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State of Michigan

In the Supreme Court

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

Plaintiffs-Appellees,

vs.

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

Defendants-Appellants.

Supreme Court No.
Court of Appeals No. 358209

Wayne County Circuit No: 20-004169-NH
Hon. Martha M. Snow

Notice of Filing Supreme Court Application for Leave to Appeal

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Michigan Supreme Court No._____
Michigan Court of Appeals No. 358209
Wayne County Circuit Court No. 20-004169-NH

To:

Clerk of the Court
Wayne County Circuit
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(*Via 1st Class Mail*)

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(*Via MiFILE*)

Defendants-Appellants have filed an Application for Leave to Appeal to the Michigan Supreme Court in the above referenced matter.

Respectfully submitted,

CORBET, SHAW, ESSAD & BONASSO, P.L.L.C.

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DATED: February 24, 2023

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Jurisdictional Statement

Defendants-Appellants seek leave to appeal the Court of Appeals' opinion affirming the trial court's ruling to deny Defendants' motion to dismiss future economic damages (claimed loss of future earnings, future earnings capacity and future household services) arising out of the death of the 13-year-old Plaintiffs' decedent.

After a hearing on July 21, 2021, the trial court entered its order on July 28, 2021 denying Defendants' motion.[1] Defendants sought interlocutory leave to appeal from Wayne County Circuit Court Judge Martha Snow's order denying Defendants' motion to dismiss future economic damages. Under MCL 600.308(2)(c), the Court of Appeals has jurisdiction to hear appeals by leave granted from interlocutory orders. Under MCR 7.205(A)(1), an application for leave to appeal is timely if it is filed within 21 days of the entry of the order being appealed or, when a reconsideration motion was filed within the 21-day appeal period, within 21 days of the entry of the order denying reconsideration. Defendants-Appellants filed an application for leave to appeal on August 18, 2021.

On October 13, 2021, the Court of Appeals entered an order granting leave to appeal. On December 1, 2022, the Court issued a published opinion affirming the Trial Court's denial of Defendants' motion to dismiss future economic damages.[2] Under MCR 7.215(I)(1), a motion for reconsideration may be filed within 21 days after the date of the order or the date stamped on an opinion. Defendants-Appellants filed a timely motion for reconsideration on December 21, 2022.[3] The Court denied the motion for reconsideration on January 13, 2023.[4]

[1] Appx p. 1-24 – July 21, 2021 Hearing Transcript and July 28, 2021 Order.
[2] Appx p. 25-31 – *Daher v Prime Healthcare Services-Garden City, LLC*,__Mich App__(Dec. 1, 2022).
[3] Appx p. 32-40 – Defendants' Motion for Reconsideration.
[4] Appx p. 41 – January 13, 2023 Order Denying Defendants' Motion for Reconsideration.

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Under MCR 7.303(B)(1), and MCR 7.305(H)(1), this Court may grant leave to appeal or order other relief after a decision of the Court of Appeals. Under MCR 7.305(C)(2), this application for leave to appeal is timely because it is being filed within 42 days of the Court of Appeals' January 13, 2023 order denying the motion for reconsideration.

Defendants-Appellants now seek leave to appeal the Court of Appeals' December 1, 2022 opinion.

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Statement of Questions Presented

In *Baker* (1948), this Court, using the 1939 version of the Wrongful Death Act (WDA), held that an estate of an adult woman could not recover the decedent's lost future earning-capacity damages in a wrongful-death action where the heirs of the estate "had no legally enforceable claim to support or maintenance by decedent." In *Swartz* (1980), the Court of Appeals, using the 1971 amended version of the WDA which had added the word "including," held that the estate of a 19-year-old could not recover for the decedent's loss of future earnings as the estate had "no reasonable expectation that decedent would contribute to the support of his parents." In *Denney* (2016), the Court of Appeals, without addressing *Baker* or *Swartz*, and using the version of the WDA with the word "including," and in getting around the damages limitations of the Highway Defect Exception to Immunity Act, held that the estate of a 42-year-old man, who left a surviving wife and son, could recover for the decedent's lost earnings, but there was no issue of expectation of support because it was not raised and it was not needed. Here (*Daher*), the Court of Appeals held that it was required to follow *Denney*, even though *Denney* did not address the relevant issue:

1. Can the estate of a 13-year-old middle school child recover damages for the decedent's lost earnings and lost earnings capacity, where the estate does not have a reasonable expectation of support?

The Trial Court answered: "Yes"

Plaintiffs-Appellees answered: "Yes"

Defendants-Appellants answer: "No"

The Court of Appeals answered: "Yes" and followed *Denney*.

2. Whether future wage calculation and/or future loss of services calculation for a 13-year-old middle school decedent is speculative and thus not recoverable?

The Trial Court answered: "No"

Plaintiffs-Appellees answered: "No"

Defendants-Appellants answers: "Yes"

The Court of Appeals answered: "No"

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Statement of Facts

Defendants-Appellants Prime – Garden City, LLC d/b/a Garden City Hospital, Kelly W. Welsh, D.O, and Megan Shady (hereinafter "Defendants"), seek leave to appeal the Court of Appeals' December 1, 2022 opinion affirming the Trial Court's order denying Defendants' motion to dismiss future economic damages.

This is a wrongful death medical malpractice action in which the Estate alleges Defendants failed to properly diagnose and treat bacterial meningitis in a 13-year-old boy leading to his death on January 16, 2017. The complaint, filed on March 18, 2020, alleges that Plaintiffs' estate lost the future earnings and future earnings capacity of the decedent. The Estate claimed that it could recover damages for the decedent's lost earnings and lost earnings capacity even though the decedent did not have any dependents at the time of his death. The Estate retained economic expert, Nitin Paranjpe, Ph.D., who estimated the lost economic damages are between $11,000,000 and $19,000,000 (not reduced to present value).

I. Motion for Partial Summary Disposition of Future Economic Damages

Defendants filed a motion for partial summary disposition on April 30, 2021 to dismiss alleged future economic damages. Defendants argued: (1) The Wrongful Death Act does not permit recovery of future wages of a child who was not supporting anyone and since the decedent was a 13-year-old middle school boy who was not working and not financially supporting anyone, the Estate should not be able to recover these damages; and (2) Alleged future earnings/capacity damages in a case involving the death of a 13-year old middle school boy who was not working or supporting anyone are remote, speculative, and contingent damages and are not allowed in Michigan.

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Oral arguments on Defendants' motion were heard on July 21, 2021. The Circuit Court denied Defendants' motion on July 28, 2021, reasoning that the WDA and Michigan case law interpreting the Act (*Denney)* allow the estate to collect any damages that the decedent had against his tortfeasor, had he survived, including future wage loss damages.[5]

II. Court of Appeals

On August 18, 2021, Defendants filed an Application for Leave to Appeal to the Court of Appeals following the Circuit Court's denial of Defendants' motion for partial summary disposition. The Court of Appeals granted Defendants' application on October 13, 2021. On December 8, 2021, Defendants filed their Brief on Appeal.[6]

Amicus Briefs were submitted by a number of interested parties, including:

- Michigan Defense Trial Counsel, Inc.,
- Michigan Society for Healthcare Risk Management,
- Beaumont Health System, and
- Trinity Health.[7]

Oral arguments were scheduled for September 8, 2022. A case considering the same issue, *Bethany Zehel v Clark Edward Nugent, M.D.* (Nos. 357511, 358134), was argued that day as well. On December 1, 2022 the Court of Appeals issued a published opinion affirming the Trial Court's denial of Defendants' motion to dismiss future economic damages indicating that *Denney* was controlling.[8] Notably, a concurrence was issued by Judge Swartzle in which he agreed that *Denney* was controlling, but raised important concerns about *Denney*. Judge Swartzle wrote in his concurrence that he questioned the soundness of *Denney* for two reasons: (1) *Denney* did not address *Baker* or the subsequent Court decisions or legislative amendments since

[5] Appx p. 1-24.
[6] Appx p. 42-74 – Defendants' Brief on Appeal.
[7] Appx p. 75-217 – Amicus Briefs.
[8] Appx p. 218-219 – Judge Swartzle's Concurrence.

