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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,

v

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

Defendants-Appellants.
_____/

MSC No. 165377

COA No. 358209

L.C. Case No. 20-004169-NH
(Wayne Circuit Court)

PLAINTIFFS-APPELLEES' ANSWER TO APPLICATION FOR LEAVE TO APPEAL

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CERTIFICATE OF COMPLIANCE WITH ADM FILE NO. 2019-16

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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STATEMENT OF THE QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD DECLINE REVIEW OF AN ISSUE FOR WHICH IT HAS RECENTLY DENIED LEAVE TO APPEAL AND WHICH IS PROPERLY DECIDED IN A PUBLISHED DECISION OF THE COURT OF APPEALS?

Plaintiffs-Appellees say "yes"

Defendants-Appellants say "no."

II.

WHETHER AN ESTATE MAY OBTAIN DAMAGES FOR THE LOSS OF A DECEDENT'S LOST FUTURE EARNINGS UNDER THE CURRENT VERSION OF THE WRONGFUL DEATH ACT?

Plaintiffs-Appellees say "yes."

Defendants-Appellants say "no."

The trial court says "yes."

The Michigan Court of Appeals says "yes."

III.

WHETHER A 13-YEAR-OLD DECEDENT'S EARNING POTENTIAL IS NOT "INHERENTLY" SPECULATIVE TO AWARD SUCH DAMAGES UNDER THE WRONGFUL DEATH ACT?

Plaintiffs-Appellees say "yes."

Defendants-Appellants say "no."

The trial court says "yes."

The Michigan Court of Appeals says "yes."

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COUNTER-STATEMENT OF FACTS

A. Introduction-summary.

Defendants-Appellants[1] contend the Court of Appeals committed error by holding that Plaintiffs-Appellees[2] may recover as a category of damages a decedent's lost future earnings under Michigan's Wrongful Death Act ("WDA"), MCL 600.2922(6). *In re Jumaa Estate*, ___ Mich App ___; ___ NW2d ___ (2022); 2022 WL 17365635 ("*Jumaa*"), Slip Opinion, pp 2-3.[3] Additionally, Defendants disagree with a series of Court of Appeals opinions, including *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016), *lv denied* 500 Mich 997; 894 NW2d 608 (2017) holding the same. Defendants contend the *Jumaa* Court of Appeals' Opinion presents an issue important to Michigan's jurisprudence, without accounting for the multiple and consistent decisions rejecting Defendants' *ipse dixit* limited interpretation of the WDA damage provision.

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[1] Defendants-Appellants are Prime Healthcare Services-Garden City, LLC, d/b/a Garden City Hospital, Kelly W. Welsh, D.O., and Megan Shady, D.O. ("Defendants.")

[2] Plaintiffs-Appellees are Nawal Daher and Mohamad Jomaa, as Co-Personal Representatives for the Estate of Jawad Jumaa, a/k/a Jawad Jomaa, Deceased ("Plaintiffs").

[3] The Court of Appeals' published Opinion is found at 2022 WL 17365635 (Mich App, Dec 1, 2022). For ease of reference, Plaintiffs will refer to the Court's Slip Opinions in this Answer, as well when referring to other cases discussed for which there are not at published citations.

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The Court of Appeals' decision is rock-solid and should be left undisturbed. After reviewing the history of legislative development of the WDA, comparing the language in 1948 when *Baker v Slack* was decided, 319 Mich 703; 30 NW2d 403 (1948), to the present version of the WDA, under which *Denney* was decided, the Court of Appeals reasoned correctly that the Legislature had expanded the recovery of damages under the WDA. Slip Op, pp 3-4. This conclusion is fully supported by the changes in statutory language of the WDA from the time of *Baker* to the time of *Denney* and now *Jumaa*. Prior to 1971 (in the 1939 version of the WDA), the Legislature provided recovery of damages deemed fair and just, but only "*with reference to the pecuniary injury resulting from such death. . . .*" In the 1971 WDA amendment, the Legislature removed the limitation on damages "*with reference to the pecuniary injury resulting from death"* – all six references thereto – and in its place:

a. Provided that recovery included the loss of society and companionship of the deceased (a category of damage not in the pre-1971 statute);

b. Allowed recovery "***under all of the circumstances,***" "**including**" certain delineated categories of damages.

Since *Baker* interpreted different statutory language than at issue here, language which previously limited recovery, the Court of Appeals correctly reasoned that when this Court decided *Baker*, "*the wrongful-death act was not only understood to provide a fundamentally different kind of cause of action, the statute also lacked the open-ended inclusiveness of the current statute*." Slip Op, p 4. *See also Wesche v Mecosta Cty Rd*

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Comm, 480 Mich 75, 90; 746 NW2d 847 (2008) (Supreme Court explains that the WDA used to be construed as providing a new cause of action for the benefit of the beneficiaries, termed an obsolete understanding and thus rendering inapplicable the *Baker* Court's analysis and holding). Slip Op, pp 3-4.

Thus, the keystone to Defendants' argument, *Baker*, could not, and did not, interpret the current WDA language because that language did not exist when *Baker* was decided. *See also* the Court of Appeals Opinion in the companion case of *In re Vasquez Estate*, ___ Mich App ___; ___ NW2d ___ (Dec 1, 2022); 2022 WL 17365602, Slip Op, pp 4-6 ("*Vasquez*").[4] This straightforward point was recognized expressly in *Jumaa, Vasquez,* and in the most recent Court of Appeals decision *Stewart-Hinkley v McLaren Healthcare Corp*, COA Docket No. 358988, *rel'd* 12/22/2022 (unpublished) ("*Stewart-Hinkley*"); 2022 WL 17876908 (Patel, P.J., and Cameron and Letica, JJ.), adopting the reasoning in *Jumaa*,[5] again placing significance in the Legislature's use of the word "including" when defining the scope of the category of damages available under the WDA.

Defendants also contend that evidence of a 13-year-old decedent's future earnings are speculative. Notably, Defendants did not respond at all, let alone discredit,

[4] The published decision of *In Re Vasquez* is found at 2022 WL 17365602 (Mich App, Dec 1, 2022).

[5] The *Stewart-Hinkley* unpublished decision is found at 2022 WL 17876906 (Mich App Dec 22, 2022) (unpublished).

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Plaintiffs' evidence on this point, presented to the trial court through the affidavit and report of an economist. In fact, Defendants' trial court and Court of Appeals argument on this point was so skeletal that the Court of Appeals could only address, in the hypothetical, whether a 13-year-old decedent's future earnings are "inherently" speculative. This is far from the ideal case to consider the question. Leave to appeal is inappropriate to consider such a vague and hypothetical contention.

