, as a result of tortious conduct). The wrongful death act, prior to *Denney*, was construed to permit compensatory damages in cases involving death or injuries resulting in death, for past economic and noneconomic losses already incurred by the decedent, the decedent's estate, or the decedent's survivors, as well as economic and noneconomic losses that the decedent's survivors are reasonably certain to incur in the future.

Denney upended this longtime understanding of the wrongful death act as a mechanism to permit compensation for damages in tort cases involving death of an injured person, for losses sustained or incurred by (1) the decedent prior to death, (2) the estate, for out of pocket expenses for which it is liable, incurred before or after death, and/or (3) survivors, after the decedent's death. For the very first time, under *Denney* and now under the Court of Appeals decisions in this case and in *Zehel v Nugent,* 344 Mich App 490; 1 NW2d 387 (2022), a personal representative no longer is

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

limited to recovering compensatory damages in the form of damages for past losses actually sustained by the decedent, the estate, and/or the survivors, and/or future losses reasonably certain to be sustained by the survivors. Under *Denney,* as it is now being applied by the Court of Appeals, the personal representative is permitted to recover, under the wrongful death act, damages that do not represent either actual past losses or future losses reasonably certain to be sustained. Instead, the damages permitted under the *Denney* rule for a decedent's lifetime "loss of earning capacity" are damages that do not correspond to an actual loss that ever was, or ever will be, sustained by anyone.

In other words, *Denney* represents the first significant departure from this long-held view of the wrongful death act as permitting recovery of compensatory damages in a manner analogous to Michigan's existing common law structure for living injured persons (recovery only for losses actually incurred, or reasonably certain to be incurred in the future). *Denney* represents an enormous shift to viewing the wrongful death act under a non-compensatory model, despite the fact that the *Denney* shift in 2016 does not correspond to any particular recent change in the wrongful death act that could support such a different view of the act. The wrongful death act as construed by *Denney* now stands alone as the only model of tort damages in Michigan that is not based on a theory of the compensatory function of damages.

Amici curiae submit that *Denney*'s significant departure from construing the wrongful death act as a mechanism to permit recovery of <u>compensatory</u> damages is wholly inconsistent with both the plain language of the act itself, and the long-held view of the act as permitting only compensatory damages for losses already incurred or

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

reasonably certain to be incurred in the future (which is itself consistent with Michigan common law).

ARGUMENT

I THE COURT OF APPEALS DECISION REGARDING DAMAGES UNDER THE WRONGFUL DEATH ACT IN *DENNEY V KENT COUNTY ROAD COMMISSION* WAS INCORRECTLY DECIDED, AND IS NOT CONSISTENT WITH THE PLAIN LANGUAGE OF THE WRONGFUL DEATH ACT OR WITH MICHIGAN'S CONSISTENT RECOGNITION OF THE SOLE COMPENSATORY FUNCTION OF TORT DAMAGES. DENNEY SHOULD BE OVERRULED, AND THE LONG-ESTABLISHED RULE LIMITING RECOVERY TO SURVIVORS' "LOSS OF FINANCIAL SUPPORT," AND REQUIRING PROOF OF A "REASONABLE EXPECTATION" BY SURVIVORS OF "LOSS OF FINANCIAL SUPPORT," SHOULD BE RESTORED.

The question of whether a minor plaintiff can be permitted to recover damages, in an action brought under Michigan's wrongful death act, for the entirety of the minor's "loss of earning capacity," requires consideration of the Court of Appeals decision in *Denney v Kent County Rd Comm'n,* 317 Mich App 727; 896 NW2d 808 (2016).

For many decades prior to the 2016 decision in *Denney*, this Court and the Court of Appeals had established and applied a legal framework for recovery under the wrongful death act of income-related economic loss in all wrongful death actions, involving both minor and adult decedents. Under that framework, the personal representative of the decedent's estate was permitted to recover a portion of the decedent's future earnings or income as damages to compensate statutory beneficiaries/survivors for their loss of the decedent's "support." The personal representative was required to present proof to establish either that (1) the decedent had a legal obligation to provide financial support to statutory survivors, or (2) the decedent's statutory survivors had a "reasonable expectation" of voluntary support from the decedent.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

The practical result of this was to limit recovery of future income-related losses under the wrongful death act to only that portion of the decedent's future income that represented the loss suffered by survivors of an adult or near-adult decedent's "financial support," while typically precluding recovery of family members'/parents' loss of "financial support" from an infant or young child decedent, where a "reasonable expectation" of future support generally could not be established.

Denney, which did not involve a child decedent, appeared to abandon this framework. *Denney* suggested that the wrongful death act, while expressly permitting recovery on behalf of survivors for their loss of the decedent's "financial support," also implicitly permits an overlapping, but supposedly entirely distinct, claim by the personal representative on behalf of the decedent, for recovery of the entirety of the decedent's "loss of earning capacity." This supposedly distinct claim for loss of the decedent's "earning capacity" apparently does not require the personal representative to prove any obligation by the decedent to provide support to, or expectation of support by, the survivors. The Court of Appeals in this case, and in *Zehel,* confirmed that the "*Denney* rule" applies in cases involving child decedents.

Amici curiae submit that *Denney* was wrongly decided as it applies to both adults and children. *Denney* is particularly problematic when applied to cases involving minor children, where it has resulted in a dramatic departure from decades of prior law precluding such claims (because there can be no "reasonable expectation" of "financial support"). It has also resulted in a dramatic upswing in damages being sought in tort actions, that will have a significant impact on the ability of health care institutions and physicians to provide obstetrical and pediatric care.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

Denney is wholly inconsistent with this State's focus on the compensatory function of tort damages and the language of the death act itself, as well as the prior legal framework established by this Court and the Court of Appeals. The Court of Appeals in this case and in *Zehel v Nugent,* 344 Mich App 490; 1 NW2d 387 (2022), incorrectly followed *Denney* and applied it to cases involving infant or minor decedents. *Denney* should be overruled, and the prior framework established by this Court for recovery of income-related damages under the wrongful death act restored.

