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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. 165377
Court of Appeals No. 358209

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

Defendants-Appellants' Reply to Plaintiffs-Appellees' Brief

Oral Argument Requested

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ARGUMENT

I. *Baker* has not been clearly overruled or superseded, and only this Court can say whether its precedent has been overruled or superseded. Thus, the Court of Appeals should not have followed *Denney, which is not even on point.*

The Court of Appeals found *Denney* to be controlling, holding that *Baker* has "clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*."[1]. Respectfully, the Court of Appeals is wrong. *Baker* has not been clearly overruled or superseded. The court reached this conclusion by relying on *Wesche*[2], in which this Court repudiated the concept that a wrongful-death claim is a new action. However, *Baker* did not rely on a "new action" rationale. Implicit overruling is not enough; the overruling must be express. And this Court has not overruled *Baker*.

The Court of Appeals also held that *Baker* has been clearly superseded by statutory amendments. Its analysis of that issue was brief – "when it was considered by the *Baker* court, the wrongful-death act…lacked the open-ended inclusiveness of the current statute."[3] In Defendants' thorough historical analysis of the amendments to the Act, it is clear that the 1971 amendment allowed *noneconomic* damages but did nothing to affect limitations on economic damages.[4] The Court of Appeals ignored the extensive historical progression of the Act and its application to case law even with the amendments. Overruling this Court's precedent requires more attention than the Court of Appeals gave it in *Zehel*[5] and *Daher*.

[1] *Daher v Prime Healthcare Services-Garden City, LLC*, __Mich App__(Dec. 1, 2022).
[2] *Wesche v Mecosta Cty Rd Comm'n*, 480 Mich 75, 88, (2008)
[3] *Daher*, p. 4.
[4] Please refer to Defendants-Appellants' Application for Leave to Appeal, p. 12-24, for the complete analysis.
[5] *Zehel v Nugent*,__Mich App__(Dec. 1, 2022).

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Further, the Court of Appeals did not consider the reasonable expectation of support rule set forth in *Thompson*[6], and applied in *Setterington*[7], *Rytkonen*[8], *Mooney*[9], and *Swartz*[10]. If estates can recover their decedents' entire earning capacity (*Denney*), it does not matter whether there was a reasonable expectation of support. *Denney* did not discuss the reasonable expectation of support test or even cite to *Thompson* or its progeny, or *Baker*. Given *Daher's* rather curt analysis of *Baker*, and the import of this issue on wrongful death cases, this Court must consider this issue and give it the meaningful analysis it deserves.

Again, if this amendment to the WDA from 1971 changed what damages are available under the Act, as plaintiffs allege, then plaintiffs have been missing out on millions and millions of damages for 45 years (1971 to when *Denney* was decided in 2016). And, that would also mean the 1980 published case of *Swartz v Dow Chemical* was wrong; or the court here was wrong. Both cases (*Daher* and *Swartz*) interpreted a WDA version containing the "all-inclusive" term "including" and came to opposite conclusions.

II. ***Swartz*, a 1980 published case, which is exactly on point, should have been followed by the Court of Appeals as it has "precedential effect under the rule of stare decisis" per MCR 7.215(C)(2), and as it interpreted the post-1971 version of the WDA which included "the open-ended inclusiveness of the current statute."**

In its decision, where it attempted to distinguish *Baker*, the Court of Appeals wrote:

> **Nevertheless, the wrongful-death act, as amended by 1931 PA 297, lacked the "including" language in the current statute. Thus, when it 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.**

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[6] *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482, 488-499; 98 NW2d 620 (1959)
[7] *Setterington v Pontiac Gen Hosp*, 223 Mich App 594; 568 NW2d 93 (1997).
[8] *Rythoken v City of Wakefield*, 364 Mich 86; 111 NW2d 63 (1961).
[9] *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962).
[10] *Swartz v Dow Chemical Co.*, 95 Mich App 328 (1980), rev'd on other grounds, 414 Mich 433 (1981).

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The Court of Appeals ignored the 1980 published decision of *Swartz*. That case interpreted the post-1971 version of the WDA which did include the "including" language. *Swartz* has precedential effect pursuant to MCR 7.215(C)(2): "A published decision of the Court of Appeals has precedential effect under the rule of stare decisis." *Swartz* is exactly on point and should have been followed by the Court of Appeals in this case.