B. Plaintiffs' allegations.

This medical malpractice action arises out of the untimely and preventable death of Jawad Jumaa, a 13-year-old boy, as a result of Defendants' negligence. Pursuant to Plaintiffs' Complaint, on the morning of January 16, 2017, Jawad Jumaa was found dead in this bed at his mother's home. At the time, he was 13 years old (**Exhibit 1**, Plaintiffs' Complaint, ¶14). An autopsy revealed the cause of death to be acute purulent meningitis. *Id.* at ¶16. The night before, January 15, 2017, Jawad Jumaa presented to the emergency department at Defendant Garden City Hospital, where he was treated over a period of four hours. *Id.* at ¶¶16-17. No inquiry was made as to the extent of his illness. Instead, one of the physicians, Dr. Shady, made a diagnostic impression of "torticollis," noting no concern or suspicion for meningitis at that time. *Id.* at ¶22. After Jawad Jumaa's vital signs were taken again, and the nursing staff noted complaints of head and neck pain, Jawad Jumaa was discharged at 20:15, recorded to have left the emergency department at 21:33. *Id.* at ¶¶23-26. While at home, he was given Tylenol

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and Motrin, a pain relieving patch for his neck, but to no avail. *Id.* at ¶¶26-27. When he was discovered the following morning, Jawad was not breathing, cold to the touch, at which time emergency services were contacted, including the police. *Id.* at ¶¶28-31.

Plaintiffs' Complaint was filed March 18, 2020 and contains several substantive counts including Count I (Professional Negligence/Gross Negligence against Defendant Prime Healthcare Services [Garden City Hospital]) (*Id.* at ¶¶32-41), Count II (Medical Malpractice/Negligence/Gross Negligence against Defendant Kelley W. Welsh, D.O.) (*Id.* at ¶¶42-50), Count III (Medical Malpractice/Negligence/Gross Negligence against Defendant Megan Shady, D.O.) (*Id.* at ¶¶51-59), and Count IV (Nursing Malpractice against Prime Healthcare d/b/a Garden City Hospital) (*Id.* at 60-68). In each of the substantive counts, it is asserted as damages that Plaintiffs were entitled to damages under Michigan's Wrongful Death Act (see e.g., ¶¶39-40, 47-49, 56-58, and 65-67).

C. Material proceedings in the trial court.

On April 30, 2021, Defendants filed their Motion for Summary Disposition of Future Economic Damages (**Exhibit 2**). In that Motion and supporting Brief, Defendants made two principal arguments: first, the decedent's future lost earnings are not recoverable as a category of damage under the WDA (Brief, pp 3-8); and second, the alleged future earnings/capacity damages in the case involving the death of a 13-year-old who was not working or supporting anyone were "remote, speculative and contingent." Motion, ¶6. ***There is no other detail or even reference challenging the***

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claimed speculative nature of such damages, and nowhere in the supporting brief is this claim argued.

On June 30, 2021, Plaintiffs filed their Response Opposing Defendant' [sic] Motion for Summary Disposition of Future Economic Damages (**Exhibit 3**). In that Motion and supporting Brief, Plaintiffs not only argued that a decedent's lost future earnings are recoverable under the WDA, but also provided the trial court with 4½ pages of extensive discussion of why the 13-year-old's future wage loss was not speculative [even though Defendants have not briefed but rather simply made the conclusory assertion that it was speculative], supported by the Affidavit of Nitin Paranjpe, PhD (**Exhibit 4**) to which was attached charts of calculations of loss and earning capacity for the decedent, one assuming a high school education, another assuming a bachelor's degree, and a third measuring loss of household services.

In his Affidavit, Dr. Paranjpe explained the data he used in support of his calculations, including United States Census Bureau information, average earnings for Caucasian males with high school degrees or bachelor degrees, adjusted for age, and taking into account his mother's Bachelor of Science degree in nursing, and his father's employment as a mechanic, using a 15% adjustment for fringe benefits (consistent with the methodology generally accepted in the field of economics), together with a 4% factor for wage growth, and use of the United States Department of Labor, Bureau of Labor Statistics for the American Time Use Survey used with respect to the

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determination of hours of household services through life expectancy (**Exhibit 4,** Affidavit, ¶¶11-27).

On July 7, 2021, Defendants filed their Reply to Plaintiff's [sic] Response to Motion for Summary Disposition of Future Economic Damages (**Exhibit 5**). The entirety of Defendants' Reply with respect to claim speculation was to provide the trial court with two circuit court opinions, then asserting in conclusory fashion that, "both cases are extremely persuasive examples of why plaintiff's claims for future economic damages should be dismissed in the present case." Reply, p 4. ***There is no response whatsoever to Dr. Paranjpe's Affidavit and his various charts***.

On July 21, 2021, the trial court heard oral argument from the respective attorneys at which time it denied the motion (**Exhibit 6,**Transcript, 7/21/2021, pp 13-18). In the course of argument, defense counsel did not expand upon the mere conclusory statement that future lost earnings would be speculative with respect to a 13-year-old decedent, let alone responding to Dr. Paranjpe's Affidavit and various attachments. *Id.* at 4-8, 10. In contrast, counsel for Plaintiffs specifically argued that the damages could not be speculative based on the Affidavit of Dr. Paranjpe, both an economist and a statistician, based on the data he had cited. *Id.* at 8-9.

Consistent with its statement from the bench, the trial court entered an order denying Defendants' motion, dated July 28, 2021, citing to the reasons stated on the record (**Exhibit 7,** Order, p 2).

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D. Material proceedings in the Court of Appeals.

On August 18, 2021, Defendants filed their Application for Leave to Appeal to the Michigan Court of Appeals, and their Corrected Application on August 19, 2021. In their Argument G, Defendants argued that the Estate's claim for future wages and services was "too speculative to allow recovery" and that any claim for "lost services was terminated at the age of majority." Application, Table of Contents; p 10. Defendants' entire argument regarding "speculation" is as follows:

> 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 economic damages in this case are speculative and based on a number of variables, including 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 personal experience, children do not provide support for their parents and siblings. As this panel is probably aware, the parents commonly provide everlasting support for their children, even well into adulthood. This is a tragic case, but the claimed economic damages stretch the bounds of logic and reality.

(**Exhibit 8,** Defendants' Corrected Application, pp 9-10). Notably, as in the trial court, there is no substantive argument nor response to Dr. Paranjpe's Affidavit and his various charts.

After Plaintiffs filed their Answer to the Application, a panel of the Court of Appeals granted leave to appeal through an Order of October 13, 2021, noting that the

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leave granted appeal was "limited to the issues raised in the application and supporting brief." (**Exhibit 9**, October 13, 2021 Court of Appeals Order).

E. Defendants' Court of Appeals briefing.

On December 8, 2021, Defendants filed their Brief on Appeal. In that Brief, the argument regarding the decedent's future wages and services being "too speculative" was ***identical*** to the cursory statement made in the defense Application (**Exhibit 10,** Brief on Appeal, pp 23-24), again making no response whatsoever to Dr. Paranjpe's Affidavit and his various charts, let alone the content of the Affidavit and the explanation of what sources were used for Dr. Paranjpe's conclusions and reports.

