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

Fieger, Fieger, Kenney & Harrington P.C.
Robert G. Kamenec (P35283)
Adam G. Winn (P84137)
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Rd.
Southfield, MI 48075
(248) 355-5555
r.kamenec@fiegerlaw.com

Collins Einhorn Farrell P.C.
Michael J. Cook (P71511)
Appellate Counsel for Defendants-Appellants
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Michael.Cook@ceflawyers.com

Corbet, Shaw, Essad & Bonasso, PLLC
Daniel R. Corbet (P37306)
Kenneth A. Willis (p55045)
Attorneys for Defendants-Appellants
30500 Van Dyke Ave, Ste 500
Warren, MI 48093
(313) 964-6300
Daniel.Corbet@cseb-law.com

Joint Appendix

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APPENDIX 1

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

v

Case No. 20-004169-NH
Hon. Martha M. Snow

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.

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNEY & HARRINGTON
Attorneys for Plaintiffs
19390 West Ten Mile Rd.
Southfield, MI 48075
248-355-5555/5148 fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300/6310 fax

ORDER DENYING DEFENDANTS' MOTION TO DIMSISS FUTURE ECONOMIC DAMGES

At a session of said Court, held in the
City of Detroit, County of Wayne,
State of Michigan on:

7/28/2021

PRESENT: Honorable Martha M. Snow
Circuit Court Judge

THIS MATTER having come before the Court pursuant to Defendants' Motion for Summary Disposition of Future Economic Damages and this Court being otherwise advised on the premises;

IT IS HEREBY ORDERED that Defendants' motion is denied for the reasons stated on the record.

This order does not resolve the last pending claim.

/s/ Martha M. Snow 7/28/2021

HON. MARTHA M. SNOW

Approved as to Form only.

/s/ MARC S. BERLIN w/permission 7/26/21
MARC S. BERLIN (37140)
Attorney for Plaintiffs

/s/ DANIEL R. CORBET
DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
Attorneys for Defendants

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APPENDIX 2

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Register of Actions

Case No. 20-004169-NH

Party Information

		Attorneys
Defendant	**Premier Healthcare Services - Garden City, LLC d/b/a Garden City Hospital**	**Daniel R. Corbet** *Retained* (313) 964-6300(W)
		Kenneth A. Willis *Retained* (313) 964-6300(W)
Defendant	**Shady, DO, Meagan**	**Daniel R. Corbet** *Retained* (313) 964-6300(W)
		Kenneth A. Willis *Retained* (313) 964-6300(W)
Defendant	**Welsh, DO, Kelly W.**	**Daniel R. Corbet** *Retained* (313) 964-6300(W)
		Kenneth A. Willis *Retained* (313) 964-6300(W)
Plaintiff	**Daher, Nawal, Personal Rep.**	**Marc S. Berlin** *Retained* (248) 355-5555(W)
Plaintiff	**Jomaa, Mohamad, Personal Rep.**	**Marc S. Berlin** *Retained* (248) 355-5555(W)
Plaintiff	**Juwaa a.k.a Jawad Jomaa, Jawad, Estate of**	**Marc S. Berlin** *Retained* (248) 355-5555(W)

Events & Orders of the Court

OTHER EVENTS AND HEARINGS

03/18/2020	**Complaint, Filed**
03/18/2020	**Service Review Scheduled**
03/18/2020	**Status Conference Scheduled**
03/18/2020	Jury Demand Filed & Fee Paid
03/18/2020	Case Filing Fee - Paid
05/08/2020	Proof of Service, Filed
05/08/2020	Miscellaneous Pleadings, Filed
05/08/2020	Miscellaneous Pleadings, Filed
05/08/2020	Miscellaneous Pleadings, Filed
05/27/2020	Answer to Complaint, Filed
05/27/2020	Proof of Service, Filed
06/04/2020	Proof of Service, Filed
06/04/2020	Answer to Affirmative Defenses, Filed
06/15/2020	Proof of Service, Filed
06/15/2020	Affidavit, Filed
06/15/2020	Affidavit, Filed
06/16/2020	**Status Conference** (8:00 AM) (Judicial Officer Snow, Martha M.) *06/17/2020 Reset by Court to 06/16/2020* Result: Reviewed by Court
06/16/2020	Status Conference Scheduling Order, Signed and Filed
09/09/2020	Witness List, Filed
09/09/2020	Proof of Service, Filed