A. Michigan Common Law Permits Tort Damages Only For The Purpose Of Compensation.

This Court and the Court of Appeals have held that Michigan common law permits an award of damages in a civil tort action only for the purpose of compensating injured persons for losses that have been incurred, or are reasonably certain to be incurred, as a result of injuries from tortious conduct. In one early case, *Allison v Chandler,* 11 Mich 542 (1863), a case involving property damage and recovery of loss of business profits, the Court recognized that the recovery of damages in tort is governed by the principle of compensatory damages, stating that the "principle of compensation for the loss or injury sustained is, we think, that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort." *Id.* at 550.

Indeed, the compensatory function of tort damages is a concept deeply embedded in tort law and the definition of liability in tort. For example, this Court has recognized that "tort liability," as used in the Governmental Tort Liability Act, MCL 691.1407, properly is understood to mean "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

of compensatory damages." *Wright v Genesee Cty,* 504 Mich 410, 428, 934 NW2d 805 (2019).

Consistent with this view of damages in tort as serving a compensatory function, this Court has declined to recognize or permit punitive or "exemplary" damages where such damages do not serve a compensatory function or may result in an unwarranted "double" compensation for the same injury. See *Veselenak v Smith,* 414 Mich 567; 327 NW2d 261 (1982) (holding that exemplary damages are not available for purposes of punishment, but only for purposes of compensation for injury to feelings; where "ordinary" damages serve the purpose of compensating injury to feelings, "exemplary" damages are not available, because this would create an impermissible double recovery).

The view of tort damages as compensatory also is reflected in the proofs required to establish both the existence of tort damages and the amount of those damages. Past damages, for example, typically are described in terms of damages that have been "actually sustained." *Allison, supra* at 554. As to future damages in a tort action, the question of whether future damages will be sustained is required to be proven to a "reasonable certainty," and a "reasonable basis for computation" of future damages, beyond mere speculation or conjecture, must exist. See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995); *Shivers v Schmiege*, 285 Mich App 636, 645; 776 NW2d 669 (2009); *Gilbert v DaimlerChrysler Corp,* 470 Mich 749, 767; 685 NW2d 391 (2004). In this manner, the requirement of proof is consistent with the view of damages in tort as functioning to compensate for damages that have been sustained or are reasonably certain to be sustained in the future.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

B. Both The Structure of Death Act And The Construction Of The Act, Prior to *Denney*, Reflect That The Death Act Is A Mechanism For Permitting Recovery Of Compensatory Damages Under Common Law Tort Liability Theories, In Cases Involving Death Or Injuries Resulting in Death.

In the wrongful death act, MCL 600.2922, the Legislature created a statutory remedy to permit a mechanism for recovery of losses that otherwise would not be compensable at all, under the common law. Since the creation in 1939 of a unified remedy for recovery of losses for death or injuries resulting in death, the abiding theme in Michigan courts' construction of the wrongful death act has been the tort principle of permitting compensation for losses actually sustained by the decedent prior to death, or by the estate prior to or after death, or by the survivors. Prior to *Denney,* neither the Michigan Legislature nor the Michigan courts ever had embraced a fully "deterrent" or "punitive" model of damages with respect to wrongful death act damages permitting recovery of damages that do not correspond to a loss actually sustained or reasonably certain to be sustained by a person identified in the act.

1. The wrongful death act permits recovery for damages for death or injuries resulting in death that was not permitted under the common law, and in doing so, recognizes the unique nature of such an action with respect to the losses that have been or will be sustained and the individuals who may sustain such losses.

Michigan common law does not permit an action for recovery of damages for the death of a person. *Jenkins v Patel,* 471 Mich 158, 164; 684 NW2d 346 (2004). In enacting the death act, MCL 600.2922, the Legislature created the exclusive remedy by which a personal representative may recover damages for a wrongful act or negligence that causes "death of a person" or "injuries resulting in death." *Id.* at 164; MCL 600.2922(1).

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

After enactment of the act, Michigan courts struggled with a problematic distinction between cases involving "instantaneous" death, which were held to be subject to the remedy created under the death act, and death that was not "instantaneous," with those cases subject to a different remedy under the survival act. In 1939, the Legislature eliminated the problematic "instantaneous death" rule by amending the "death act" and partially repealing the "survival" act to create a single, exclusive statutory remedy for all cases involving a wrongful act or negligent that causes "death of a person" or "injuries resulting in death." See *In re Olney's Estate,* 309 Mich 65, 82; 14 NW2d 574 (1944) ("obvious purpose" of the 1939 act was to eliminate the "instantaneous death" rule and to ensure that all actions for death or injuries resulting in death are brought under the death act).

The Legislature at the same time repealed the "survival act," to the extent that its provisions are inconsistent with the amended "death act":

> Sec. 3. Insofar as the provisions thereof are inconsistent with the provisions of act number 38 of the public acts of 1848 as amended by this act, section 32 of chapter 12 of act number 314 of the public acts of 1915, being section 14040 of the compiled laws of 1929 is hereby repealed.

Since that time, the wrongful death act consistently has been viewed as a mechanism to permit recovery of damages subject to the substantive requirements of proof and other defenses (such as statute of limitations defenses) applicable to particular liability theories in tort. *Hawkins v Regional Med Labs,* 415 Mich 420; 329 NW2d 729 (1982).

Notwithstanding that claims brought under the wrongful death act are subject to the same requirements of proof and defenses as claims brought by living plaintiffs, Michigan courts consistently have recognized that the types or categories of damages

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

available under the wrongful death act have been adjusted by the Legislature, in creating the unified remedy, to account for the fact that both the persons who sustain damages and the type of damages sustained in wrongful death actions are different from those in common law tort actions by living plaintiffs.