After Plaintiffs filed their Brief on Appeal, Defendants filed their Reply Brief, dated January 10, 2023, which ***again*** made no reference to the evidence which Plaintiffs had submitted to the trial court. Instead, Defendants argued only that there was no basis for assuming the decedent would have earned an average income for any particular level of education, and thus any wage loss was purely speculation (**Exhibit 11,** Reply Brief, pp 9-10).

F. The Court of Appeals decision.

On December 1, 2022, the Michigan Court of Appeals issued its published opinion in *Jumma*, in which it affirmed the trial court's denial of the Motion for Summary Disposition. The *Jumaa* Court cited prominently the earlier decision of *Denney v Kent Co Rd Comm, supra*, for the proper interpretation of the WDA, specifically MCL

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600.2922(b). "[T]he Legislature's use of the word 'including' meant that the enumerated list of kinds of damages available is not exhaustive; '[t]herefore, damages for lost earnings are allowable under the wrongful-death statute.'" (**Exhibit 12,** Slip Op, p 3). The *Jumaa* Court noted that, upon Application, *Denney* had not been overturned by this Court. *Id.*

Rejecting Defendants' central argument, the *Jumaa* Court found that this Court's decision in *Baker* interpreted an earlier and different version of the WDA, and that the version addressed by *Baker* lacked the "including" language of the current WDA. *Id.* at 3-4. "Thus, when it [WDA] was considered by the *Baker* court, the wrongful-death act was not only understood to provide a fundamentally different kind of cause of action, the statute lacked the open-ended inclusiveness of the current statute." *Id.* at 4. The *Jumaa* Court also ultimately concluded that, "[e]ither way, *Baker* has clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*." *Id.*

With respect to the calculation of damages (addressing Defendants' meager "speculation" argument), the *Jumaa* Court found ample authority in other states supporting its holding that "a child's expected future earning potential is not *inherently* too speculative to permit recovery." *Id.* at 7 (italics original). The *Jumaa* Court rejected the proposition that a child must have an employment history for the Estate to recover such damages, instead noting that well-known factors in a child's environment,

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including the child's parents, school system, general area of residence, and related matters, could affect a child's future earning potential. The *Jumaa* Court concluded:

> We hold only that it seems highly likely that the future earning potential of a 13-year-old can be proven with reasonable certainty based on personal characteristics and influences known at the time, and we unequivocally reject the proposition that the future earning potential of a 13-year-old categorically cannot be proven with reasonable certainty."

Id. In obvious reference to the lack of any specific factual challenge to Jawad's situation, and whether his lost future earning potential was impermissible as speculative for this 13-year-old, the *Jumaa* Court found that the grant of leave to appeal related only to whether a 13-year-old's future earning potential was "*inherently* impermissible or speculation." "Whether *Jawad's* future earning potential can be proven with reasonable certainty is a matter for the parties to address in the trial court on remand." *Id.*

In his concurring opinion, Judge Swartzle reasoned that there were complicated questions of statutory interpretation, legislative history, and binding precedent, such that he encouraged this Court to take up the question and "definitively answer it." Concurring Opinion, p 2. Judge Swartzle did not reference to this Court's denial of leave to appeal in *Denney* nor its leave to appeal in *Touma/Langell v McLaren Port Huron*, COA Docket No. 347274, July 30, 2020 (unpublished); 2020 WL 4382791, *lv denied* 508 Mich 976; 965 NW2d 550-551 (Nov 5, 2021) ("*Langell*").

After Defendants filed and the Court of Appeals denied reconsideration (**Exhibit 13**, Order dated January 13, 2023), Defendants' Application to this Court followed.

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ARGUMENT I

THIS COURT SHOULD DECLINE REVIEW OF AN ISSUE FOR WHICH IT HAS RECENTLY DENIED LEAVE TO APPEAL AND WHICH IS PROPERLY DECIDED IN A PUBLISHED DECISION OF THE COURT OF APPEALS.

A. Standard of review and supporting authority.

The granting of appellate review is left to the sound discretion of the appellate court. *Armstrong v Commercial Carriers, Inc,* 341 Mich 45; 67 NW2d 194 (1954); *Sweitzer v Littlefield*, 297 Mich 356; 297 NW 522 (1941).

B. Argument.

As Applicants, Defendants have the burden of demonstrating one or more of the MCR 7.305(B) grounds justifying Supreme Court review. Defendants contend that the Court of Appeals incorrectly ruled that MCL 600.2922 allows recovery of a decedent's lost future earnings as a category of damages. Defendants invoke only MCR 7.305(B)(3), contending that the issue presented involves a legal principle of major significance to the state's jurisprudence. This assertion lacks merit because this is not a case which warrants Supreme Court review for multiple reasons.

First, it was less than two years ago when this Court reviewed and then refused to consider the identical issue, evidenced in the denial of leave to appeal in *Langell*. Defendants fail to point to any development in the law which would justify this Court revisiting this issue, especially given the Court's earlier denial of leave to appeal in *Denney v Kent Cty Rd Comm'n*, 317 Mich App 727, 731-732; 896 NW2d 808 (2000), lv den 500 Mich 997; 894 NW2d 608 (2017) ("*Denney*").

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Second, pre-*Jumaa* and pre-*Vasquez*, Defendants consistently sought appellate review of *Denney* based on the refrain that there was no published appellate decision ***directly*** applying the *Denney* rule, arguing that the *Denney* finding was dicta and/or limited to the facts of that case.[6] That concern has now been remedied by the release of *Jumma* and *Vasquez*.

Third, in like fashion to the previous point, Defendants have bemoaned a post-*Denney* appellate decision which directly addresses this Court's decision in *Baker v Slack*, arguing that this 75-year-old case interpreting an earlier version of the WDA defeats *Denney*, *Langell*, and the many circuit court and federal district court opinions which have relied upon these cases. Again, *Jumaa* and *Vasquez* remedy this concern, as misplaced as it may be. Review and interpretation of the current WDA should not involve this Court looking in its rearview mirror at decades-old cases interpreting earlier and different versions of the WDA. Nor should this Court devote its valuable resources in a purely formal exercise of overruling *Baker*, through this Court's unnecessary review and consideration of the extensive briefing, conducting oral argument, and review of the mountain of amicus briefs likely to be filed.

Fourth, the Court of Appeals' published decisions in *Jumaa* and *Vasquez* on this issue are spot-on and appropriately act as direct guidance for trial courts across the

[6] Defendants have argued that *Denney* was limited to whether the decedent's claim for lost earnings was allowable under the highway exception to immunity under MCL 691.1402.

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state (and federal district courts in diversity matters) on the available categories of damage under the WDA. No action need be taken by this Court to so ratify this certainty and clarity, other than to deny leave to appeal.

Fifth, there is no conflict on this issue in the Court of Appeals. See *Denney*, *Langell*, *Jumaa*, *Vasquez*, and *Stewart-Hinkley*. The only "conflict" is Defendants' view of the issue versus the multiple Court of Appeals' decisions rejecting that view.