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09/09/2020 Proof of Service, Filed
09/09/2020 Witness List, Filed
09/10/2020 Witness List, Filed
09/10/2020 Proof of Service, Filed
10/23/2020 Miscellaneous Pleadings, Filed
10/23/2020 Miscellaneous Pleadings, Filed
10/23/2020 Proof of Service, Filed
10/23/2020 Proof of Service, Filed
10/23/2020 Notice of Taking Deposition, Filed
10/23/2020 Notice of Taking Deposition, Filed
10/29/2020 Proof of Service, Filed
10/29/2020 Motion to Adjourn, Filed
10/30/2020 Praecipe, Filed (Judicial Officer: Snow, Martha M.)
11/13/2020 **Motion Hearing** (11:00 AM) (Judicial Officer Snow, Martha M.)
Result: Held
11/13/2020 **Motion to Extend Time Granted, Order to Follow** (Judicial Officer: Snow, Martha M.)
11/13/2020 Proof of Service, Filed
11/18/2020 Order Adjourning Mediation and Settlement Conference, S/F
12/10/2020 Motion to Compel Action, Filed
12/10/2020 Proof of Service, Filed
12/10/2020 Praecipe, Filed (Judicial Officer: Snow, Martha M.)
12/14/2020 Miscellaneous Pleadings, Filed
12/14/2020 Proof of Service, Filed
02/02/2021 Proof of Service, Filed
02/02/2021 Witness List, Filed
02/05/2021 *CANCELED* **Motion Hearing** (10:00 AM) (Judicial Officer Snow, Martha M.)
Dismiss Hearing or Injunction
04/05/2021 **Case Evaluation - Medical Malpractice**
04/07/2021 Proof of Service, Filed
04/07/2021 Witness List, Filed
04/07/2021 Proof of Service, Filed
04/07/2021 Miscellaneous Pleadings, Filed
04/14/2021 Proof of Service, Filed
04/14/2021 Notice of Taking Deposition, Filed
04/14/2021 Notice of Taking Deposition, Filed
04/14/2021 Objection, Filed
04/14/2021 Proof of Service, Filed
04/14/2021 Objection, Filed
04/30/2021 Motion for Summary Judgment/Disposition, Filed
04/30/2021 Proof of Service, Filed
05/03/2021 **Case Evaluation - No Acceptance**
05/04/2021 Praecipe, Filed (Judicial Officer: Snow, Martha M.)
05/04/2021 Proof of Service, Filed
05/04/2021 Notice of Hearing, Filed
05/05/2021 Miscellaneous Motion, Filed
05/05/2021 Proof of Service, Filed
05/07/2021 Praecipe, Filed (Judicial Officer: Snow, Martha M.)
05/10/2021 **Settlement Conference** (10:00 AM) (Judicial Officer Snow, Martha M.)
01/07/2021 Reset by Court to 05/10/2021
Result: Held for Further Settlement
05/14/2021 **Motion Hearing** (11:00 AM) (Judicial Officer Snow, Martha M.)
Result: Motion and/or Praecipe Dismissed
05/18/2021 Proof of Service, Filed
05/18/2021 Exhibit, Filed
05/21/2021 Proof of Service, Filed
05/24/2021 Order for Miscellaneous Action, Signed and Filed (Judicial Officer: Snow, Martha M.)
06/17/2021 Order for Miscellaneous Action, Signed and Filed (Judicial Officer: Snow, Martha M.)
06/21/2021 Proof of Service, Filed
06/21/2021 Appearance of Attorney, Filed
06/22/2021 Proof of Service, Filed
06/22/2021 Notice of Hearing, Filed
06/30/2021 Proof of Service, Filed
06/30/2021 Reply to Brief, Filed
07/01/2021 **Settlement Conference** (11:00 AM) (Judicial Officer Snow, Martha M.)
Result: Held for Further Settlement
07/07/2021 Reply to Brief, Filed
07/07/2021 Proof of Service, Filed
07/21/2021 **Motion Hearing** (12:00 PM) (Judicial Officer Snow, Martha M.)
07/01/2021 Reset by Court to 07/21/2021
Result: Held
07/21/2021 **Motion Denied, Order to Follow** (Judicial Officer: Snow, Martha M.)
07/27/2021 Proof of Service, Filed
07/28/2021 Order Denying Motion, Signed and Filed
10/13/2021 Higher Court Order/Decision Received by Circuit Court
10/14/2021 Proof of Service, Filed
10/14/2021 Claim of Appeal, Filed-WVD
10/26/2021 Notice of Hearing, Filed
10/26/2021 Motion for Stay of Proceedings, Filed
10/26/2021 Proof of Service, Filed
11/01/2021 Praecipe, Filed (Judicial Officer: Snow, Martha M.)
11/09/2021 Proof of Service, Filed
11/11/2021 **Settlement Conference** (1:00 PM) (Judicial Officer Snow, Martha M.)