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Baker; and (2) *Denney* did not discuss or cite subsection 3 of the WDA in which the Legislature placed strict limits on who may be entitled to damages in a wrongful-death suit; specifically, to recover damages for lost earnings the person would have to establish that the decedent supported the person. **Judge Swartzle ended his concurrence stating: "I encourage our Supreme Court to take up this question and definitively answer it."**[9] Judge Swartzle issued the same concurrence in *Zehel* as well.

III. Motion for Reconsideration

On December 21, 2022 Defendants filed a Motion for Reconsideration or in the Alternative Request for a Conflict Panel Pursuant to MCR 7.215(J).[10] Defendants argued multiple points, including: (1) *Denney* ignored *Baker* and unnecessarily contradicts the rule of law established in *Swartz v Dow Chemical Co.*, 95 Mich App 328 (1980), rev'd on other grounds, 414 Mich 433 (1981); (2) *Denney* is not on point since our case involves a 13-year-old decedent who was not supporting anyone, whereas the decedent in *Denney* was a 42-year-old man with a spouse and child; (3) *Swartz* is on point and interpreted the Wrongful Death Act with the 1971 amendment that contained the word "including"; and (4) the Court's decision permits a Plaintiffs' estate to recover damages for both "lost future support" and "lost future earnings/earnings capacity." Double recovery is not permitted under Michigan law.[11]

The Court denied the motion for reconsideration on January 13, 2023.[12] Under MCR 7.303(B)(1), and MCR 7.305(H)(1), this Court may grant leave to appeal or order other relief after a decision of the Court of Appeals. Under MCR 7.305(C)(2), this application for leave to

[9] Appx p. 218-219.
[10] Appx p. 32-40.
[11] Appx p. 32-40.
[12] Appx p. 1-24.

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appeal is timely because it is being filed within 42 days of the Court of Appeals' January 13, 2023 order denying the motion for reconsideration.

Defendants-Appellants now seek leave to appeal the Court of Appeals' December 1, 2022 opinion.

Standard of Review

This Honorable Court reviews a trial court's decision on interpretation of a statute de novo. *Brackett v Focus Hope, Inc*, 482 Mich 269, 275 (2008). Also, this Court reviews a trial court's ruling on a motion for summary disposition de novo. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 5; 658 NW2d 127 (2003). This Court reviews an order denying reconsideration for an abuse of discretion. *In re Ingham Co Treasurer for Foreclosure*, 331 Mich App 74; 951 NW2d 85 (2020).

Argument

This issue is incredibly important and has jurisprudential significance. Before *Denney* was decided in 2016, it was understood that an estate could recover lost financial support that the decedent would have provided others, but not the entirety of the decedent's earning capacity. See Michigan Law of Damages and Other Remedies ch 3, SECTION 3.16 (Barbara A. Patek et al eds, ICLE 3d ed 2002) ("The [wrongful-death act] provides for recovery of loss of financial support, not for loss of earning capacity."), citing *Swartz*. Recently, however, claims for a decedent's earning capacity after death are called "*Denney* damages," reflecting the fact that *Denney* has changed Michigan law. However, there were no legislative changes to the Wrongful Death Act immediately before *Denney*. The Wrongful Death Act has never allowed the estate of a child to recover future earnings or future earning capacity when that child was not supporting anyone or obligated to support anyone. *Denney* does not even address this issue. *Baker* and

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Swartz addressed this issue and held that the WDA (including the 1971 version with the added word "including") only allows recovery if loss of support is a reasonable expectation or legal obligation. *Denney* did not address this issue, as the 42-year-old decedent left a surviving spouse and son. Lost support was already a given for his estate. *Denney* should not control for the present case (*Daher*).

Denney's holding affects every wrongful-death case in which the decedent had a capacity to earn income in the future. Estates are now claiming unprecedented damages that they apparently forgot to claim before *Denney*. For example, in this case, Plaintiffs retained an economic expert who estimated that the lost economic damages are between $11,000,000 and $19,000,000. Plaintiffs are relying on *Denney* to claim these damages, but the *Denney* Court failed to even mention the holdings in *Baker* and/or *Swartz* and the cases following them, and the history of the wrongful death act which will be set forth in the brief to follow. Further, this Court's decision in *Baker* has never been overruled or superseded. Only this Court can say whether its precedent has been overruled or superseded.

As such, this Court should grant Defendants' leave to appeal to consider this question of law as it is an issue involving a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3).

I. The Wrongful Death Act does not allow an estate to recover a decedent's potential lost future wages or potential lost future earning capacity unless loss of support is proven.

In Michigan, there is no common law action for wrongful death. See *Hyatt v Adams*, 16 Mich 180, 185 (1867). The Wrongful Death Act, codified at MCL 600.2922, provides the exclusive remedy under which to seek damages for a wrongful death. *Jenkins v Patel*, 471 Mich 158 (2004), citing *Courtney v Apple*, 345 Mich 223 (1956). Technically, the Wrongful Death Act

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is in derogation of the common law (i.e. it provides a remedy where the common law provides none). "[S]tatutes in derogation of the common law must be strictly construed and will not be extended by implication to abrogate established rules of common law." *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508 (1981).

"The Wrongful Death Act is essentially a "filter" through which the underlying claim may proceed." *Wesche v Mecosta Cty Rd Comm'n*, 480 Mich 75, 88, (2008). Wrongful death claims retain "[a]ny statutory or common law limitations on the underlying claim …" *Id*. at 89; see, e.g., *Jenkins v Patel*, 471 Mich 158 (2004). The Wrongful Death Act specifies who can recover for an alleged wrongful death. In doing so, it places the focus on compensating people for their actual damages which stem from the wrongful death.

The Act specifically limits who can recover to family/beneficiaries "who suffer damages …" It reads:

> …the person or persons who may be entitled to damages under this section shall be limited to any of the following ***who suffer damages and survive the deceased***:
>
> (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters…
>
> (b) The children of the deceased's spouse. MCL 600.2922(3). (Emphasis added).

The Act lists the three general types of recoverable damages available. The Court or jury may award these damages as the Court or jury shall consider fair and equitable, under all circumstances including: (1) compensation to the Estate for its expenses ("reasonable medical, hospital, funeral, and burial expenses for which the estate is liable"), (2) compensation for the decedent's conscious pain and suffering until his death ("reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death"), and (3) compensation to the beneficiaries for their

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losses ("damages for the loss of financial support and the loss of society and companionship of the deceased"). MCL 600.2922(6).

A decedent's estate can only recover the loss of support suffered by the decedent's heirs, not the full measure of the decedent's potential lost future wages or loss of future earning capacity. The Wrongful Death Act plainly and unambiguously does not contain any reference to damages for "loss of future wages or loss of earning capacity."

II. The facts in *Denney* are substantially different and its holding conflicts with *Baker.*

a. *Baker* is the ruling precedent.