Sixth, Defendants are free to approach the Michigan Legislature if they insist as a matter of Michigan jurisprudence that a WDA action should deprive recovery of the decedent's lost wages and earning capacity as a category of damage.

Seventh, application of the *Denney/Jumaa* rule neither causes manifest injustice nor is inconsistent with the terms of MCL 600.2921 and the WDA, particularly MCL 600.2922(6), as addressed in the following Argument.

With respect to Defendants' assertion that the lost future earnings of a 13-year-old are "speculative," three points defeat the grant of leave to appeal. First, never once did Defendants challenge the factual evidence presented by Plaintiffs in support of Jawad's future lost earnings. When Defendants presented this argument in the trial court, it was a conclusion only. There was no evidence presented. There was no case law presented (other than general proposition case law). Once Plaintiffs presented their evidence, including the Affidavit of Dr. Paranjpe and his various calculations, together with an explanation of how he reached those conclusions and the sources he used as a

basis for those conclusions, Defendants failed to even respond to such factual evidence. This omission continued through Defendants' Court of Appeals Application for Leave to Appeal and the Michigan Court of Appeals briefing and oral argument. Indeed, even in their pending Application, Defendants' argument in this regard is cursory, once again does not address the factual evidence presented by Plaintiffs in support of this claim, cites no legal authority for Defendants' position (again, other than general proposition case law), and does not even do the courtesy of addressing, let alone distinguishing, the cases cited by the Michigan Court of Appeals for the proposition that the future lost earnings of a 13-year-old are not "inherently" speculative. It is hard to imagine a worse record for this Court to decide a legal issue than the record on this particular argument.

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ARGUMENT II

AN ESTATE MAY OBTAIN DAMAGES FOR THE LOSS OF A DECEDENT'S LOST FUTURE EARNINGS UNDER THE CURRENT VERSION OF THE WRONGFUL DEATH ACT.

A. Standard of review and supporting authority.

A grant or denial of summary disposition is reviewed *de novo* on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), the Court considers all evidence submitted by the parties in the light most favorable to the non-moving party, here Plaintiffs, and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 461 Mich at 120.

A motion brought under MCR 2.116(C)(8) may be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120.

Whether a particular kind of damage is recoverable for a given cause of action is a question of law, which the Court reviews *de novo*. See *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242; 82 NW2d 660 (2013). Finally, the interpretation and application of statutes, rules, and legal doctrines are reviewed *de novo*. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

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B. Introduction – summary.

Relying on case law interpreting an older version of the WDA, Defendants ask this Court to hold that future economic damages for a decedent's future lost earnings and household services are disallowed in Michigan. This request should be rejected outright. Defendants' application devotes much of its discussion to a case from 1948: *Baker v Slack,* 319 Mich 703; 30 NW2d 403 (1948). However, that case has no legal importance concerning damages recoverable by the Estate of Jumaa because Plaintiffs' case is governed by the most recent version of MCL 600.2922, which did not exist in 1948.

The *Baker* Court held that damages for loss of a potential inheritance were not recoverable in an action for wrongful death, but the Court's holding was based on the requirement of "pecuniary injury" to the surviving spouse or next of kin (neither of whom existed in *Baker*), a requirement which was later removed from the statute by 1971 PA 65. Under Michigan law, a claim for lost earnings is separate and distinct from a claim for loss of support under the WDA. *See Denney*. The lost earning damages are to compensate the decedent for the wages that would have been earned but for his untimely death. *Denney* and now *Jumaa* and *Vasquez* correctly allow the Estate to recover these damages.

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C. Argument.

1. The Wrongful Death Act and Michigan case law interpreting the current version of the WDA allow plaintiffs to receive any damages that the decedent had against his tortfeasor, had the decedent survived.

The WDA provides that a plaintiff may stand in the shoes of the decedent when claiming damages for wrongful death. The gravamen of Defendants' arguments is that the law allowing an estate to recover all damages that could have been recovered by the decedent had he survived should not apply to those decedents without dependents at the time of their death, relying on *Baker*. Defendants would have this Court hold there are two separate interpretations of the WDA – one for individuals with dependents, and one for those without dependents. No such qualifier exists in the Act.

This Court has long allowed an estate to stand in the shoes of the decedent when claiming damages. *Jorgenson v Grand Rapids & I Ry Co*, 189 Mich 537, 541; 155 NW 535 (1915). Those shoes included recovery of the decedent's lost earnings. *Walker v McGraw*, 297 Mich 97; 271 NW 570 (1937); *Olivier v Houghton CS R Co*, 138 Mich 242; 101 NW 530 (1904); *Gates v Beebe*, 170 Mich 107; 35 NW 934 (1912). When the WDA was subsequently enacted, the Legislature numerated a *non-exhaustive* list of those damages which a decedent's estate could claim as damages. The most recent version of the WDA, MCL 600.2922(1) and (6), provide in relevant part:

> (1) ***Whenever the death of a person, injuries resulting in death***, or death as described in section 2922a ***shall be caused by wrongful act, neglect, or fault of another, and the act, neglect or fault is such as***

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> ***would, if death had not ensued, have entitled the party injured to maintain an action and recover damages***, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages . . . .
>
> * * *
>
> (6) In every action under this section, ***the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including*** reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

(Emphasis supplied). Since, by law "[a]ll actions and claims survive death," MCL 600.2921, Michigan's WDA is properly considered an "integrated" act which combines the two remedies of "survival" and "wrongful death" claims. Before passage of the WDA, the "survival" and "wrongful death" actions were separate actions. The WDA combined them, creating a single integrated act, and all claims for wrongful death are brought under the WDA. In turn, there are two classes of potential claims within each WDA claim: (1) those suffered by the deceased, who is represented through a personal representative standing in his or her shoes; and (2) the damages suffered by survivors of the deceased, who are a defined class of individuals expressly created under §(3) of the WDA.

Michigan courts have consistently ruled that the WDA neither limits nor precludes the type of damages recoverable in a death case, as Defendants now assert.