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 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."[11] The *Swartz* 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 adding the "including" language 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.

Denney did not address the issue of whether support is required under the WDA. The decedent in *Denney* was a 42-year-old man with a spouse and a child. Any rule of law established by *Denney* could not and should not apply to a case where the issue is, as in *Swartz*, whether the decedent was supporting anyone or under an obligation to support anyone. That was an issue specifically addressed in *Swartz* (and this case - *Daher*) but not in *Denney*. The rule of law used

[11] *Swartz*, 95 Mich App 328 at 335 (1980)); rev'd on other grounds, 414 Mich 433 (1981).,

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by the Court of Appeals in our case (*Daher*) unnecessarily contradicts the rule of law established in *Swartz*.

III. The jury instructions confirm that the WDA amendment was to allow non-pecuniary damages.

Plaintiffs cited to M Civ JI 45.02 – Wrongful Death-Damages in their brief. The comments to this jury instruction support the limitation on economic damages, and that the purpose of the 1971 amendment was just to include noneconomic losses like loss of society and companionship.

> Clause 3 of the instruction covers the "wrongful death" element of the statute, for losses inflicted upon the surviving spouse or next of kin as a result of the decedent's death. Until 1971, the statute limited this element of damage to "pecuniary injury." Historically, "pecuniary injury" was interpreted to include only injuries resulting in an actual loss of money to the surviving spouse and next of kin.
>
> In *Wycko v Gnodtke*, 361 Mich 331; 105 NW2d 118 (1960), a case involving the death of a fourteen-year-old child, the court upheld the jury award to his surviving parents as not being excessive. The opinion declared that the traditional child labor formula (probable wages less cost of keep) did not adequately measure the pecuniary injury to the child's parents and went on to say that loss of companionship is an element of damages for the wrongful death. However, *Breckon v Franklin Fuel Co*, 383 Mich 251, 174 NW2d 836 (1970), limited *Wycko* to its holding that the award of damages was not excessive in the particular case and repudiated *Wycko* and later cases regarding loss of companionship as an element of pecuniary injury. (*Breckon* was later overruled by *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972), as to cases commenced prior to the effective date of 1971 PA 65.)
>
> **The legislature responded to *Breckon* with the enactment of 1971 PA 65, which amended the statute by deleting the phrase "pecuniary injury," and by directing the jury to give such damages as it "shall deem fair and just, under all of the circumstances, … [including] recovery for the loss of the society and companionship of the deceased."** In context it seems clear enough that **this was not intended to eliminate any of the elements of "pecuniary injury" previously allowed, but rather to settle the troublesome question as to inclusion of damages for loss of society and companionship.** Therefore, clause 3 of this instruction includes both kinds of elements. (Emphasis added).

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This amendment was in direct response to this Court's decision in *Breckon*, 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 their decedent's death."** *Miller v Mut Auto Ins Co*, 410 Mich 538, 561 (1981). (Emphasis added).[12] 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.)

IV. Subsection (3) of the Wrongful Death Act placed a strict limitation on those persons who may be entitled to damages, and is evidence that the expectation of support standard still stands.

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

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Neither *Denney* nor *Daher*, discussed subsection (3) of the Act, in which the Legislature placed a strict limitation on who may be entitled to damages.

> (3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, **the person or persons who may be entitled to damages under this section shall be limited to <u>any of the following who suffer damages and survive the deceased</u>**:
>
> > (a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
> > (b) The children of the deceased's spouse.
> > (c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased. MCL 600.2922(3). (Emphasis added).

Further, subsection (6)(d):

> The court shall then enter an order distributing the **proceeds 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. MCL 600.2922(6). (Emphasis added).