In *Baker v Slack,* 319 Mich 703; 30 NW2d 403 (1948), the adult son of the decedent sought damages for her conscious pain and suffering and her "probable future earnings." *Id.* at 707. The *Baker* Court held that the administrator could not recover for loss of the decedent's earning capacity/future earnings, because recovery of such damages required evidence that the decedent would have provided financial "support," and there was no evidence that the decedent was under a legal or moral obligation to provide "support" to anyone.

In so holding, the *Baker* Court explained that the 1939 amendment of the death act and partial repeal of the "survival act" was intended to change the elements of damage available in former "survival" actions that were now required to be brought exclusively under the "death act." The Court held that, as a result of the amendment, a personal representative in any action brought under the death act--either a former "survival" action, or a "death" action--only can recover those categories of damages explicitly permitted under the "death act": (1) "pecuniary injury" of the beneficiaries/next of kin; (2) the decedent's conscious pain and suffering; and (3) the decedent's medical or funeral/burial expenses. *Id.* at 711, 713. The Court further explained that "pecuniary injury" encompasses only a husband's claim for loss of his wife's services, or a family member's claim for loss of the decedent's "support or maintenance" where there is a legally enforceable claim of maintenance or support by the deceased. "Pecuniary

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

injury" does not encompass "hope of an inheritance." *Id.* at 714. Because the decedent's next of kin had no "legally enforceable claim" to "support or maintenance," the administrator could not recover for loss of the decedent's earnings.

Following Baker, this Court continued to hold that damages in both former "survival" action and "death" actions are limited to (1) the decedent's conscious pain and suffering, (2) the decedent's medical, hospital, funeral, and burial expenses for which the estate is liable, and (3) "pecuniary injury" of the next of kin/survivors. See *Courtney v Apple,* 345 Mich 223; 76 NW2d 80 (1956) (in a case of "instantaneous" death of a two-year-old, recovery of damages is limited by the death act; jury was properly charged that it could award damages only for the loss of the child's earnings up to the age of majority (which belonged to the parent), less the cost of maintenance/support provided to the child).

2. The current wrongful death act explicitly authorizes recovery and distribution of damages only on behalf of, and only to, those who sustain or suffer damages.

In its current form, the wrongful death act reflects the compensatory model of damages by explicitly authorizing recovery on behalf of, and distribution of amounts recovered through settlement or judgment only to, individuals or the estate for damages sustained or suffered.

MCL 600.2922 explicitly permits recovery of only certain damages sustained by the decedent (damages for the decedent's conscious pain and suffering); certain damages sustained by the decedent's estate (damages for medical, hospital, funeral, and burial expenses for which the estate is liable); and certain damages sustained by the survivors (loss of the decedent's society and companionship and loss of the decedent's financial support):

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

> (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….

MCL 600.2922 also governs distribution of the proceeds of a settlement or judgment. The act provides that (1) the reasonable medical, hospital, funeral, and burial expenses are to be paid out of the proceeds; (2) the proceeds for the decedent's conscious pain and suffering are to be distributed to the estate; (3) proceeds are to be distributed to individual family members/beneficiaries who "suffered damages," in the amount of the "relative damages sustained" by each of those persons. MCL 600.2922(6)(d). The act does not contemplate distribution of any damages to the estate other than damages for conscious pain and suffering. Nor does it authorize distribution of any damages to individual beneficiaries other than those damages "sustained" or "suffered" by them individually.

While the act permits recovery of limited damages sustained by the decedent or by the estate, it does not explicitly permit recovery of all of the damages the decedent could have recovered if the decedent had survived. For example, the act permits recovery of damages for certain hospital and medical expenses incurred by the decedent, but only those expenses for which the estate would remain liable after the death. The act also permits recovery of the decedent's conscious pain and suffering, but only the decedent's pain and suffering for the period intervening between injury and death, not any pain and suffering that the decedent would have incurred if the decedent had survived. See MCL 600.2922(6).

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE, SUITE 2400
DETROIT, MICHIGAN
48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

As the Court recognized in *Baker,* the Legislature has recognized that compensatory damages in actions under the wrongful death act are different from those in cases involving living plaintiffs. Unlike cases involving living plaintiffs who may be reasonably certain to incur future economic losses for medical/hospital expenses, future noneconomic losses for pain and suffering, or future economic losses for lost wages or lost wage earning capacity, it is absolutely certain that the decedent will not sustain any of those losses in the future. Instead, future damages in such an action are measured by the losses that it is reasonably certain the decedent's survivors will incur: the noneconomic loss of the relationship with the decedent (loss of society and companionship, which is a type of damage that is extremely limited, and not available, in many cases involving living plaintiffs)[2] and economic losses of the value of household services and/or financial support that the decedent was obligated to provide, or that it is reasonably certain that the decedent would have provided, to survivors.

3. Michigan's law regarding recovery of "financial support" under the wrongful death act developed, over a period of almost a century, in a manner consistent with both the view of the function of tort damages as compensatory and the need for nonspeculative proofs of future damages recognized in non-death tort cases.

Specifically in the context of income-related losses, this Court and the Court of Appeals have established a legal framework for recovery of such losses under the wrongful death act that is fully consistent with the view of tort damages as serving a compensatory function, and the requirement of proof of future damages to both a

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

[2] For example, the parents of living injured child cannot recover past or future damages for loss of society and companionship or consortium of the child. See *Sizemore v Smock,* 430 Mich 283; 422 NW2d 666 (1988).

RECEIVED by MSC 4/15/2024 4:21:02 PM

"reasonable certainty" as to their being sustained and a "reasonable basis" for their computation.

After the 1939 unification of remedies under the wrongful death act, but prior to the 2016 Court of Appeals decision in *Denney*, recovery for income-related damages in a case brought under the death act was permitted only on behalf of the decedent's survivors. In 1948, this Court clarified that the personal representative was permitted to recover damages sustained or incurred by the survivors for "loss of support" from the decedent, as a "pecuniary injury" under the wrongful death act. *Baker v Slack,* 319 Mich 703; 30 NW2d 403 (1948). Later, authorization of recovery of damages for economic loss due to the survivors' "loss of financial support" from the decedent was added to the wrongful death act by amendment in 1985, in 1985 PA 93.