Baker v Slack, 319 Mich 703 (1948) was a case involving the death of a 63-year-old widow who left behind her three adult children. The estate claimed loss of future economic damages for the earnings their mother would have made and left them. The issue in *Baker* was whether a decedent's estate may recover lost-earning capacity damages under the WDA. *Baker* looked at a prior version of the WDA codified in MCL 600.2922(2), that stated in relevant part:

> Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in 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 from such death, to those persons who may be entitled to such damages when recovered…1948 CL § 691.582.

This Court declared in *Baker* that the Wrongful Death Act only allows recovery for the decedent's loss of earnings and/or earning capacity ***if*** the administrator of the estate can show that the decedent would have provided support or maintenance to a person entitled to recovery under the Act. This Court wrote:

> The next question presented is whether recovery may be had under Act No. 38, Pub. Acts 1848, as amended by Act No. 297, Pub. Acts 1939, for loss of probable future earnings, without diminution for cost of maintenance, **when the widowed decedent had an established earning capacity but no surviving spouse or next of kin to whom she was under a legal or moral obligation to contribute support.**

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The Supreme Court also wrote:

> the administrators right to recover extends also to the pecuniary injury to decedents surviving spouse and next of kin, **which shall be found to exist only, as under the old death act, when and to the extent that it is established that the decedent owed a legal duty to contribute to the support of such persons** or any of them.

This Court also wrote:

> **the widowed decedent's next of kin… 'had no legally enforceable claim to support or maintenance by decedent' and, consequently, suffered no pecuniary loss**, the only element of damages which was recoverable was the expense of the decedent's funeral and burial, for which plaintiff and defendant conceded that plaintiff was entitled to have judgment for $190.00. *Baker*, 319 Mich at 708, 712, 715. (Emphasis added).

b. The *Denney* decision

Denney involved a 42-year-old decedent, who was married and a father, who sustained fatal injuries after his motorcycle struck two potholes and crashed on the highway. His estate, filed suit against the governmental agency responsible for maintenance of the highway where the accident occurred under the highway-defect exception to governmental immunity. The governmental defendant moved for partial summary disposition, claiming that it could not be liable for lost financial support to the decedent's widow under the highway-defect exception as the exception limited damages to "bodily injury" only, and did not include "loss of financial support." The governmental defendant relied on this Court's decision in *Wesche v Mecosta Co Rd Comm'n*, 480 Mich 75, 87; 746 NW2d 847 (2008), holding that, despite the Wrongful Death Act's provision for loss-of-society damages, a spouse could not recover for loss of consortium when the underlying claim was through the motor-vehicle exception to governmental immunity. The trial Court agreed and granted partial summary disposition.

On appeal, the governmental defendant maintained its reliance on the highway-defect exemption. The Court of Appeals, however, looked first to the *Thorn v Mercy Memorial Hosp*

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Corp, 281 Mich App 644; 761 NW2d 414 (2008) Court's interpretation of the Wrongful Death Act as "permit[ting] the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case" and "that could have been recovered by the person had the person survived the injury." *Denney*, 317 Mich App at 731, quoting *Thorn*, 281 Mich App at 651, 660. The *Denney* Court then turned away from the economic damages that were recoverable by beneficiaries or an estate under the Wrongful Death Act (e.g., the economic value of household services provided in *Thorn* to the decedent's minor children), and examined the damages available to a living plaintiff under the Governmental Tort Liability Act (GTLA), MCL 691.1401 et seq.

Denney held that if a decedent could have obtained lost-earning capacity damages, then so can his or her estate through the WDA. *Denney*, Mich App at 731-732. The Court also noted that the "word 'including' in MCL 600.2922(6) 'indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case.'" *Denney* at 731, quoting *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651 (2008). *Thorn* correctly stated that the damages provision, MCL 600.2922(6), is nonexclusive. *Thorn*, 281 Mich App at 651. The word "including" precedes its list of available damages. *Id*. So damages that are not specifically listed, like the value of the decedent's lost services (less the decedent's maintenance), are recoverable. *Id*. at 661; see also *Baker*, 319 Mich at 714; *Bricker*, 313 Mich at 227. But that does not mean that the act "broadly permits recovery of all types of damages 'deemed justified by the facts of the particular case.'" Court of Appeals Opinion, p. 7, quoting *Denney*, 317 Mich App at 731. The Act, for example, does not permit punitive damages. See *Fellows v Superior Prod Co*, 201 Mich App 155, 157; 506 NW2d 534 (1993). *Denney's* holding suggests that the damages available under the WDA generally reflect those available under

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the prior survival act, even though this very conclusion was rejected in *Baker*. *Touma v McLaren Port Huron*, 965 NW2d 550 (Mich 2021).

The *Denney* Court did not address this Court's holding in *Baker* or any of the other Supreme Court cases following *Baker*. It also did not cite to a single case stating that estates can recover damages for the decedent's earning capacity after death absent a showing of lost financial support. Instead, the Court cited to *Hannay v Dept of Transp*, 497 Mich 45; 860 NW2d 67 (2014). In *Hannay*, this Court examined the phrase "liable for bodily injury" in the GTLA, and concluded that it allowed for recovery of "economic" damages, including "damages incurred due to the [living plaintiff's] loss of the ability to work and earn money." *Id*. at 67. There was no death involved in *Hannay*, and this Court in *Hannay* did not address wrongful death damages. Nonetheless, because *Hannay* defined "economic" damages under the GTLA to include those incurred as a result of the loss of the ability to work and earn money, the *Denney* Court concluded that the Wrongful Death Act likewise allowed recovery of the decedent's lost wages where the underlying cause of action would have allowed a living plaintiff to recover them. *Denney*, 317 Mich App at 735-736.

Although the *Denney* Court correctly recognized the Wrongful Death Act as a "'filter' through which the underlying claim may proceed," *Denney*, 317 Mich App at 735, quoting *Wesche*, 480 Mich at 88, the Court failed to apply this "filter" to the estate's recovery of damages "as limited by the wrongful death act." *Denney*, 317 Mich App at 735. Stated differently, the *Denney* Court's version of a "filter" was a giant hole through which any kind of damages could pass, unlimited by the letter and spirit of the Legislature's intent to limit recovery of a decedent's future wages to the financial support lost by his or her family. There is no compensatory function to awarding the decedent's future wages or the value of her future services to anyone who would

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not have received or benefitted from the wages and services if the decedent had not died. By ignoring *Baker*, the *Denney* Court impermissibly and absurdly expanded an estate's recovery to non-compensatory damages (and potentially double damages), in full contravention of the common law and with full disregard for the Act's specific reference to "loss of financial support."

Baker rejected a claim for "loss of probable earnings;" it held that estates are limited to recovering the financial support the decedent was providing others. *Baker*, 319 Mich at 708, 712, 715. There is no way to reconcile *Denny* and *Baker*. *Baker* has clearly not been overruled or superseded so the lower Courts should have followed *Baker*. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). *Denney* is distinguishable, and to the extent it can be interpreted as a repudiation of *Baker*, it was wrongly decided. Either *Denney* is an outlier, or Michigan plaintiffs have been missing out on tens of millions of dollars in wrongful-death damages for decades.