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Thorn v Mercy Mem Hosp Corp, 281 Mich App 644, 660; 761 NW2d 414 (2008). In *Thorn*, the Court of Appeals held that the Legislature intended an expansive view of the WDA, rejecting a challenge similar to that now lodged in this case:

> ***Defendants assert that the most serious injury, which results in death, serves to restrict and prohibit claims that would be compensable had the individual survived. Common sense would dictate the opposite – the more egregious the injury, the greater the damages. Any other result would be contrary to the history of litigation in this area of the law, which sought to assure that wrongdoers would be held accountable to their victims.***
>
> * * *
>
> We find it inconceivable, as argued by defendants, that a child would be precluded from recovering damages . . . following the harsher and irreversible outcome of a parent's death, but that these same damages would be recoverable by a parent who is injured but survives. ***Such a position is inconsistent with the stated purpose of the WDA, MCL 600.2921, to assure that '[a]ll actions and claims survive death,' and contrary to the language of MCL 600.2922(1). The statutory language leads to the inescapable conclusion that the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury.***

Thorn, 281 Mich App at 659-660 (emphasis supplied). *Thorn* held that the term "including" in §600.2922(6) that preceded the list of possible damages must "be construed as merely providing specific examples of the types of damages available, and not an exhaustive list." *Thorn*, 281 Mich App at 651. *Thorn* explained that under the defendants' interpretation, "the statutory language would mandate both the award of damages 'considere[d] fair and equitable, under all the circumstances' while simultaneously limiting a plaintiff's recovery only to those items specified in the list

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following the term including." *Ibid*. The Court found that "such an interpretation conflicts with the rules of statutory interpretation." *Id.*

The *Thorn* Court addressed many of the cases Defendants presently cite for a narrow interpretation of §2922(6), finding such citations unavailing. Instead, the *Thorn* Court observed that "our [Michigan] Supreme Court has issued numerous rulings expressing an expansive interpretation of the damages available under the WDA." *Id.* at 653. The guiding principle is "the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury." *Id.* at 660. This Court so explained in *Wesche v Mecosta Cty Rd Comm'n*:

> The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act' does not change the character of such actions except to expand the elements of damages available.

480 Mich at 89, quoting *Jenkins v Patel*, 471 Mich 158, 165-166; 684 NW2d 346 (2004), quoting *Hawkins v Regl Med Labs, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982).

These principles were further reinforced by this Court in *Shinholster v Annapolis Hosp*, 471 Mich 540, 564; 685 NW2d 275 (2004) (Italics original) :

> These provisions [MCL 600.2922(1), (2) and (6)], state that 'the personal representative of the estate of the deceased person' be able to 'maintain an action and recover damages [against] the person who or the corporation that would have been liable, if death had not ensued . . . .' Accordingly, while we agree with the Chief Justice that the Legislature is free to make 'a policy decision that the survivors of dead medical malpractice victims' . . . we see no indication in the statute that the Legislature made a quite contrary policy decision in §2922(1), (2), and (6)

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by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived.

2. Defendants' reliance on *Baker v Slack* is misplaced.

The cornerstone of Defendants' Application argument is that *Baker v Slack* remains good law and that its interpretation of the previous version of the WDA translates into the proper and limiting interpretation of the present version of the WDA, to the exclusion of a decedent's future lost earnings as a compensable item of damage. The argument is misplaced for several reasons. First, as earlier advertised in this Answer, the *Baker* Court interpreted a different version of the WDA under which the 1939 Act allowed only for "pecuniary injuries to the surviving spouse of next of kin." In *Baker*, a 63-year-old widow was killed in a motor vehicle accident. She had no spouse nor next of kin who she was required to support. Instead, the decedent had three married children for whom there was no legal duty to contribute to their support. In turn, there were no "pecuniary injuries" because there was no surviving spouse and there was no "next of kin" for which the widow had a duty to support. Under this limiting language of the then-effective WDA, damages for a potential inheritance were disallowed.

Baker could not, and did not, interpret the current WDA language, because that language did not even exist when *Baker* was decided. As explained earlier, prior to the 1939 Act, the earnings of the decedent were recoverable under case law. Under the 1939 Act, the limiting language of damages deemed fair and just "with reference to the

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pecuniary injury resulting from such death" eliminated recovery in the four corners of the *Baker* facts. Then, the WDA changed in 1971, by which the jury or the court may award damages deemed fair and just under all the circumstances, and the "with reference to the pecuniary injury" references in the prior statute – six references – were removed. *Baker* simply does not carry the legal effect imagined by Defendants and is certainly outdated given the material changes in the WDA.

3. Defendants' position is inconsistent with the statutory language of the WDA.

Not only do Defendants fail to account for the effect of the present WDA (which combines the traditional actions for instantaneous death with a survival actions), Defendants also fail to account for the Legislature's addition of language to the 1971 version of the WDA to allow for damages deemed fair and just "under all of the circumstances," as determined by the court or the jury. Moreover, equally infirm is Defendants' attempt to relegate the term "including" to the judicial wastepaper basket, failing to explain how such an inclusive term can be given such a limiting effect to the examples that follow thereafter. There is no proffered – indeed possible – interpretation of the word "including" which equates with exclusivity, rather than inclusion.

These omissions are fatal to Defendants' position. When the Legislature prescribed that damages could be awarded in an amount "fair and equitable, under the circumstances," it specifically signaled that the trier of fact is to examine the particular circumstances of each case. Since the Legislature used the word "including"

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immediately before a set of damage examples, it cannot be credibly argued that the word should be demoted to the concept of "only," as in only the four examples otherwise set forth by the Legislature. By law, all words and phrases are to be construed and understood according to their common and approved usage. MCL 8.3a. Defendants' assigned interpretation does just the opposite.

D. The Court of Appeals opinion is consistent with other statutory provisions and jury instructions.

Left unaddressed by Defendants is the consistency in the Court of Appeals' interpretation of the WDA and other statutory provisions and jury instructions that involved damages. Plaintiffs already discussed the integrated nature of the WDA, with its wrongful death aspects and survival claims, the latter under MCL 600.2921. There are other provisions defeating Defendants' position. For example, consider MCL 600.6305, by which lost wages and earning capacity are denominated as future damages, and that the calculation of future damages can be based on the period of time that the plaintiff would have lived but for the injury upon which the claim is based:

> (1) Any verdict or judgment rendered by a trier of fact in a personal injury action subject to this chapter shall include specific findings of the following:
>
> (a) Any past economic and noneconomic damages.
>
> (b) Any future damages and the periods over which they will accrue, on an annual basis, for each of the following types of future damages:
>
> (i) Medical and other costs of health care.

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(ii) ***Lost wages or earnings or lost earnings capacity*** and other economic loss.

(iii) Noneconomic loss.

(2) The calculation of future damages for types of future damages described in subsection (1)(b) shall be based on the costs and losses during the period of time the plaintiff will sustain those costs and losses. ***In the event of death, the calculation of future damages shall be based on the losses during the period of time the plaintiff would have lived but for the injury upon which the claim is based.***

MCL 600.6305 (emphasis supplied).