Before and after the 1985 amendment, this Court and the Court of Appeals addressed the question of what level of proof was necessary in order to permit a personal representative to recover damages, on behalf of survivors, for the survivors' "loss of support" or "loss of financial support" from the decedent. Initially, this Court held that a survivor only could recover for "loss of support" that would have been provided by the decedent, if the decedent had a legally enforceable obligation to support the survivor (such as, for example, the obligation to support a minor child or other dependent person). *Baker, supra.*

Later, the Michigan courts recognized that a personal representative could recover damages for survivors' "loss of support," even in the absence of a legal obligation of support, so long as the personal representative could present proof that the decedent already had been providing, or would have provided in the future, voluntary

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

financial support to one or more statutory survivors. See *Judis v Borg-Warner Corp,* 339 Mich 313, 326-37; 63 NW2d 647 (1954) (personal representative could recover as damages a father's loss of voluntary support from an adult son, given evidence of the son's past voluntary contributions of money to his father each month, and the father's need for support); *MacDonald v Quimby,* 350 Mich 21; 85 NW2d 157 (1957) (mother who claimed to have been receiving voluntary support from her adult son is permitted to seek damages for "pecuniary injury" of loss of support).

In 1959, this Court in *Thompson v Ogemaw Cty Bd of Rd Comm'rs,* 357 Mich 482; 98 NW2d 620 (1959), clarified the legal framework to be applied to claims under the wrongful death act for damages for survivors' loss of a decedent's future voluntary "support." *Thompson* involved claims for damages resulting from the death of a 15-year-old daughter. The decedent's father sought damages for loss of his minor daughter's household services or support during minority (based on evidence that the daughter earned money as a babysitter that she contributed to her parents, and performed 4 to 6 hours of household work per day). The father also sought loss of "prospective contributions" that the daughter might have made to her family after her 21st birthday.

Relying on *Judis* and *MacDonald,* the *Thompson* Court held that a voluntary obligation undertaken by an adult child to support a parent or other family members had been recognized as a "pecuniary injury" that could be recovered as damages under the wrongful death act. The *Thompson* Court adopted a test for determination of whether such potential, future voluntary contributions from the teen daughter's potential earnings after reaching the age of majority could be recovered. The Court held that, in order to

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

recover damages for "loss of support" where there is no legal obligation to provide support, the personal representative must establish that survivors had a "reasonable expectation" of such voluntary future support from the decedent. *Id.* at 489.

The Court held that a "reasonable expectation" of voluntary future support was established in *Thompson* by proof that (1) the decedent's father was "unemployable"; (2) the 15-year-old decedent had "proved to be a willing worker" and already had earned money and contributed it to family support; (3) the daughter had performed several hours of household work each day to free her mother to become the family's sole wage earner; and (4) the father testified that his daughter's expressed post-high school plan was to take her mother's job. *Id.* at 485-86, 491-92. *Thompson* made it clear that, at least in cases involving minor decedents (if not all cases involving claims of voluntary future support), the "reasonable expectation of support" test must be satisfied before a family member could recover for any portion of the decedent's earnings after the age of majority.

The "reasonable expectation of support" test as framed in *Thompson* thus encompassed two different questions. The first question was the question of how much money the minor decedent might have been expected to earn in the future (in *Thompson,* this was established through evidence of the 15-year-old decedent's industrious nature and her proven history of work inside and outside the home, as well as the wages actually being earned by her mother, whose job the minor decedent had promised to take upon reaching her majority). The second question was the question of whether the minor decedent would in fact have contributed all or some of her earnings after reaching majority to support her parents (again, in *Thompson,* established through

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

evidence of the family's reliance on those wages for their support, and testimony that the daughter had promised to take her mother's job and support the family, with the Court noting that a jury also could consider whether the daughter might have had her own family to support as an adult).

After *Thompson,* the "reasonable expectation of support" test continued to be applied to answer these questions in cases under the death act in which the personal representative sought income-related damages, where the decedent had no fixed legal obligation to provide support to survivors. For example, in *Swartz v Dow Chemical Co,* 95 Mich App 328; 290 NW2d 135 (1980) rev'd on other gds 414 Mich 433; 326 NW2d 804 (1982), the parents of a nineteen-year-old decedent sought a new trial in part on the ground that the parents had been precluded from introducing the testimony of an expert in "vocational and economic losses" to attempt to prove the decedent's "loss of future earning capacity." *Id.* at 334. The Court of Appeals, citing *Thompson,* concluded that the expert testimony properly was excluded, holding that the test for recovery of such damages under *Thompson* (and, thus, for admissibility of expert testimony to establish the amount of such damages) is whether there is evidence of a "reasonable expectation of support" by the decedent's family member(s). *Id.* at 335-336. The *Swartz* Court concluded that the decedent's father's testimony established that the decedent never had contributed to the support of his parents, but instead that the decedent's parents had continued to support the decedent. *Id.* at 335-36. The Court therefore concluded that the trial court correctly had found that the parents had no "reasonable expectation" of support from their son's future earnings, and therefore that there was no error in the exclusion of the expert testimony. *Id.* at 335-36.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

The Court of Appeals again followed *Thompson* and applied the "reasonable expectation of support" test to a claim for a portion of the decedent's lost earnings in *Setterington v Pontiac Gen Hosp*, 223 Mich App 594; 568 NW2d 93 (1997). In *Setterington,* a jury awarded economic damages to the decedent's children beyond the age of their majority. The defendants argued that this award was improper because the decedent had no legal obligation to support his children after they reached adulthood. The *Setterington* Court followed *Thompson,* explicitly stating that the "reasonable expectation of support" test governs the determination of whether the personal representative can recover economic damages under the death act for the loss of money the decedent was not legally obligated to provide to the survivors, but might have undertaken to provide voluntarily. *Id.* at 607. The Court concluded that the *Thompson* "reasonable expectation of support" test applies regardless of whether the money at issue was to be paid to a child, or from a child. *Id.* at 607.