III. ***Denney* conflicts with more than just *Baker*.**

There are other issues with *Denney*, including that it conflicts with other Supreme Court cases. For example, in *Thompson*, this Court held that when a deceased child was a wage earner, the parent can recover lost support from the child's wages to the age of majority or for the time that the parent reasonably expected financial support from the child. *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482, 488-499; 98 NW2d 620 (1959). The plaintiff's 15-year-old daughter died in a car accident. Before her death, she earned money babysitting and gave her parents about $5 every week. The jury awarded damages for that lost support beyond her 21st birthday. This Court held that when a deceased child was a wage earner, the parent can recover lost support from the child's wages for the time that the parent reasonably expected financial support from the child. *Id*. at 488-489.

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Denney conflicts with *Thompson* and its progeny as well. See *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962) (holding that parents who establish than an adult child was voluntarily contributing financial support before he died could recover the lost financial support); *Rythoken v City of Wakefield*, 364 Mich 86; 111 NW2d 63 (1961) (upholding damages because the decedent had provided his mother financial support for 12 years before his death).

The Court of Appeals applied *Thompson's* "reasonable expectation of support" rule in *Setterington v Pontiac Gen Hosp*, 223 Mich App 594; 568 NW2d 93 (1997). There, the jury awarded lost support damages to the decedent's children beyond their 18th birthdays. The Court affirmed the award, holding that "the 'pecuniary injury' language of the statute construed in *Thompson* is analogous to the clearer "loss of financial support" language of the current statute." *Id.* at 607.

Denney would moot or negate those limitations set forth in *Thompson* and its progeny. If the estate can recover the decedent's entire earnings capacity (*Denney*), it does not matter when he would have reached the age of majority or whether the parents reasonably expected his financial support to continue (*Thompson*).

IV. A brief history of the Wrongful Death Act reveals that the Legislature has not superseded *Baker*.

The Wrongful Death Act, codified at MCL 600.2922, provides the exclusive remedy under which to seek damages for a wrongful death. *Jenkins v Patel*, 471 Mich 158 (2004), citing *Courtney v Apple*, 345 Mich 223 (1956). The current Wrongful Death Act is "an amalgamation of the remedies previously existing under the wrongful death and survival acts." *Thorn v Mercy Memorial Hosp Corp*, 281 Mich App 644, 656; 761 NW2d 414 (2008), quoting *In Re Haque*, 237 Mich App 295, 306; 602 NW2d 622 (1999). The history and evolution of the damages recoverable under the Wrongful Death Act have never reflected an intent by the Legislature to allow recovery

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for economic/pecuniary damages for loss of earning capacity without evidence of the expectation of support.

Where the Legislature amends a statutory provision, the Court of Appeals "remains bound to follow the Supreme Court's interpretation of [the] since-amended statute if the intervening amendment merely 'undermined' the foundations of the Supreme Court's prior decision, but not if the intervening amendment 'clearly…superseded' the Supreme Court's interpretation." *In re AGD*, 327 Mich App 332, 341; 933 NW2d 751 (2019). Where the "Legislature has entirely repealed or amended a statute to expressly repudiate a court decision…lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law." *Id*. At 341, quoting *Associated Builders*, 499 Mich at 191 n 32. However, "when the operative statutory language interpreted by the Supreme Court in the previous case remains the same after amendment, the intervening amendment of the statute does not clearly overrule or supersede the Supreme Court's prior interpretation." *In re AGD*, 327 Mich App at 341.

Baker cannot be ignored because the version of the Wrongful Death Act that was examined in *Baker* contained the phrase "pecuniary injury", a phrase deleted when the Legislature amended the statute to allow recovery for the non-economic damages of loss of society and companionship.

Further, the Court of Appeals issued an opinion in *Swartz* in 1980 which upheld that an expectation of support must be proven in order for an estate to recover damages for the decedent's loss of future earning capacity. *Swartz v Dow Chem Co*, 95 Mich App 328; 290 NW2d 135 (1980). *Swartz* came after the much-discussed 1971 amendment to the WDA that the Court of Appeals relied on in our case holding that *Baker* has clearly been overruled or superseded. [13] As a review

[13] The 1948 WDA interpreted by *Baker*, as amended in 1971 by 1931 PA 297, lacked the "including" language in the current statute. The Court of Appeals held when issuing its opinion that "when [the WDA] was considered by the *Baker* court…the statute lacked the open-ended inclusiveness of the current statute. Either way, *Baker* has

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of the history of the WDA and subsequent case law reveals, the amendment does not impact *Baker's* precedential value.

a. Michigan's first Wrongful Death Act.

An English law, Lord Campbell's act, first granted relief from the common law's absolute bar and "was the predecessor of the American wrongful death acts." See *Lincoln v Detroit & M Ry Co*, 179 Mich 189, 195; 146 NW 405 (1941); *Wycko*, 361 Mich at 333-334. The purpose behind this English law to American wrongful death acts was to give a "new cause of action unknown to common law, for the benefit of certain designated classes of surviving relatives." *Lincoln*, 179 Mich at 195. As summarized by this Court in *Lincoln*, the wrongful death action was intended to allow recovery to the beneficiaries named in the statute of their damages, which at that time was limited only to "economic", i.e., "pecuniary damages": "Such relatives…are enabled by the statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them." *Lincoln*, 179 Mich at 195-196.

In 1848, Michigan adopted its first wrongful death statute. See 1848 PA 38. That act stated:

> [I]n every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered. [*Lincoln v Detroit & M Ry Co*, 179 Mich 189, 199; 146 NW 405 (1914) (emphasis added), quoting 1848 PA 38.]

This act limited damages to the decedent's "widow and next of kin legally entitled to support." The Legislature modified the statute in 1897, but it only changed who would receive distributions, providing for recovery by the heirs to the estate if the decedent died intestate. The damages provision remained unchanged, and limited damages to the pecuniary damage of those legally

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clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*." Appx p. 25-31.

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entitled to support. *Rouse v Detroit Elec Ry*, 128 Mich 149, 155; 87 NW 68 (1901), citing *Van Brunt v Cincinnati, J & M R Co*, 78 Mich 530; 44 NW 321 (1889).[14]

b. The Supreme Court decides *Baker* in 1948.

In 1939, Michigan merged the "Death Act" with the "Survival Act" into one statute. *Hardy v Maxheimer*, 429 Mich 422, 43; 416 NW2d 299 (1987). The damages available under each statute differed. Under the death act, a cause of action was created for the survivors whom the decedent was obligated to support, limited to the losses they sustained due to the decedent's death. *Baker*, 319 Mich 715 (1948). Under the survival act, a decedent's claim survived his or her death and entitled the estate to whatever the decedent could have recovered, including the decedent's lost earning capacity. The new combined Wrongful Death Act stated:

> [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 from 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 intervening between the time of the inflicting of such injuries and his death. [1939 PA 297]

After this merger of the survival and wrongful death acts, this Court decided *Baker*, which resolved whether an estate could recover the decedent's earning capacity under the post-1939 Wrongful Death Act. This Court held that an estate could not, explaining that the Legislature intended to retain the former death act's more limited damages with express exceptions for certain expenses and the decedent's pain and suffering. *Baker* at 711. The Court actually concluded that the amendment was intended to limit damages in cases that previously would have fallen under the survival act. *Baker* at 715. The Supreme Court rejected the claim that the estate could recover

[14] In *Van Brunt*, the Court affirmed a directed verdict based on lack of damages because the decedent was not providing support to anyone when he died.

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for lost earning capacity without proof of support. Equally important, this Court rejected the estate's claim that it could recover the decedent's lost earnings, which would amount to a claim for "lost inheritance" by the surviving children.