According to these subsections, the limitation on economic damages regarding those persons who reasonably expect support still applies to this statute. Judge Swartzle agreed in his concurrence:

> Second, the *Denney* Court did not discuss or even cite subsection (3) of the wrongful death act. In that subsection, our Legislature placed a strict limit on those persons who may be entitled to damages in a wrongful-death suit—specifically, those persons who, among other things, "suffer damages" as a result of the decedent's death. MCL 600.2922(3); see also MCL 600.2922(6)(d) ("The court shall then enter an order distributing the proceeds 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 . . . ." (emphasis added)). With respect to the key issue on appeal, i.e., the lost earnings

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> of the decedent, subsection (3) would appear to require that any claim for lost earnings be made by a listed person who can show that the person has "suffer[ed] damages" as a result of those lost earnings of the decedent. In other words, to recover damages for lost earnings under the act, the person would have to establish that the decedent supported the person, which dovetails nicely with subsection (6)'s mention of "financial support" as a category of compensable damages under the act**. Thus, when the entire statute is read in context, a broad reading of subsection (6) might not, in fact, be warranted.** (Emphasis added).[13]

This, again, is evidence that *Daher* did not give this issue enough consideration as this statutory analysis was not even discussed. This Court should consider this issue and give it the due diligence it deserves.

V. Future lost earnings of a 13-year-old decedent are speculative, and Michigan courts have used employment history as evidence of lost future earnings.

Plaintiffs maintain that Defendants did not once challenge the factual evidence they presented (Plaintiffs' expert Dr. Paranjpe's economic report for up to $12,000,000) in support of the decedent's future lost earnings. That is untrue and frankly not relevant to the issues presented here. Defendants filed this motion for partial summary disposition of future economic damages, filed in the trial court and is the basis for this appeal, as an outright rejection of the estate's claim for lost future earnings for a 13-year-old decedent. Defendants have not yet had the chance to challenge plaintiffs' expert's report as Dr. Paranjpe has not yet been deposed. Defendants clearly object to these calculations for future lost earnings as Defendants do not think they should be determined or awarded to begin with.

Plaintiffs criticize Defendants for not citing specific case law that clearly states a 13-year-old's earning capacity damages are speculative. Plaintiffs argue that *Daher's* holding that these damages are not inherently speculative is "supported by Michigan case law and logic".[14] However,

[13] *Daher* Judge Swartzle Concurrence.
[14] Plaintiffs-Appellees' Brief, p. 34.

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the Court of Appeals admitted in *Daher* that it could not find Michigan case law to support this point – "We have found little clear authority in Michigan regarding a claim for a child decedent's lost wages or lost earning capacity."[15] The court had to reach for cases out-of-state to form the basis of its opinion. But, plaintiff cited no cases discussing lost future wage damages for teenage decedents as being non-speculative or speculative. In general, in Michigan, remote, speculative and contingent" damages are not allowed. *Sutter v Biggs*, 377 Mich 80 (1966). There are several cases in Michigan discussing lost future earnings for estates of deceased teenagers and the rule has been whether there was a reasonable likelihood of support and/or whether there was support in the past (*Swartz* and *Thompson* for instance).

Defendants find the court's discussion of out-of-state cases off point. The two out of state cases discussed in the court's opinion from 1987 and 1996 do not interpret the Michigan Wrongful Death Act. The *Swartz* case does interpret the Michigan WDA, specifically a version which contains the "including" language.

Michigan courts have used employment history as evidence of lost future earnings. This Court found in *Thompson* that there was evidence that the decedent had a history of earning money and contributing to family support and therefore these future wage loss damages were allowed. *Thompson*, at 491-492. The Court of Appeals however held in *Daher* that "there is no reason why the child must have an employment history"[16], which directly contradicts this Court's reasoning for permitting damages in *Thompson*. The court, again, disrupts precedent with its only basis being support from irrelevant out-of-state cases.

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

[15] *Daher*, p. 5.
[16] *Daher*, p. 7.

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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.*

This Court, therefore, in *Hannay*, warned that such future work loss damages without a historical basis could be "contingent and speculative, and therefore, barred under Michigan law." No further case law on this issue should be expected to be produced by defendants.

Further, Plaintiffs are relentlessly advocating for the reliability of Dr. Paranjpe and his economic reports, yet this is not the issue presently before the Court as Defendants are arguing that these damages are (1) not permitted under the Wrongful Death Act, and (2) are speculative, remote, and contingent and therefore not allowed in Michigan. Furthermore, the report of loss of services was only filed by plaintiffs in response to defendants' motion to dismiss the economic damages. The reliability of this expert report and its bases is appropriate for a Daubert hearing if/when the issue is properly brought forth. Dr. Paranjpe has not yet been deposed and if/when it gets to that point, Defendants will be challenging his findings.

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,

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

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