The *Setterington* Court also made it clear that the *Thompson* test remains good law, notwithstanding the amendment of the death act after *Thompson* to eliminate "pecuniary injury." The *Setterington* Court held that *Thompson* continues to apply because the "pecuniary injury" language in the prior version of the death act that was in effect at the time *Thompson* was decided is "analogous to the clearer 'loss of financial support' language of the current statute." *Id.* at 607. The *Setterington* Court concluded that cases such as this one seeking damages for a decedent's earnings under the current wrongful death act would continue to be subject to the "reasonable expectation of support" test, because "[t]he Legislature is presumed to act with knowledge of appellate court statutory interpretations," such as *Thompson*. *Id.* at 607.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

Prior to *Denney,* therefore, this Court and the Court of Appeals, when addressing recovery of damages for "loss of support" or "loss of financial support" under the wrongful death act, construed these damages in a manner consistent with the compensatory function of tort damages to permit recovery of future damages for a living, injured plaintiff under the common law. *Thompson*'s requirement of proof of a "reasonable expectation of support" for the personal representative's recovery of future income-related damages in cases in which there is no obligation of legal support of survivors serves the analogous function of establishing that future damages will be sustained, to a "reasonable certainty."

C. *Denney*'s Apparent Abandonment Of The Legal Framework For Recovery of Income-Related Losses In Wrongful Death Actions Is Wholly Inconsistent With Both Plain Language Of The Death Act And The Recognized Compensatory Function Of Tort Damages Generally.

The Court of Appeals decision in *Denney*, which was affirmed and applied to minor decedents by the Court of Appeals in this case and in *Zehel,* was incorrect and inconsistent with the legal framework established for recovery of "loss of financial support" under the wrongful death act, as set forth in *Baker, supra* and in *Thompson, supra*.

The Court of Appeals, in its 2016 decision in *Denney*, did not actually address the long line of cases preceding *Denney* that had established the legal framework for seeking recovery of income-related losses as "loss of financial support" under the wrongful death act. Instead, the *Denney* Court entirely ignored those cases, including *Baker* and *Thompson,* and sidestepped the issue by holding that the recovery sought in *Denney* was for a supposedly entirely different claim for "loss of earning capacity" of the adult decedent.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

Although the import of *Denney* in all wrongful death actions was then unclear, *Denney* appeared to suggest that the framework developed for almost a century for recovery by survivors of income-related losses in wrongful death actions should, or could, be entirely abandoned in favor of a new claim for "loss of earning capacity" that is entirely unmoored to the prior requirements of proof. The Court of Appeals decision below in this case and in *Zehel* confirmed this as it applies to cases involving minor decedents, holding that *Denney* would be followed, and that these are claims for "loss of earning capacity" and not for "loss of financial support."

As set forth above, for decades, the Supreme Court and the Court of Apepals consistently have held that a personal representative only is permitted to recover that portion or subset of a decedent's "lost earnings" that represents lost "support" the decedent would have provided to the beneficiaries/family members, and that the personal representative must establish that the decedent owed a legal obligation of support, or that the family members had a "reasonable expectation" of voluntary future support. *Baker, supra; Thompson, supra; Setterington, supra*.

The text of the wrongful death act supports this conclusion. The Legislature's explicit adoption of the phrase "loss of financial support" as a recoverable item of survivor's damages in MCL 600.2922(6); the fact that the Legislature never explicitly has permitted recovery under the death act for a decedent's own "lost earnings" or "lost earning capacity"; and the fact that the Legislature explicitly provided only for distribution of proceeds for medical/hospital expenses, conscious pain and suffering of the decedent, and damages "sustained" or "suffered" by individual beneficiaries, all are consistent with, and must be viewed in light of, the longstanding prior judicial

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

interpretations permitting recovery only of survivors' loss of "support." See *Setterington, supra* (Legislature is presumed to know of prior judicial interpretations).

Though *Baker* and *Thompson* were decided prior to the 1971 amendment of the death act and the elimination of the phrase "pecuniary injury," both are still good law, and both are more consistent with the plain language of the current statute and the compensatory model of damages accepted in Michigan than is *Denney*.

As to the effect of the 1971 amendment to eliminate "pecuniary injury," this Court in *Hawkins v Regional Medical Laboratories, PC,* 415 Mich 420; 329 NW2d 729 (1982), a case decided fairly soon after the 1971 amendment, favorably cited *Baker* for the proposition that the 1939 amendment to the death act and partial repeal of the "survival" act changed the measure of damages available under the death act. *Id.* at 433 n 4.

In fact, even the Court of Appeals in *Thorn v Mercy Mem'l Hosp Corp,* 281 Mich App 644; 761 NW2d 414 (2008), a case upon which the Court in *Denney* relied, cited *Thompson* approvingly, and relied upon pre-amendment judicial interpretations of "pecuniary injury" for the purpose of analyzing damages available the current act. *Thorn* involved the question of whether the death act permits a personal representative to bring a claim seeking "loss of services" of the decedent, even though the act does not explicit provide for such a claim. The *Thorn* Court held that a claim for the survivors' "loss of services" is permitted under the death act. The *Thorn* Court's holding was based in part on a conclusion that the death act, though not explicitly referring to damages for "loss of services," does not explicitly exclude such a claim; and in part on the fact that the courts, in decades of pre-amendment judicial interpretations of the death act and of the term "pecuniary injury," consistently had held that "pecuniary injury"

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

includes "loss of services." The *Thorn* Court reviewed and relied upon pre-amendment case law, explicitly relying on *Thompson* for the proposition that "pecuniary injury" includes a claim for loss of services. *Id.* at 657. The *Thorn* Court concluded that "the evolution of" the death act demonstrates that the statute "consistently has been found to recognize the availability of damages for loss of services…" *Id.* at 658.