The Legislature adopted the ruling in *Baker* when it re-enacted the Wrongful Death Act in 1961 as part of the Revised Judicature Act. The act was re-enacted as MCL 600.2922. "When a statute or part thereof has been interpreted by the court of last resort, and is subsequently re-enacted without change, the Legislature adopts the court's statutory construction unless the contrary is 'clearly shown' by the language of the act." *Jeruzal v Herrick*, 350 Mich 527; 87 NW2d 122 (1957). The Legislature was well aware of the 1948 *Baker* ruling, limiting an estate's recovery of a decedent's future earnings to the support he or she would have legally been obligated to provide. Nonetheless, the Legislature chose not to amend, expand, or otherwise change the Wrongful Death Act to repudiate *Baker*. As a result of this verbatim re-enactment, "it may be assumed that the legislature acted with knowledge of the Court's decisions and that the legislature intended the re-enacted statute to carry the Court's interpretation with it." *Wood v Detroit Edison Co*, 409 Mich 279, 294; 294 NW2d 571 (1980).

c. A 1971 amendment allowed noneconomic damages and removed the Act's reference to "pecuniary loss", but did nothing to affect limitations on economic damages.

The most significant change to the WDA after *Baker* was in 1971, when the Legislature removed "with reference to the pecuniary injury resulting from such death" and replaced it with "under all of the circumstances." The Act was amended to allow for recovery of "loss of the society and companionship", non-economic damages, of the decedent:

> [I]n every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, under all of the circumstances to those persons who may be entitled to such damages when recovered including damages for the reasonable medical,

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> hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. The amount of damages recoverable by civil action for death caused by the wrongful act, neglect, or fault of another may also include recovery for the loss of the society and companionship of the deceased. MCL 600.2922, as amended by 1971 PA 65. (Emphasis added).

This amendment was in direct response to this Court's decision in *Breckon v Franklin Fuel Co*, 383 Mich 251; 174 NW2d 836 (1970), rev'd on other grounds, *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972), wherein the Court ruled that under the prior statute, which limited recovery to "pecuniary loss," society and companionship damages were not recoverable. See 1971 PA 65. Consistent with the decision to allow recovery of such non-economic damages (and to avoid the confusion noted in *Breckon* regarding the use of "pecuniary injury" and "pecuniary loss" to describe such damages), the Legislature removed the language "with reference to the pecuniary injury resulting from such death," and replaced it with "under all of the circumstances." See *Wood*, 409 Mich at 294 (explaining that the amendment "specifically provided for what this Court had denied in *Breckon*," namely, recovery of damages for loss of society and companionship under the Wrongful Death Act); *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 664-665; 761 NW2d 414 (2008) (noting that prior versions of the Act "focused on pecuniary damages," and the "historical progression of the [Act] initially precluded recovery for nonpecuniary damages, such as loss of society and companionship, grief, and mental anguish").

The removal of the term "pecuniary injury" simply made clear that nonpecuniary injuries, like lost society and companionship, were available. It has not been given effect beyond that narrow aim. Even after the 1971 amendment, **this Court has stated that the "wrongful death act damages focus upon the financial loss actually incurred by the survivors as a result of**

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their decedent's death." *Miller v Mut Auto Ins Co*, 410 Mich 538, 561 (1981). (Emphasis added).[15] The text of MCL 600.2922(3) focuses on this point, stating that "the person or persons who may be entitled to damages under this section shall be limited to any of the following *who suffer damages* and survive the deceased…" (Emphasis added.) See also MCL 600.2922(6)(d) (providing for the default distribution of proceeds, with the residuum after various expenses to go:

> to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased.

Justice Viviano stated in a dissent[16] that the subsection provided above might be read to suggest that the individuals entitled to bring a wrongful death action must still themselves suffer damages.

Similarly, in *Wood*, the Court observed that the "complete focus of 1971 PA 65 was this court's *Breckon* decision," and rejected the defendant's argument that the amendment was intended to alter any other decision interpreting the Wrongful Death Act:

> The complete focus of 1971 PA 65 was this court's *Breckon* decision. The legislation clearly and unambiguously provided a remedy that this Court refused to provide. When the Legislature acts with such specificity to alter one decision of this Court, it would be highly unlikely that the Legislature would intend to alter another decision of this Court without the same specificity. *Wood*, 409 Mich at 294-295.

While the defendant in *Wood* was challenging two other decisions interpreting the Wrongful Death Act, the Court's observation applies with equal force to the *Baker* decision and its holding limiting recovery of the decedent's future lost wages to the amount of financial support he or she was providing to beneficiaries under the Act. The Legislature was aware of *Baker*, just

[15] *Miller* was a suit instituted to recover benefits under an automobile policy.

[16] Justice Viviano dissented from an order denying leave to appeal on the same issue as is presented in our case: whether a decedent's estate may recover lost-earning capacity damages under the Wrongful Death Act. *Touma v McLaren Port Huron*, 965 NW2d 550 (Mich 2021). Appx p. 220-222.

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like it was aware of *Breckon*, and the Legislature was not subtle about abrogating *Breckon*. In 1971, it inserted a separate sentence allowing what *Breckon* prohibited—loss-of-society-and-companionship damages. 1971 PA 65. It is illogical to assume that the Legislature decided to be coy about overruling *Baker*. See *Wood*, 409 Mich at 295 ("When the Legislature acts with such specificity to alter one decision of this Court, it would be highly unlikely that the Legislature would intend to alter another decision of this Court without the same specificity.")

d. The Court of Appeals decides *Swartz* in 1980.

The holding in *Denney* unnecessarily contradicted case law that had already interpreted the WDA with the 1971 amendment. The rule of law established in *Swartz* interpreted the WDA version with the "under all of the circumstance" language and still adhered to the holding in *Baker* and *Baker's* progeny. *Swartz v Dow Chemical Co.*, 95 Mich App 328 (1980), rev'd on other grounds, 4143 Mich 433 (1981).[17] The Court of Appeals in our case should have followed *Swartz* as precedent according to MCR 7.215(C):

> **(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.** The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals. Mich. Ct. R. 7.215 (Emphasis added).

In *Swartz*, the plaintiffs, including the decedent's parents and two brothers, tried to collect future earning capacity damages for a 19-year-old decedent. The estate attempted to offer an expert to prove the loss of future earning capacity of the decedent. Defendants objected to this expert, arguing that there was no reasonable expectation of support or contribution by decedent to his

[17] *Swartz* was reversed on other grounds in 1982 by the Supreme Court. This Court granted leave to appeal on whether the trial court's ruling which permitted the defendants to introduce evidence of citations for MIOSHA violations was error requiring reversal on the grounds of prejudicial hearsay. This Court ultimately found that it was error for the trial court to allow this evidence and reversed the decision of the Court of Appeals. *Swartz v Dow Chem Co*, 414 Mich 433; 326 NW2d 804 (1982). This review by this Court had no bearing on the issue of wrongful death damages.

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parents and therefore this expert testimony was not necessary. The Court cited to *Thompson*, *Mooney*, and *Rytkonen* for the rule that, "in regard to recovery of loss of possible support, **the test is reasonable expectation of support** in determining whether damages may be had when death of an adult child results." *Swartz*, 95 Mich App 328 at 335 (1980). (Emphasis added). The Court ruled that the facts showed that the decedent had never contributed to the support of his parents but instead, his parents continued to support him. Therefore, *Swartz* proves that the 1971 amendment did not change the meaning of the WDA or intend for courts to award lost future earning capacity damages where no support was being provided by the decedent.