The same legal framework is found in of M Civ JI 45.02 [Wrongful Death – Damages], by which the jury is instructed to award such amounts that are fair and just under all the circumstances, and that such damages "may include" the delineated items as follows:

> If you decide the plaintiff is entitled to damages, you shall give such amount as you decide to be ***fair and just, under all the circumstances***, to those persons represented in this case. Such damages ***may include*** the following items, to the extent you find they have been proved by the evidence:
>
> (1)*(reasonable medical, hospital, funeral and burial expenses)
>
> (2)*(reasonable compensation for the pain and suffering undergone by [name of decedent] while [he / she] was conscious during the time between [his / her] injury and [his / her] death)
>
> (3)*(losses suffered by [name of surviving spouse / name of next of kin] as a result of [name of decedent]'s death, ***including***:
>
> (a) loss of financial support
>
> (b) loss of service

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(c) loss of gifts or other valuable gratuities

(d) loss of parental training and guidance

(e) loss of society and companionship

(f) [***other***]

(g) [***other***])

(Emphasis supplied). The jury then is then instructed that, "[w]hich, if any, of these elements of damages has been proved is for you to decide. . . ." This jury instruction confirms that "including" found in the WDA is an inclusive term, and that the trier of fact in such cases is to decide damages which are "fair and just, under all the circumstances." *Id.*

E. Even federal district court opinions follow *Denney*.

The Honorable David Lawson of the Eastern District of Michigan issued an opinion in *White v FAC US, LLC*, 325 F Supp 3d 640 (ED Mich, 2018), which also considered whether an estate can recover for the decedent's loss of earning capacity. While not binding, Judge Lawson's reasoned analysis is highly persuasive. In *White*, the defendants sought to exclude all damages involving decedent's lost wages, lost compensation, and lost earning capacity, making arguments nearly identical to those in this matter. *Id.* Plaintiffs responded by arguing that such damages were available pursuant to *Thorn* and *Denney*. Judge Lawson, thoroughly analyzing Michigan law, stated:

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> ***The defendant contends that Thorn and Denney are novelties that ought to be disregarded by this Court as poorly reasoned and in tension with earlier decisions of the state's appellate courts.*** The Court does not see it that way. ***Those decisions have not been criticized by Michigan courts, and they are binding on Michigan's trial and intermediate appellate courts.*** See Mich Ct R 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."). Moreover, the older, conflicting intermediate appellate decisions relied upon by the defendant are not even regarded by Michigan's own courts as controlling law. See Ibid. ***The panel in Thorn also considered and rejected the same position advanced by the defendant here, based on the same authorities on which it principally relies, finding that the restrictive language in those cases was mere dicta and contrary to the subsequent development of the law by the Michigan Supreme Court.*** *Thorn,* 281 Mich App at 652-653, 761 NW2d at 419-420 ("In contrast to the case law relied on by defendants, we note that our Supreme Court has issued numerous rulings expressing an expansive interpretation of the damages available under the WDA." *Id.* at 13-14, with emphasis added.

Id. (emphasis supplied). The same analysis is equally applicable to this matter.

F. Response to other Defendants' arguments.

Defendants rely on the pre-November 1, 1980 decision of *Swartz v Dow Chem Co*, 95 Mich App 328; 290 NW2d 135 (1980), *rev'd on other grounds* 414 Mich 333; 726 NW2d 804 (1982), arguing that *Denney* is not binding law because it did not address an issue in *Swartz*, where the decedent was supporting others or under an obligation to do so. Putting aside the confusing nature of this argument, Defendants misunderstand the

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import of *Denney* and now *Jumaa* and *Vazquez*:[7] regardless of whether the decedent was "supporting" another person, under the current version of the WDA the decedent's lost future earnings may be recovered to the same extent that the decedent could have recovered those damages had he survived. *Jumaa*, p 4. *Denney, Jumaa* and *Vasquez* follow the lead of cases such as *Thorn* and *Langell* and *White v FCA US, LLC*. It is thin gruel to suggest that *Swartz*, with its pre-November 1, 1980, status somehow trumps all of these cases, sufficient to justify the grant of Supreme Court review, let alone argue that a different decision should issue. Moreover, *Swartz* did not deal with the issue of whether there was a separate recoverable category of damages in the form of the decedent's lost earnings had the decedent survived. Equally important, no court has ***ever*** cited *Swartz* for any proposition, let alone for the claimed disallowance of the decedent's lost earnings as a recoverable category of damage under the WDA.

Defendants claim that *Denney* is not on point and did not address whether a decedent's lost earnings constitute a separate category of damage recovered under the WDA. Defendants assert that *Denney* involved a 42-year-old man with a spouse and a child, and therefore infer that "[l]ost support was already a given." This is a distinction without legal significance because *Denney* acknowledged a separate category of damage

[7] As earlier explained, since the issuance of the *Jumaa* and *Vasquez* Opinions, the Court of Appeals issued its unpublished decision of *Stewart-Hinkley*, adopting the reasoning in this case, again placing significance in the Legislature's use of the word "including" when defining the scope of the category of damages available under the WDA.

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recoverable under the WDA: independent of loss of financial support of the decedent, which is the misplaced lynchpin of Defendants' *Denney* argument.

Defendants assert that the dividing line for recovery for a decedent's lost future earnings should be based on support issues, rather than factors such as the knowledge of the age, sex, physical and mental characteristics of the decedent. This is a collateral attack upon the Court of Appeals reasoning in the calculation of damages section of its Slip Opinion, pp 4-7, flying in the face of the Court's conclusion derived from both Michigan and non-Michigan cases that projecting future wages can be accomplished through an economist with the requisite evidence of the decedent's characteristics. The Court of Appeals concluded:

> We hold only that it seems highly likely that the future earning potential of a 13-year-old can be proven with reasonable certainty based on personal characteristics and influences known as the time, and we unequivocally reject the proposition that the future earning potential of a 13-year-old categorically cannot be proven with reasonable certainty.

Slip Op, p 7. This reasoning demonstrates two flaws in Defendants' argument. First, Defendants conflate the sufficiency of proofs to demonstrate the actual recovery of damages of a decedent's lost future earnings with the legal question of whether a decedent's lost future earnings constitute a recoverable category of damages under the WDA. Second, "where to draw the line" in this case is futile because the "line" is

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dependent upon a position never established by Defendants: the legal inability to establish lost future earnings for a 13-year-old upon presentation of sufficient proofs.[8]

Defendants point to Justice Viviano's dissent in *Touma/Langell*, suggesting that the legal issue presented is worthy of Supreme Court review. Two points in response: (1) respectfully, Justice Viviano's dissent suggested but did not take an affirmative stance on whether Defendants' position is correct; and (2) respectfully, Defendants rely on a dissent in the denial of leave to appeal which five other Justices found appropriate.

[8] Defendants take umbrage with the use of experts in the area of economics and presumably with life care experts, disparaging them as "well-paid experts" who supposedly inflate the value of future damages. Yet, in this case, they had not even taken the deposition of such experts, let alone discrediting their opinions or questioning the reliability of their methods and principles. And to suggest that only one side in the medical malpractice arena uses expert testimony on a legitimate basis is apt to drown Defendants once the thin ice upon which they argue is broken.

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ARGUMENT III

THE COURT OF APPEALS CORRECTLY DETERMINED THAT A 13-YEAR-OLD DECEDENT'S EARNING POTENTIAL IS NOT "INHERENTLY" SPECULATIVE TO AWARD SUCH DAMAGES UNDER THE WRONGFUL DEATH ACT.

A. Standard of review and supporting authority.

The Court is referred to the MCR 2.116(C)(10) standard in Argument II. With respect to non-legal questions resolved by the trial court under MCR 2.116(C)(10), the trial court must examine the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999); MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The court is not permitted to assess credibility, to weigh the evidence, or to determine the facts. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). If material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Id*.