Thus, *Thorn* actually supports defendants' position: that pre-amendment judicial interpretations must be considered to inform the understanding of the current act. *Thorn*'s holding is that, because "loss of services" was recognized for decades under prior versions of the act and because the Legislature did not exclude a claim for "loss of services" despite knowledge of these longstanding judicial interpretations, "loss of services" will continue to be recognized as a claim under the current version of the act. This analysis supports declining to recognize a new claim for "lost earnings/lost earning capacity" that is very different in nature from any type of claim previously recognized.

The courts in interpreting prior version of the act for many decades rejected a claim for "lost earnings" in favor of a more limited claim for the survivors' lost "support," and the Legislature actually adopted "loss of financial support" as recoverable damages in the statute. Based on the history of interpretation of the death act, there is no basis for recognizing a claim for "lost earnings" here, where "lost earnings" was rejected for decades in favor of a more limited recovery for "loss of support" requiring a showing of legal obligation or reasonable expectation of voluntary support.

The analysis in *Baker* is fully supported by the text of MCL 600.2922 in its current iteration, which permits only one type of damages that could have been recovered by the decedent (pain and suffering) but no damages that could have been recovered by

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

the decedent after death; recovery of hospital and medical expenses, but only those for which the estate is liable; recovery of damages suffered by survivors that could not have been recovered if the decedent had not died (loss of society and companionship of children or siblings); and recovery by survivors of damages for their own loss of "support" that represents only a subset of the damages that the decedent could have recovered on the decedent's own behalf (lost earnings). All of those damages are, in fact, very different from the type of damages that an injured person could recover on their own behalf in a common law action for negligently inflicted injuries. See *Baker, supra.* The fact that the death act only makes provision for distribution of damages for conscious pain and suffering, for hospital/medical/funeral/burial expenses, and for damages "sustained" or "suffered" by individual survivors/beneficiaries (see MCL 600.2922(6)) also makes it very clear that no other types of damages--particularly no other damages that could have been recovered by the decedent on the decedent's own behalf--are contemplated under the act.

Any analysis suggesting that two different claims—the statutorily recognized claim for the survivors' "loss of financial support," and a distinct but undescribed claim on the decedent's own behalf for the entirety of the decedent's own "lost earnings" or "lost earning capacity"--coexist under the death act, not only is this in conflict with *Baker* and the history and text of the act, but it creates a host of practical problems. A claim for the survivors' "loss of support" seeks a portion or subset of the decedent's earnings and demands proof of a legal obligation of support or a "reasonable expectation" of voluntary support, while the supposed claim for "lost earnings/earning capacity" on the

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan
48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

decedent's own behalf permits recovery of some of the same damages, but without the need for any of those proofs.

Not only does the suggestion that two distinct claims coexist under the death act for recovery of the same damages or subset of damages create a problem of double recovery, but recognizing a claim for "lost earnings/lost earning capacity" without either the limitations or requirements of proof applicable to a claim for "loss of financial support" effectively renders meaningless the statutory recognition of a claim for "loss of financial support." If the personal representative can recover the entirety of the decedent's earnings, not merely the subset of earnings representing lost "support," and if the personal representative does not need to prove an obligation or promise of support in order to recover the entire amount, a claim for "loss of financial support" would be entirely superfluous. Moreover, because the death act makes no provision whatsoever for distribution of proceeds of a settlement or judgment representing a decedent's "lost earnings/lost earning capacity" (which, as *Denney* makes clear, are not damages "sustained" or "suffered" by survivors), there is no way that those proceeds can be distributed in accordance with the act.

II RECOVERY OF INCOME-RELATED DAMAGES UNDER THE WRONGFUL DEATH ACT SHOULD CONTINUE TO BE SUBJECT TO THE TEST OF "REASONABLE EXPECTATION OF SUPPORT."

The second question posed by this Court is to what degree of specificity damages need to be proven, in a case such as this one involving the death of a minor child.

A. The Court of Appeals' Requirement Of Proof Of Future Damages Beyond Mere Speculation Is Consistent With The "Reasonable Expectation Of Support" Test, Which Should Continue To Apply.

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

The decision of the Court of Appeals in this case and in the related case of *Zehel v Nugent,* 344 Mich App 490; 1 NW2d 387 (2022), addressing both the degree of specificity required in order to recover income-related damages and the question of how to address the speculative nature of the recovery for such damages in cases involving minor children, properly are viewed in the context of the sweeping shift in approach to damages under the wrongful death act represented by the prior Court of Appeals decision in *Denney.*

The Court of Appeals in *Denney* seemed to be addressing the same type of damages that had been sought to be recovered in *Thompson* and in *Setterington,* but *Denney* simply did not address the "reasonable expectation of support" test at all. Nor did *Denney* purport to overrule the "reasonable expectation of support" test.

Denney, however, appeared to suggest that there is a claim under the wrongful death act for a decedent's "loss of earning capacity" that is entirely distinct from, and unmoored by, the legal framework of the "reasonable expectation of support" test that had been the rule of law applied for many decades, at least since *Thompson,* to the recovery of income-related damages in cases involving death of a decedent who had no legal obligation to support others.

Denney left Michigan courts without any legal framework to apply to proof of claims for damages for loss of "wage earning capacity" in cases involving the death of a minor child. The Court of Appeals in this case, and in *Zehel,* while confirming that the Denney rule permitting recovery of "loss of earning capacity" applies, stepped into this vacuum to attempt to supply at least some framework to protect against an otherwise entirely speculative recovery of future damages for lifetime "loss of earning capacity" for

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan
48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

the death of a minor child. The Court of Appeals' conclusion that recovery of such damages is too speculative unless it is based on some unique proof related to what a particular child is likely to earn is nothing more than a continued application of one prong of the "reasonable expectation" test adopted in *Thompson* (a test that never has been overruled or abandoned).