MCR 7.215(J)(1) requires the Court of Appeals to follow the rule of law "established" by a prior published decision of the COA issued on or after November 1, 1990. However, this rule does not say to completely ignore decisions published prior to 1990 such as *Swartz*, supra. The decedent in *Denney* was a 42-year-old husband and father; there was no issue or discussion in *Denney* whether the decedent was "supporting" anyone. So, any rule of law established by *Denney* could not and should not apply to a case where the issue is, as in *Swartz*, was the decedent supporting anyone or under an obligation to support anyone. That was an issue specifically addressed in *Swartz* but not in *Denney*. The rule of law used by the Court of Appeals in our case (*Daher*) unnecessarily contradicts the rule of law established in *Swartz*.

e. The Legislature adopted the ruling in *Baker* in 1985 by adding express reference to "loss of financial support" as the measure of lost wages recoverable under the Act.

As it does today, the 1985 amended Act stated:

> 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

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> the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

The Legislature inserted "loss of financial support" into the Act's list of recoverable damages–an express adoption of the *Baker* decision, and a means of reiterating the Act's historic "pecuniary" limitation on recovery of future wage loss without excluding the non-economic damages now recoverable under the Act. In *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 607; 568 NW2d 93 (1997), this Court observed that "the 'pecuniary injury' language of the statute construed in *Thompson* is analogous to the clearer 'loss of financial support' language of the current statute." *Setterington* held that the decedent's children could recover for lost financial support beyond their 18th birthdays, which was consistent with this Court's prior interpretation of the Act. *Id*.

The addition of "loss of financial support" to the list of "fair and equitable" damages allowed under the Act has meaning. "When a statute uses a general term followed by specific examples included within the general term...the general term is restricted to only things of the same kind, class, character or nature as those specifically enumerated." *Hugett v Dep't of Nat Res*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). In MCL 600.2922(6), the general term "fair and equitable" damages is followed by a list of specific examples included within that general term. The listed items fall into two categories: (1) damages the decedent incurred before death (reasonable medical and hospital expenses and conscious pain and suffering); and (2) damages the decedent's dependents, beneficiaries or estate incurred after death (funeral and burial expenses, loss of financial support and loss of society and companionship). The decedent's post-death earning capacity doesn't fall into either category, and is therefore not a type of damages authorized by the broader term. *Id*.

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The financial support lost by the decedent's beneficiaries is a subset of the decedent's future wages. By specifically including this narrow subset of lost financial support, the Legislature intended to exclude the decedent's entire future earnings from recovery by beneficiaries who did not depend on the decedent for financial support. For example, an estate can recover the economic value of household services that a mother was providing to her minor children at the time of her death. *Thorn*, 281 Mich App at 646. Those lost-services damages are then distributed to the children "who suffered damages. . .relative [to the] damages sustained by each of the persons. . ." MCL 600.2922(6). The purpose is to compensate the family members for their own personal losses. Economic damages recoverable under the Act have never reached beyond compensating for lost financial support or other things of value that family members or beneficiaries were receiving from the decedent before the time of death.

Further, the Act's specific reference to "loss of support" would be rendered surplusage by an interpretation allowing for the recovery of a decedent's entire lost earning capacity regardless of support, as the former is necessarily subsumed within the latter. This interpretation must therefore be rejected. See *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007) (when interpreting a statute, "no word should be treated as surplusage or made nugatory"). It would be strange indeed to interpret the Act in a manner that negates a category of damages that the Legislature specifically added.

The 1985 amendment further adopted the holding in *Baker* by clarifying who could recover damages under the Act. Before 1985, the Act stated that the courts would determine the "proportionate share" of the damages to distribute to the decedent's surviving spouse and next of kin and that "[t]he remainder of the proceeds of such judgment shall be distributed according to the intestate laws." 1971 PA 65. The 1985 amendment added a detailed subsection that defined

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"the persons who may be entitled to damages under this section...." MCL 600.2922(3); 1985 PA 93. ***There is no provision for distributing any "remainder" or earning-capacity damages***. Instead, the Act pays the decedent's final expenses, compensates each beneficiary ***"who suffered damages"*** in the amount of those damages (i.e., for loss of the decedent's companionship and financial support), and compensates the decedent's estate for the decedent's conscious pain and suffering. See *Shinholster*, 471 Mich at 564-565 (noting that statute "expressly permits" jury to award, and estate to recover, reasonable compensation for decedent's pain and suffering, including higher amount of capped non-economic damages under MCL 600.1483); see also M Civ JI 45.01 (instructing jury to determine the damages suffered by the "real parties in interest," i.e., the decedent's heirs). Again, it would render this statutory distribution scheme surplusage and nugatory if the Act were interpreted to allow recovery, but not distribution, of an unaccounted-for category of damages that can amount to tens of millions of dollars.

Finally, to the extent the heirs of the decedent's estate could recover those lost earnings damages without a showing of financial support, those damages would constitute an impermissible windfall. This Court has ruled that the Wrongful Death Act does not provide for punitive or exemplary damages, and therefore is limited recovery to compensatory damages only.

f. Nothing material has changed in the Act since the 1985 amendment.

After the 1985 amendments, the Wrongful Death Act underwent minor revisions without any substantive changes to the damages or distribution sections of MCL 600.2922. See 2000 PA 56 (changing statutory reference in the distribution provision); 2005 PA 270 (replacing "as" with "that" and replacing "consider" with "determines to be"). Thus, consistent with its history and this Court's opinion in *Baker*, the Act continues to only permit recovery of loss of support, if such

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support can be proven by those heirs allowed to recover under the act. Only this subset of lost future wages/earning capacity is a recoverable damage under the Act.

V. ***Baker* has not been clearly overruled or superseded, and *Swartz* is binding precedent.**

When a Supreme Court holding conflicts with a subsequent Court of Appeals holding, "The Court of Appeals is bound to follow decisions by this Court…" *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). "It is the Supreme Court's obligation to overrule or modify caselaw, and until it takes such action, the Court of Appeals and all lower courts are bound by that authority." *Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 354 n 17; 785 NW2d 45 (2010).

There is a single narrow exception to the rule that lower courts must follow this Court's precedent. Lower courts do not have to follow Supreme Court decisions that "have **clearly** been overruled or superseded…" *Associated Builders*, 499 Mich at 191-192 (emphasis in original). If a Supreme Court decision has been "undermined" or is "no longer viable," lower courts still must apply it. *Id.* at 191-192 & n 33. It is only when Supreme Court precedent has been "clearly" overruled or superseded that lower courts can deviate. *Id*. at 191-192. And this Court has conveyed that this Court will tell lower courts when it has overruled its precedent. See *Associated Builders*, 499 Mich at 191 n 32 ("[O]ne can determine with relative ease whether a case was overruled by this Court…")

Implicit overruling is not enough; the overruling must be express. *Id*. at 192. And this Court has not overruled *Baker*. *Baker* has not been clearly overruled or superseded and therefore the Court of Appeals was required to follow the holding in *Baker*.

a. **This Court has not overruled *Baker*.**

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In its opinion in *Daher*, the Court of Appeals stated that "*Baker* has clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*."[18] Despite the court's holding, this Court has never clearly overruled *Baker*. The Court of Appeals failed to meaningfully consider the WDA's historical analysis or the holdings in *Baker* and *Swartz*. Further, the Court of Appeals dedicated no part of its opinion to the reasonable expectation of support standard applied in *Swartz* following the amendment to the WDA in 1971. The Court of Appeals put forth no evidence that his Court has ever clearly overruled *Baker*.