B. Scope of preserved review.

The limited nature of the question presented should be noted by the Court. In the trial court, Defendants never presented any ***factual*** evidence through which they claimed the future earnings of a 13-year-old were speculative and thus insufficient to

present to the jury. When Plaintiffs presented ***specific*** evidence demonstrating how Dr. Paranjpe had reached his conclusions (based on the calculations), Defendants ***still*** did not challenge those facts, nor the methodology used by Dr. Paranjpe, nor his conclusions (other than Defendants' mere conclusion that the future earnings of a 13-year-old had to be speculative). When the Court of Appeals granted leave to appeal, it limited consideration on leave granted to those issues specifically raised in the Application – again mere conclusions rather than a challenge to Plaintiffs' facts and evidence. As earlier demonstrated, the arguments through the Court of Appeals briefing, and including at oral argument, did not specifically challenge the factual evidence submitted by Plaintiffs. Indeed, the Court of Appeals addressed the question only on the basis of whether the future earnings of a 13-year-old are "inherently" speculative. It is through this narrow avenue that Defendants' argument must be considered. As demonstrated next, Defendants' argument lacks merit.[9]

[9] As in the trial court and in the Michigan Court of Appeals, Defendants cite no legal authority for their arguments, other than general proposition cases. Defendants do not even address the out-of-state case law reviewed and cited by the Michigan Court of Appeals in its Opinion. These omissions further demonstrate the pedestrian nature of the argument, for which Supreme Court review is particularly inappropriate.

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C. Argument.

1. The lost earnings of a 13-year-old decedent are not inherently speculative.

Defendants take issue with the Court of Appeals' determination that a 13-year-old's earning potential is not "inherently" speculative. As explained in the prior section, the question is general in nature because Defendants did not challenge – and certainly did not oppose – the specific proofs presented by Plaintiffs in the trial court nor in the Michigan Court of Appeals. Instead, they presented a generalized argument, prompting the Court of Appeals to correctly find that the grant of leave to appeal and the briefing in the main appeal related only to a general question of inherent speculation. On that question, Defendants' argument lacks both merit and support.

The Court of Appeals stated that it was unnecessary that a child have an actual employment history, and it declined to specify at what age a child's earning potential can be determined with reasonable certainty because "different people mature at different rates, so that inquiry will inevitably depend on the specific child at issue." *Jumaa*, Slip Op, p 7. The Court reasoned:

> Nevertheless, it is well-known that at least by the end of middle school, it is common for teachers or other adults in a child's life to perceive when a child shows promise in a field, has any particular aspirations or strengths, displays developed personality characteristics such as conscientiousness or the kind of social adeptness that would likely evolve into adult networking skills, and so on. Furthermore, it is also well-known that a child's environment, including the child's parents, school system, general area of residence, participation in extracurricular activities, exposure to traumas

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> or role models, and similar extrinsic influences will affect the child's future earning potential.

Id. Noting the decedent here was a 13-year-old child, the Court of Appeals "unequivocally reject[ed] the proposition that the future earning potential of a 13-year-old categorically cannot be proven with reasonable certainty." *Id*. The Court concluded that the future earning potential of the 13-year-old decedent could be "proven with reasonable certainty based on personal characteristics and influences known at the time." *Id*.

The *Jumaa* Court's analysis of this issue is both supported by Michigan law and logic and is anything but speculative. This is not a case where a child never had a chance to display any individual personality whatsoever and the proofs were such that it was too speculative to extrapolate from parents or siblings. Equally important, given the limited nature of review, addressing only whether a 13-year-old's future earnings would be "inherently speculative," the Court understandably and properly simply assumed as true the evidence presented by Plaintiffs (as it would have been required to do so under MCR 2.116(C)(10) even if the specific issue had been preserved). Those proofs demonstrate the methodology used by Dr. Paranjpe, further solidifying the view that a 13-year-old's future lost earnings are not speculative.[10]

[10] Defendants also argue that such future earnings should be limited to the age of majority. Besides the fact that this argument is not preserved, it relates to the question of whether economic damages are limited to support damages under §6 of the WDA. *(cont'd next page)*

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The award of all future damages is governed by the rule of reasonability, which was established in Michigan's jurisprudence in *Brininstool v Michigan United Rys Co,* 157 Mich 172, 180; 121 NW 728 (1909) holding that, "It is the generally accepted rule that to entitle a plaintiff to recover damages presently for apprehended future consequences of an injury, there must be such a degree of probability of such consequences as to amount to reasonable certainty that they will result from the original injury." This is consistent with the civil action preponderance burden, and the legal principle that "[t]he law does not require impossibilities; and cannot, therefore, requires a higher degree of certainty than the nature of the case admits." *Allison v Chandler*, 11 Mich 542, 554 (1863). A well-settled aspect of Michigan law is that if uncertainty exists, it is better that the claimant recover more than he or she is entitled to rather than less and that the risk of any uncertainty be cast on the wrongdoer rather than on the injured party. *Routsaw v McClain*, 365 Mich 167, 171; 112 NW2d 123 (1961).

Our courts have long held that it is the policy of this State to preclude tortfeasors from benefiting from their tortious conduct if that conduct has resulted in the injured party's shortened life expectancy or death. See *May v William Beaumont Hospital*, 180 Mich App 728, 755; 448 NW2d 497 (1989), holding that it is well established that an

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However, as earlier demonstrated, a decedent's lost future earnings is a separate and distinct category of damages from loss of support. Accordingly, this particular argument regarding the "age of majority" is infirm for the reasons set forth in Argument II.

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injured child's loss of earning capacity extends to his life expectancy independent of his injuries, even though his damages likely include lost income or earning capacity beyond the injured party's shortened life expectancy. *May, supra*, at 755.

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

> Damages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury, and the difference in the actual earning of plaintiff before and after the injury does not constitute the measure; hence the amount which plaintiff is capable of earning and not that which he has actually earned since the injury is to be taken for the purpose of comparison with his previous earnings as showing the diminution of earning capacity, evidence as to actual earnings subsequent to the injury being received not as tending to mitigate damages but to establish plaintiff's earning powers. Accordingly, recovery may be had for impairment or diminution of earning ability or power, even though it should not be shown that plaintiff has in the past earned anything or been engaged in a remunerative or compensable pursuit.

Miller v Pillow, 337 Mich 262, 272-273; 59 NW2d 283 (1953), quoting 25 CJS at 620.

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2. Plaintiffs presented evidence of Jawad's lost future earnings.

In support of the loss of earning capacity claim, Plaintiffs submitted as evidence the economic loss projections for Jawad, assuming that he completed high school or some college (**Exhibit 4**, Affidavit, with Charts). Those calculations were performed by Dr. Paranjpe, PhD.[11] Dr. Paranjpe's opinions, as set forth in his Affidavit, are reliable and are based upon his education, training, and experience as applied to the facts of this case. To make his calculations, Dr. Paranjpe utilizes data gleaned from the Federal Life Tables, Department of Labor Studies, and assessment of past and projected Federal and State wage growth. The factual basis and Dr. Paranjpe's calculations are in accord with Michigan statutes and case law. (Significantly, Defendants have not challenged Dr. Paranjpe's analysis or prospective testimony. As such, the Court must accept the testimony as reliable evidence supporting the Estate's claim for Jawad's lost earning capacity.)