Thompson held that family members could recover a teenaged decedent's loss of future earnings or contributions based on individualized proof that the teenaged decedent had plans to take her mother's existing job and was a willing and hard worker who had performed services and earned money outside the home to contribute to the family, and who would have been capable of performing her mother's job.

Amici curiae submit that both prongs of the *Thompson* "reasonable expectation of support" test should continue to apply to cases under the wrongful death act involving the death of a decedent, such as a minor child, who has no obligation to provide support to anyone. *Thompson* never has been overruled. Its formulation of a test and legal framework for recovery of damages is consistent with the language of the act, with the recognized compensatory function of damages, and with the "reasonable certainty" standard for future tort damages.

Alternatively, however, if *Thompson*'s framework of the "reasonable expectation of support" test is to be abandoned in claims for future income-related loss of minor children or other decedents with no legal obligation to provide support, then the test adopted by the Court of Appeals in this case and in *Zehel*, requiring some unique proof of a minor decedent's ability to earn money upon reaching majority, is necessary to

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

provide some framework to prevent an entirely speculative recovery, and at a minimum should be applied.

B. The Test Adopted In This Case And In *Zehel,* Requiring Proof Of The Unique Interests And Abilities Of A Minor Decedent To Support An Award Of Future Income-Related Damages, Is Not Inconsistent With Prior Michigan Law.

Plaintiff and amicus curiae supporting plaintiff's position contend that the rule articulated by the Court of Appeals in this case and in *Zehel,* requiring at least some unique proof of a minor child's interests and abilities, is inconsistent with existing Michigan law. This is incorrect.

Many of the cases cited by amicus curiae supporting plaintiff's position, supposedly establishing the general proposition that future damages need not be proven with "precision," shed no real light on the issues presented here because they do not involve the wrongful death act, or personal injury, or claims for loss of earning capacity. For example, *Allison v Chandler,* 11 Mich 542 (1863), is not a wrongful death case, nor a personal injury case, nor a case involving claims of wage earning capacity of an adult or a minor child. *Allison* involved a claim for property damage due to trespass. The question in that case primarily involved whether the plaintiff could recover damages for loss of business profits. The Court there held that the "principle of compensation for the loss or injury sustained is, we think, that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort." *Id.* at 550. The Court's conclusion in that case that damages should be permitted to be recovered for lost business profits does not shed any light on the legal framework relevant to a claim such as this one involving the death of a minor child.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

Gilbert v Kennedy, 22 Mich 117 (1870), is yet another case involving trespass, this time in the context of cattle farming. The Court there held that the plaintiff could present proof as to the "growth and increase in weight which the cattle might reasonably have been expected to have attained" but for the trespass by the defendant's cattle on the pasture, and the "increase in value that would have resulted from such an increase in weight." *Id.* at 136. Again, this application of a doctrine requiring reasonable proofs of likely future damages as to the value of cattle in a property damage case sheds little light on the issue presented in this case.

Muskegon Agency, Inc v General Telephone Co of Michigan, 350 Mich 41; 85 NW2d 170 (1957), likewise was not a wrongful death case, nor a personal injury case, and did involve a claim for loss of wage earning capacity.

Instead, the most recent case that thoroughly addresses the issue of recovery of damages for a minor decedent is the 1959 decision in *Thompson, supra,* which requires proof of a "reasonable expectation of support," and which also involved proof of actual earnings that the minor decedent had expected to earn (based on her promise to take her mother's job).

C. Proof of Personal Consumption and Taxes Also Is Relevant To Any Recovery Of Loss Of Wage Earning Capacity.

Amici curiae also supports defendant's position that, regardless of whether this Court holds that the *Thompson* and *Setterington* framework requiring proof of "reasonable expectation of support" continues to apply, or instead only a framework requiring, at a minimum, non-speculative, individualized proof of a minor decedent's loss of future wage earning capacity under the Court of Appeals formulation in this case is applied, proof of personal consumption by the decedent and income taxes that would

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

have been paid on any future earnings are relevant, and must be considered by a jury, in order to prevent a "windfall" recovery.

In the context of actions under the wrongful death act, this Court has not addressed the question of whether the income tax that a decedent would have paid should be considered by a jury when awarding income-related damages for loss of financial support or loss of future earning capacity. In a case involving an analogous statute that provides for survivors' loss benefits under the no-fault, MCL 500.3108, this Court held that survivors' loss benefits should be reduced by the amount of income taxes that would have been paid by the decedent. See *Miller v State Farm Mutual Automobile Ins Co*, 410 Mich 538; 302 NW2d 537 (1981).

MCL 500.3108 provides for recovery by survivors of "a loss…of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of his death would have received for support…." This Court recognized that the description of survivors' loss benefits would "at least roughly correspond to economic loss damages recoverable under our wrongful death act." *Id.* at 560. In concluding that the amount of income tax should be deducted from the benefits, the Court relied on the language of the statute reflecting that survivors should receive the amount that they "would have received for support," stating as follows:

> Tax liability associated with income is an inescapable fact of our modern economic life. In measuring the financial loss actually incurred by surviving dependents, it would be unrealistic to fail to acknowledge that surviving dependents would not have received for their support that portion of the deceased's income that he would have been required to pay in taxes. Moreover, the adjustment for such taxes can be accurately based on readily ascertainable information, without unnecessary administrative delays or time-consuming factual disputes. [*Id.* at 564.]

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

The Sixth Circuit Court of Appeals applied *Miller*'s rule on income tax owed by the decedent to actions brought under Michigan's wrongful death act, in *Kirchgessner v US*, 958 F2d 158 (CA6, 1992). There, the Court applied Michigan law to a wrongful death claim under the Federal Tort Claims Act. The *Kirchgessner* Court affirmed the trial court's deduction of the amount of income tax which would have been paid on future income, under the authority of MCL 600.2922(6).