Judge Swartzle concurred in *Daher* stating his reservations surrounding the soundness of *Denney*. Judge Swartzle noted: (1) *Denney* did not confront the Supreme Court's decision in *Baker* or the subsequent court decisions or legislative amendments since *Baker*; (2) *Denney* did not discuss or even cite subsection (3) of the WDA which places a strict limit on those persons who may be entitled to wrongful death damages, namely, to those who suffered damages as a result of the lost earnings of the decedent (reasonable expectation of support). For those reasons, Judge Swartzle "encourage[d] our Supreme Court to take up this question and definitively answer it."[19]

For further support for the reasons stated in his concurrence, Judge Swartzle referred to Justice Viviano's dissent in *Touma v Huron*, 508 Mich 976; 965 NW2d 550 (2021).[20] In *Touma*, this Court denied an application for leave to appeal on this same issue. Justice Viviano stated that this issue posed "a significant question of law in which the Court of Appeals has reached a conclusion seemingly at odds with our precedent." *Touma*, 508 Mich at 976 (2021). Justice Viviano squarely confronted the issue of reconciling *Denney* and *Baker*:

> Under this language, the Court of Appeals has found that lost-earning-capacity damages are allowed. See *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 N.W.2d 808 (2016). The prevailing theory in that case was relatively

[18] Appx p. 25-31.
[19] Appx p. 218-219.
[20] Appx p. 220-222.

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> straightforward. As this Court has noted, MCL 600.2922 "permit[s] a decedent's estate to recover everything that the decedent would have been able to recover had she lived." *Shinholster v Annapolis Hosp*, 471 Mich 540, 564; 685 N.W.2d 275 (2004). Accordingly, *Denney* held that if a decedent could have obtained lost-earning-capacity damages, then so can his or her estate through the WDA. See *Denney*, 317 Mich App at 731-732. *Denney* also noted that "[t]he word 'including' in MCL 600.2922(6) 'indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case.' " Id. at 731, quoting *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 761 N.W.2d 414 (2008).
>
> *Denney's* logic suggests that the damages available under the WDA generally reflect those available under the prior survival act. **But we rejected that very conclusion in *Baker*. The question thus arises whether *Baker* remains viable law. This is a question only we can answer.** See *Associated Builders & Contractors*, 499 Mich at 191-192. Plaintiff argues that *Baker* focused on the term "pecuniary injury," which a later amendment replaced with the phrase "under all of the circumstances." 1971 PA 65. According to plaintiff, this amendment, together with *Denney's* reading of the word "including" in MCL 600.2922(6), undermines *Baker*.
> *Touma*, 508 Mich at 977 (2021). (Emphasis added).

Justice Viviano also commented on the 1971 amendment to the WDA:

> The removal of the term "pecuniary injury" came about as a result of our decision in *Breckon v Franklin Fuel Co*, 383 Mich 251; 174 N.W.2d 836 (1970), overruled by *Smith v Detroit*, 388 Mich 637; 202 N.W.2d 300 (1972), which held that loss-and-companionship damages were not compensable under the WDA. Subsequently, the Legislature passed 1971 PA 65 in response to *Breckon*, specifically allowing for such damages. That amendment also replaced the phrase "with reference to the pecuniary injury" with "under all of the circumstances." 1971 PA 65. **It is not clear that this removal reinstated the full scope of recovery available under the older survival act. Even after the 1971 amendment, we have stated that the "wrongful death act damages focus upon the financial loss actually incurred by the survivors as a result of their decedent's death."** *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 561; 302 N.W.2d 537 (1981).
> …
> In sum, the statute appears to contain a tension between allowing the same recovery the decedent would have obtained and limiting the recovery to losses sustained by the survivors. **This case presents a significant and recurring question of law involving a complicated statute. Determining the statute's meaning requires a careful examination of its text in light of its lengthy history. And it requires our state's highest Court to determine whether *Baker* remains good law.** That important question has not been addressed and it cannot be resolved until we take up this issue.
> *Touma*, 508 Mich at 977-78 (2021). (Emphasis added).

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The majority declined to review this issue but included an important footnote stating that in *Denney* "the defendants did not address *Baker* until their reply brief in this Court and did not present the historical tensions in the statute that help to explain the potential conflict between *Denney* and *Baker*." *Touma*, 508 Mich at 978 n 1 (2021). Defendants here have included those analyses and believe, along with Justice Viviano, that this is an important issue that must be taken under review by this Court. Until that happens, there is no evidence that *Baker* has been overruled.

b. The Legislature has not superseded *Baker*.

Where the Legislature amends a statutory provision, the Court of Appeals "remains bound to follow the Supreme Court's interpretation of [the] since-amended statute if the intervening amendment merely 'undermined' the foundations of the Supreme Court's prior decision, but not if the intervening amendment 'clearly . . . superseded' the Supreme Court's interpretation." *In re AGD*, 327 Mich App 332, 341; 933 NW2d 751 (2019). Where the "Legislature has entirely repealed or amended a statute to expressly repudiate a court decision. . . lower courts have the power to make decisions without being bound by prior cases that were decided under the now-repudiated previous positive law." *Id.* at 341, quoting *Associated Builders*, 499 Mich at 191 n 32. The evolution of the damages recoverable under the Wrongful Death Act has never reflected an intent by the Legislature to allow recovery for economic/pecuniary damages for loss of earning capacity without evidence of the expectation of support.

Plaintiffs' estate and the Court of Appeals relied on the 1971 amendment to the WDA to support that wrongful death damages include lost earnings even when there was no expectation of support from the decedent. The 1971 amendment was arguably the most significant change to the WDA after *Baker* when the Legislature removed "with reference to the pecuniary injury resulting from such death" and replaced it with "under all of the circumstances." The Act was amended to

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allow for recovery of "loss of the society and companionship", non-economic damages, of the decedent:

> [I]n every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, under all of the circumstances to those persons who may be entitled to such damages when recovered including damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. The amount of damages recoverable by civil action for death caused by the wrongful act, neglect, or fault of another may also include recovery for the loss of the society and companionship of the deceased. [MCL 600.2922, as amended by 1971 PA 65.]

As explained in the historical analysis above, this amendment was in direct response to this Court's decision in *Breckon v Franklin Fuel Co*, 383 Mich 251; 174 NW2d 836 (1970), rev'd on other grounds, *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972), wherein the Court ruled that under the prior statute, which limited recovery to "pecuniary loss," society and companionship damages were not recoverable. See 1971 PA 65. Consistent with the decision to allow recovery of such non-economic damages (and to avoid the confusion noted in *Breckon* regarding the use of "pecuniary injury" and "pecuniary loss" to describe such damages), the Legislature removed the language "with reference to the pecuniary injury resulting from such death," and replaced it with "under all of the circumstances." See *Wood*, 409 Mich at 294 (explaining that the amendment "specifically provided for what this Court had denied in *Breckon*," namely, recovery of damages for loss of society and companionship under the Wrongful Death Act); *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 664-665; 761 NW2d 414 (2008) (noting that prior versions of the Act "focused on pecuniary damages," and the "historical progression of the [Act] initially precluded recovery for nonpecuniary damages, such as loss of society and companionship, grief, and mental anguish").

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The removal of the term "pecuniary injury" simply made clear that nonpecuniary injuries, like lost society and companionship, were available. Even after the 1971 amendment, this Court has stated that the "wrongful death act damages focus upon the financial loss actually incurred by the survivors as a result of their decedent's death." *Miller v Mut Auto Ins Co*, 410 Mich 538, 561 (1981). The text of MCL 600.2922(3) focuses on this point, stating that "the person or persons who may be entitled to damages under this section shall be limited to any of the following **who suffer damages** and survive the deceased…" (Emphasis added). See also MCL 600.2922(6)(d) (providing for the default distribution of proceeds, with the residuum after various expenses to go: to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased.