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	08/11/2021 Reset by Court to 11/11/2021
11/11/2021	**Motion Hearing** (10:00 AM) (Judicial Officer Snow, Martha M.)
	11/19/2021 Reset by Court to 11/11/2021
	Result: Held
11/11/2021	**Motion Granted, Order to Follow** (Judicial Officer: Snow, Martha M.)
11/11/2021	**Closed/Final - Ord for Stay of Proceedings, Signed and Filed**
12/22/2021	**Letter, Filed**
12/22/2021	**Claim of Appeal, Filed**
12/22/2021	**Proof of Service, Filed**
02/14/2022	**Review Hearing** (11:00 AM) (Judicial Officer Snow, Martha M.)
	Result: Held
05/17/2022	**Review Hearing** (12:00 PM) (Judicial Officer Snow, Martha M.)
	Result: Held for Further Settlement
12/01/2022	**Higher Court Order/Decision Received by Circuit Court**
12/01/2022	**Higher Court Order/Decision Received by Circuit Court**
01/13/2023	**Higher Court Order/Decision Received by Circuit Court**
02/24/2023	**Proof of Service, Filed**
02/24/2023	**Appellant/Appellee Brief, Filed**
12/04/2023	**Review Hearing** (10:00 AM) (Judicial Officer Snow, Martha M.)
	08/17/2022 Reset by Court to 10/26/2022
	10/26/2022 Reset by Court to 11/30/2022
	11/30/2022 Reset by Court to 02/02/2023
	02/02/2023 Reset by Court to 05/04/2023
	05/04/2023 Reset by Court to 08/03/2023
	08/03/2023 Reset by Court to 10/03/2023
	10/03/2023 Reset by Court to 12/04/2023

Financial Information

	Plaintiff Daher, Nawal, Personal Rep.			
	Total Financial Assessment			385.00
	Total Payments and Credits			385.00
	Balance Due as of 11/30/2023			**0.00**
03/18/2020	Transaction Assessment			85.00
03/18/2020	eFiling	Receipt # 2020-23844	Fieger, Fieger, Kenney & Harrington	(85.00)
03/18/2020	Transaction Assessment			175.00
03/18/2020	eFiling	Receipt # 2020-23845	Fieger, Fieger, Kenney & Harrington	(175.00)
10/29/2020	Transaction Assessment			20.00
10/29/2020	eFiling	Receipt # 2020-80139	Corbet, Shaw, Essad & Bonasso, PLLC	(20.00)
12/10/2020	Transaction Assessment			20.00
12/10/2020	eFiling	Receipt # 2020-93522	Fieger, Fieger, Kenney & Harrington	(20.00)
05/03/2021	Transaction Assessment			20.00
05/03/2021	eFiling	Receipt # 2021-33737	Corbet, Shaw, Essad & Bonasso, PLLC	(20.00)
05/05/2021	Transaction Assessment			20.00
05/05/2021	eFiling	Receipt # 2021-34365	Corbet, Shaw, Essad & Bonasso, PLLC	(20.00)
10/28/2021	Transaction Assessment			20.00
10/28/2021	eFiling	Receipt # 2021-84068	Corbet, Shaw, Essad & Bonasso P.L.L.C	(20.00)
12/22/2021	Transaction Assessment			25.00
12/22/2021	eFiling	Receipt # 2021-104443	Corbet, Shaw, Essad & Bonasso P.L.L.C	(25.00)

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APPENDIX 3

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiff,

vs. Case No. 20- -NH
Hon.

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

Defendants.
_____/

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
Fieger, Fieger, Kenney & Harrington, PC
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555/fax (248) 355-5148
m.berlin@fiegerlaw.com
_____/

COMPLAINT AND AFFIDAVITS OF MERIT

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

/s/ Marc s. Berlin, Esq.
Marc S. Berlin, Esq.

NOW COME the Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives for the Estate of JAWAD JUMAA a/k/a JAWAD JOMAA, Deceased, by and through their attorneys, FIEGER, FIEGER, KENNEY & HARRINGTON, P.C., and for their Complaint, Affidavits of Merit, and Jury Demand, state:

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COMMON ALLEGATIONS

1. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, the parents of JAWAD JUMAA a/k/a JAWAD JOMAA (hereinafter, "JAWAD JUMAA"), the deceased minor, were appointed Co-Personal Representatives of the Estate on July 25, 2018 by the Wayne County Probate Court, File Number 2018-839999-DE.

2. The amount in controversy is in excess of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, exclusive of costs, interest, and attorney fees.

3. The injury originated at Defendant hospital facility, PRIME HEALTHCARE SERVICES – GARDEN CITY, LLC d/b/a GARDEN CITY HOSPITAL (hereinafter "GARDEN CITY HOSPITAL") located in Garden City, County of Wayne, State of Michigan.