Discussions of evidence of income tax liability in consideration of damages often are confused with the question of whether a jury should be informed about whether a verdict awarded to a plaintiff will be subject to income tax. As the Court of Appeals explained in discussing this issue in the context of the federal Jones Act in *Woodruff v USS Great Lakes Fleet*, 210 Mich App 255; 533 NW2d 356 (1995), there is an important distinction between instructing the jury regarding income tax consequences of a verdict and allowing a jury to consider income tax liability in determining economic damages (loss of earning capacity). In that case, the Court held that a new trial was warranted due to the trial court's refusal to allow the defendant to elicit testimony from plaintiff's economic expert regarding income tax rates and its refusal to allow defendant to argue to the jury that the wage loss should be reduced by income taxes.

The Court of Appeals rejected the argument that such evidence or instruction was improper under a line of case suggesting that the jury should not be informed of the income tax consequences of a verdict, stating that "[t]his concern should not be blurred with the separate and distinct issue whether gross or net income figures are to be used in calculating the wage-loss portion of the verdict." *Id.* at 258. The Court further noted that, "[a]s defendant aptly observes in its brief, 'jury verdicts are not subject to income

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

tax liability; but the sums that comprise the jury verdict are intended solely to make a plaintiff whole. People do not bring home gross wages; they bring home after-tax wages.' " *Id.* at 258.

Likewise, evidence of the decedent's personal consumption should be an accepted consideration for the jury in determining any income-related damages under the wrongful death act. This is inherent in the Legislature's authorization of recovery for "loss of financial support" that a decedent would have provided, as a decedent could not provide "support" to another person from income that would have been used to support the decedent's own needs. Even if recovery is permitted for "loss of earning capacity" of the decedent rather than support, evidence of personal consumption is required in order to prevent a windfall, as that portion of the earnings that would have gone to the decedent's needs will not be expended for that purpose in any case under the wrongful death act.

This Court suggested that personal consumption should be considered as early as 1925, in *Sipes v Michigan Central Railroad Co*, 231 Mich 404 (1925), *overruled on other gds in Bunda v Hardwick*, 376 Mich 640; 138 NW2d 305 (1965). In *Sipes,* the Court addressed the issue of whether the decedent's wife and child should have been allowed to recover damages for "pecuniary loss" under a prior version of the wrongful death act. The Court held that the jury should have been instructed that it should award damages based only upon the decedent's "known earnings and contributions" to his widow and child, and not speculative possibilities of future opportunities. *Id.* at 406. The Court further stated as follows:

> It is difficult from this record to determine the amount of pecuniary aid actually given by decedent to his wife and child. We are informed of his

Kitch Drutchas Wagner Valitutti & Sherbrook
ATTORNEYS AND COUNSELORS
One Woodward Avenue, Suite 2400
Detroit, Michigan 48226-5485
(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

> earnings and his inability to support his wife and child without going into debt. This is not a suit to recover the loss to decedent's estate of his prospective earnings, but only to recover the pecuniary loss sustained by his widow and child. Such loss, in no event, could approximate his earnings, for the expense of his own needs would have to be met along with the needs of his family. [(emphasis supplied) Id. at 408.]

Sipes thus supports the proposition that "personal consumption" is properly considered in a wrongful death action.

The Sixth Circuit in *Kirchgessner v US*, 958 F2d 158 (CA6, 1992), held that it was error under "Michigan and federal law" to include retirement benefits in an award for wrongful death but not to include post-retirement consumption of the decedent.

Thus, at a minimum and regardless of which legal framework applies, personal consumption and income tax properly should be considered with respect to wage loss.

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

RECEIVED by MSC 4/15/2024 4:21:02 PM

RELIEF REQUESTED

WHEREFORE, amici curiae Michigan Health & Hospital Association, Michigan Osteopathic Association, and Michigan State Medical Society respectfully request that this Honorable Court reaffirm the rule of law established in *Baker* and *Thompson*, and overrule the new and inconsistent rules purportedly established in *Denney* and in *Zehel* and *Daher,* to the extent that the new rules would permit recovery of "loss of earning capacity" damages instead of "loss of financial support."

Alternatively, amici curiae submit that the standard for recovery of loss of earning capacity in cases involving minor children should continue to require proof of a "reasonable expectation" of support by survivors, and consideration of income tax that would have been paid on earnings and personal consumption of the decedent.

KITCH ATTORNEYS &
COUNSELORS, PC

By: /s/ Christina A. Ginter
CHRISTINA A. GINTER (P54818)
Attorneys on behalf of Amicus Curiae
Michigan Health and Hospital Association
Michigan Osteopathic Association, and
Michigan State Medical Society
One Woodward Avenue, Suite 2400
Detroit, MI 48226 / (313) 965-7841
christina.ginter@kitch.com

Dated: April 15, 2024

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900

RECEIVED by MSC 4/15/2024 4:21:02 PM

STATEMENT REGARDING WORD COUNT COMPLIANCE

The elements of the brief subject to the word limit requirement in MCR 7.212(B) contain a total of 9,599 countable words, based upon the word count of the word-processing system used to prepare the brief.

KITCH ATTORNEYS &
COUNSELORS, PC

By: /s/ Christina A. Ginter
CHRISTINA A. GINTER (P54818)
Attorneys on behalf of Amicus Curiae
Michigan Health and Hospital Association
Michigan Osteopathic Association, and
Michigan State Medical Society
One Woodward Avenue, Suite 2400
Detroit, MI 48226 / (313) 965-7841
christina.ginter@kitch.com

Dated: April 15, 2024

Kitch Drutchas
Wagner Valitutti &
Sherbrook
ATTORNEYS AND
COUNSELORS
ONE WOODWARD AVENUE,
SUITE 2400
DETROIT, MICHIGAN
48226-5485

(313) 965-7900