The life expectancy projections are based on the Federal Life Tables, which are issued by the Center for Disease Control, and the tables reflect the average life span for individuals, taking into account their gender and race. These averages are simply another tool to provide to the jury to evaluate damages. The tables are self-authenticating pursuant to MRE 902(5) and are admissible under MRE 803(8) and MRE

[11] Dr. Paranjpe has been an economist for over 26 years and is/has been an instructor at Wayne State University, Oakland Community College, the University of Windsor and Michigan State University.

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803(9). Michigan courts have held that the mortality tables "may be considered with all the other evidence in determining life expectancy." *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450; 633 NW2d 418 (2001). Dr. Paranjpe's calculations are at the 4% growth rate, which is in accordance with the Federal Social Security Trustees Report and the Michigan Minimum Wage growth rate evidence and projection. Testimony derived from the facts of this case, expert medical testimony, and the Federal Life Tables laid a proper foundation from which the jury could decide loss of earning capacity.

3. Defendants present no specific case law supporting their argument.

As noted by the Court of Appeals, ample case law supports the position that a 13-year-old's lost future earnings are not speculative. As noted earlier in footnote 9, Defendants offer no case law which specifically supports their assertion that the future lost earnings of a 13-year-old are necessarily speculative. On this basis alone, the argument should be rejected. Arguments on appeal are considered abandoned if they are not supported by citation to legal authority. *Holtzlander v Brownell*, 182 Mich App 716; 453 NW2d 295 (1990).

4. Ample case law supports the Court of Appeals' ruling.

The Michigan Court of Appeals cited and relied upon two cases which have specifically addressed this issue and ruled in favor of the position presented by Plaintiffs here. In *Howard v Seidler*, 689 NE2d 572 (Ohio App 1996), the Ohio Court of Appeals reversed the trial court's finding that the future lost earnings of an 11-year-old deceased

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child could not be established reliably with respect to loss of support, as asserted by the plaintiffs in that case. The *Howard* Court ruled that as a matter of course, "a jury must weigh evidence in determining the probability of lost future earnings of a decedent, whether that decedent be an adult with a wage earning history or a child too young to have been a wage earner at the time of death." 689 NE2d at 580. The *Howard* Court noted that there was evidence that the 11-year-old boy had a good relationship with his family, that his sister was educated and well-employed, and also cited to factors such as knowledge of the age, sex, physical and mental characteristics of the child, supplemented with evidence as to the position in life and earning capacity of the parents. *Id.* at 578, 580. Deferring to the "experience and judgment of the jury" to consider such matters, *Id.* at 578, the *Howard* Court explained that the better legal course was to allow the development of such evidence and testimony for the jury to determine, as a factual matter, whether such damages were recoverable:

> Rather than foreclosing evidence on this issue, in our view, the trial court should have permitted the development of testimony on this issue, by all parties, so that when the time came for deliberation, the jury would have had all it needed to make its factual determinations and to accept or reject, as it saw fit, the conclusions of the witnesses. The exclusion of Dr. Slesinger's testimony, under the facts of this case, was reversible error.

Id. at 581. In like fashion here, Dr. Paranjpe presented more than ample testimony for the jury to perform the very function described by the Court in *Howard*. And Dr. Paranjpe went one step further, relying upon governmental statistics and other analyses to support his conclusions. More importantly for purposes of the limited review of this

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issue, the *Howard* Court established that there are defined factors which may be considered by the jury which remove any assertion of any "inherent" speculation.[12]

The second case is *Mecca v Lukasik*, 530 A2d 1334 (Pa Super 1987), involving a wrongful death case in which several teenagers were killed in a car accident. Upon defendants' challenge, the *Mecca* Court found that the plaintiffs' expert had an adequate basis to justify his testimony concerning the loss of earning power, as with Dr. Paranjpe in this case. The expert in *Mecca*, Dr. Reavy, relied partly on figures from the United States Government, including those from the United States Bureau of the Census, when calculating for lost earnings, discussing each of the plaintiff's possible earning capacities. The expert employed future wage loss for all high school and college graduates, considered the gender of the decedents, as well as other demographic evidence. The expert, who was a professor of economics (again, like Dr. Paranjpe), opined on the earning potential of two decedents, who were the ages of 16 and 18 at the time of their deaths, each calculated both as college graduates and as high school graduates. Based on this evidence, together with testimony of the parents concerning their own stations in life, the *Mecca* Court found that the jury's award was based on

[12] The *Howard* case is significant for one other reason: the Court reasoned that it would be incongruent for a limitation on recoverable damages under Ohio's Wrongful Death Act when that Act had been expanded to increase the scope of recoverable damages beyond the pre-version of the Act with limitations also allowed the recovery of such damages. *Howard*, 689 NE2d at 579.

credible evidence properly within the factfinding domain of the jury. 530 A2d at 1339-1340.

The evidence presented in *Mecca* is very similar to the evidence presented by Plaintiffs in this case, through Dr. Paranjpe. Just as the *Mecca* Court found that such evidence was not unreliable, and indeed was properly submitted to that jury, here there is no credible argument that the lost earning capacity of a 13-year-old deceased child is "inherently" speculative, and certainly not under the facts presented by Plaintiffs, including Dr. Paranjpe's evidence.

For all these reasons, this Court should deny leave to appeal on this issue.

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RELIEF

WHEREFORE, Plaintiffs-Appellees request this Court deny leave to appeal, enter any other relief this Court deems appropriate, and award costs and attorney's fees wrongfully sustained in responding in this matter.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & HARRINGTON, P.C.

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Dated: April 10, 2023

CERTIFICATE OF COMPLIANCE WITH ADM FILE NO. 2019-16

Audra A. Arndt states that the foregoing document complies with 6/29/22 Order in ADM File No. 2019-16, effective 9/1/22, and the word count requirements contained therein. Using the word count feature in Microsoft Word (the word processing software used to prepare this document) and including or excluding certain sections as provided for in the applicable court rules, the number of countable words in the foregoing document is 10,398.

/S/ Audra A. Arndt
Audra A. Arndt

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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,

v

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

Defendants-Appellants.
_____/

MSC No. 165377

COA No. 358209

L.C. Case No. 20-004169-NH
(Wayne Circuit Court)

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

Audra A. Arndt, being first duly sworn, deposes and says that she is an employee with the firm of Fieger, Fieger, Kenney & Harrington, PC, and that on April 10, 2023, she caused to be served a copy of the Plaintiff-Appellees' Answer to Application for Leave to Appeal, Exhibits and Proof of Service/Statement Regarding E-Service as follows:

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