There is no evidence that the Legislature intended the 1971 amendment to abrogate *Baker*. To abrogate the common law, the Legislature "should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006); see *Rusineck v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981) ("[S]tatues in derogation of the common law must be strictly construed and will not be extended by implication to abrogate established rules of common law."). The Legislature has not directly stated that estates can recover earning-capacity damages without proof of the expectation of support. "Under all of the circumstances" does not equate to "earning capacity", and the only cases to consider that amendment concluded that it only affected *Breckon.* See *Wood*, 409 Mich at 286.

VI. The estate's claim for future wages and services is too speculative to allow recovery and any claim for lost services must terminate at the age of majority.

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Alleged future earnings/capacity damages in a case involving the death of a 13-year-old who was not working or supporting anyone, are remote, speculative and contingent. “Remote, speculative and contingent” damages are not allowed in Michigan. *Sutter v Biggs*, 377 Mich 80 (1966). “The party asserting a claim has the burden of proving his damages with reasonable certainty.” *SC Gray, Inc v Ford Motor Co*, 92 Mich App 789, 801; 286 NW2d 34 (1979). The economic damages in this case are speculative and based on a number of variables, including the patient recovering from bacterial meningitis, no permanent damage from the bacterial meningitis, completion of middle school and high school, marriage, children, grades, future education, contribution to parents and siblings. Logically, and based on significant common experience, children do not provide support for their parents and siblings. Parents commonly provide everlasting support for their children, even well into adulthood. To the extent that Plaintiffs have preserved a claim for lost services of the minor decedent, any lost services claim terminates when the decedent would have reached the age of majority. As stated by the Court of Appeals in *Rodriguez v Solar of Michigan, Inc*, 191 Mich App 483, 496-497; 478 NW2d 914 (1991), parents have no claim for damages for a child’s lost services after that child would have reached the age of majority. After the age of majority, damages for claimed loss of household services can only be awarded to those identified individuals who would be entitled to such damages. See MCL 600.2922(3) ("the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased ... "). There is no such person or persons here.

In our case (*Daher*) the Court of Appeals recognized that there is little clear authority in Michigan regarding a claim for a child decedent’s lost wages or lost earning capacity. The court cited to this Court’s holding in *Thompson*, supra, in which this Court found there was evidence

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that the decedent had a history of earning money and contributing to family support and therefore these damages were not speculative. *Id.* at 491-491. The court then referred to non-binding precedent from other states and ultimately concluded that those cases proved that a child's expected future earning potential is not inherently too speculative. The court held that "there is no reason why the child must have an employment history", which contradicts this Court's reasoning for permitting damages in *Thompson*, supra.[21]

The court failed to set forth any standard or possible calculation for determining how old is "old enough", and instead, listed a number of variables for courts to consider on a case-by-case basis, including: maturity, showing promise in a field, aspirations, strengths, personality characteristics, social adeptness, child's environment, school system, general area of residence, extracurricular activities, and exposure to trauma or role models. While this list is not exhaustive, this list contains subjective traits and characteristics that could be very problematic when applied. For example, considering possible damages for a child that grew up in a lower-income area and school district compared to a child in a more affluential area and school district is unfair and has no bearing on potential employment success. This will inevitably lead to inconsistent results in Michigan wrongful-death cases. Prior wages have consistently been used as the standard and should continue to be the standard.

This Court has explained that "prior wages generally are the most relevant and reliable evidence for determining what a plaintiff actually would have earned had the accident not occurred." *Hannay*, 497 Mich at 82. Here, with no prior wages to guide a jury, "courts must be cautious…because of the risk that a calculation based on such wages will be contingent and speculative and, therefore, barred under Michigan law." *Id.*

[21] Appx p. 25-31.

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VII. Policy Arguments

a. The Court of Appeals opined that future earnings of a 13-year-old middle school child are not speculative.

In this case, the Court of Appeals ruled that the estate of this middle school, 13-year-old decedent can claim lost future earnings damages even though the decedent was not supporting anyone. In a similar case, *Zehel v Nugent*__Mich App__(Dec. 1, 2022),[22] heard by the Court of Appeals, on the same day as this case, the Court ruled that the estate of a newborn decedent cannot make these claims for future economic damages because those damages are too speculative. While those damages are speculative, the determination of where to draw the line between allowing and disallowing these claimed future economic damages should be based on support issues pursuant to *Swartz*, not the age of the decedent. The standard should be whether there was a reasonable expectation of support. This may very well lead to chaos. Imagine the depositions of the parents. What toys did your child play with? What TV shows did she/he watch? What sports did she/he play? She wanted to be a doctor, a lawyer, an astronaut, a baseball pitcher, etc.

b. Permitting "*Denney*" damages allows for double recovery.

Permitting an estate to recover *Denney* damages means that an estate may recover damages for both "lost future support" AND "lost future earnings/earnings capacity." This conclusion is not logical as it allows double recovery. Lost support is determined by using future earnings and then subtracting taxes and personal consumption. Under the Court of Appeal's opinion, estates may now recover that lost support plus lost future earnings. As "a general rule, only one recovery for a single injury is allowed under Michigan law." *Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 251; 660 NW2d 344 (2003). The only logical relief that should be allowed to an estate is reasonably expected lost future support.

[22] Appx p. 223-236.

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c. Hospitals and Medical Groups

At least four hospitals and medical groups filed amicus briefs in the Court of Appeals in this matter to address the so-called *Denney* damages. *Denney* damages have created an incredible amount of potential damages in death cases of minors. For decades before *Denney* and even for a few years after *Denney*, the plaintiffs' bar did not seek lost earnings damages for estates of minors, almost as a rule. As this Court wrote in 1981: "wrongful death act damages focus upon the financial loss actually incurred by the survivors as a result of their decedent's death." *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 561; 302 N.W.2d 537 (1981), quoted by Justice Viviano in *Touma v Huron*, 508 Mich 976, 978; 965 NW2d 550 (2021). The law on this point was well settled. Even the ICLE text on Damages, edited by attorney Barbara Patek and attorney Mark Granzotto: "**The WDA provides for recovery of loss of financial support, not for loss of earning capacity.**" (emphasis added). Jilek, Koning & Sawsuch, Damages and Remedies in Michigan, Chapter 5: Personal Injury Damages (ICLE, Online Book, current to 08/26/2022), p 50 of 73.

Relief Requested

As such, this Honorable Court should grant Defendants' application for leave to appeal to consider these questions of law as they involve legal principles of major significance to the state's jurisprudence.

Respectfully submitted,

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Certificate of Compliance

I certify that the Defendants-Appellants' Application for Leave to Appeal complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this document. This brief uses a 12-point proportional font (Times New Roman), and the word count for this brief is 10,9073.

Respectfully submitted,

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State of Michigan

In the Supreme Court

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

Plaintiffs-Appellees,

vs.

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

Defendants-Appellants.

Supreme Court No.
Court of Appeals No. 358209

Wayne County Circuit No: 20-004169-NH
Hon. Martha M. Snow

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The Undersigned states that she is employed with the firm of CORBET, SHAW, ESSAD & BONASSO, P.L.LC., and that on February 24, 2023, she served **Notice of Filing Supreme Court Application for Leave to Appeal** upon:

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