4. Jurisdiction and venue are proper in Wayne County.

5. At all times relevant hereto, Defendant, KELLY W. WELSH, D.O., (hereinafter "DR. WELSH") was a physician licensed to practice medicine in the State of Michigan, who conducted business in the County of Wayne, State of Michigan.

6. At all times relevant hereto, Defendant, MEAGAN SHADY, D.O., f/k/a MEAGAN THOMAS, D.O. (hereinafter "DR. SHADY") was a resident physician licensed to practice medicine in the State of Michigan, who conducted business in the County of Wayne, State of Michigan.

7. Defendant, GARDEN CITY HOSPITAL is a foreign limited liability company conducting regular and systematic business in Garden City, County of Wayne, State of Michigan.

8. Defendant, GARDEN CITY HOSPITAL, is vicariously liable for the actions and inactions of its agents, ostensible agents, and/or employees whether physicians,

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residents, nursing staff, or other healthcare providers including, but not limited to DR. WELSH and DR. SHADY, and the nurses who provided care and treatment to Decedent, JAWAD JUMAA, including but not limited to, Joshua A. Byars, RN; Charles L. Moran, RN; Cherie Patterson, RN; and Annette Garlow, RN, as set forth herein and incorporated by reference herein.

9. At all times relevant hereto, DR. WELSH was engaged in the practice of medicine in the County of Wayne, State of Michigan, who held herself out to the public in general, and to the Plaintiffs and Decedent in particular, as a skilled and competent physician, capable of properly and skillfully treating, caring for, and providing medical services to the public in general, and to Decedent, JAWAD JUMAA, in particular.

10. At all times relevant hereto, DR. SHADY was engaged in the practice of medicine in the County of Wayne, State of Michigan, who held herself out to the public in general, and to the Plaintiffs and Decedent in particular, as a skilled and competent physician, capable of properly and skillfully treating, caring for, and providing medical services to the public in general, and to Decedent, JAWAD JUMAA, in particular.

11. At all times relevant hereto, Defendant DR. WELSH was the actual, apparent, and/or ostensible principal, agent, servant and/or employee of GARDEN CITY HOSPITAL, and at all times relevant, was acting within the course and scope of her agency and/or employment with GARDEN CITY HOSPITAL, when the medical malpractice/negligence alleged herein was committed, hereby imposing vicarious liability upon the corporate Defendants.

12. At all times relevant hereto, Defendant DR. SHADY was the actual, apparent, and/or ostensible principal, agent, servant and/or employee of GARDEN CITY HOSPITAL, and at all times relevant, was acting within the course and scope of her

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agency and/or employment with GARDEN CITY HOSPITAL when the medical malpractice/negligence alleged herein was committed, hereby imposing vicarious liability upon the corporate Defendants.

GENERAL ALLEGATIONS

13. Plaintiffs hereby reiterate each and every allegation contained in the preceding paragraphs of this Complaint as if fully stated herein.

14. On the morning of January 16, 2017, JAWAD JUMAA, was found dead in his bed at his mother's home. He was 13 years old.

15. An autopsy revealed the cause of death to be acute purulent meningitis.

16. In the evening of January 15, 2017, Decedent, JAWAD JUMAA, and his mother presented to the Emergency Department at Defendant, GARDEN CITY HOSPITAL. The attending physician was Defendant, DR. WELSH. The resident was Defendant, DR. SHADY, f/k/a DR. THOMAS.

17. The records indicate that Decedent was in the Emergency Department for four hours, from 17:30 – 21:33. The timeline is as follows:

- Time: 17:30 Event: Arrival
- Time: 18:07 Event: Triage/Vital signs
- Time: 18:09 Event: End Triage
- Time: 18:12 Event: Resident Provider Note (Dr. Thomas)
- Time: 18:41 Event: Order for Valium and ibuprofen
- Time: 18:56 Event: 2 mg Valium, 600 mg ibuprofen given
- Time: 19:07 Event: Nursing Note
- Time: 19:29 Event: Vital Signs
- Time: 19:39 Event: Dr. Welsh at bedside
- Time: 19:49 Event: Discharge decision time
- Time: 20:15 Event: Discharge
- Time: 21:33 Event: Departure time

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18. After triage, and more specifically from the time Defendant, DR. SHADY examined the Decedent until the decision was made to discharge, only one hour, 37 minutes elapsed (18:12 – 19:49).

19. The triage note of Joshua A. Byars, RN records the primary complaint as "migraine." Under the section "Primary Details," it is recorded, "Pt has stiff neck. Unable to bend his neck, nausea and vomiting around 2 days ago." Other than taking vital signs, no further information is obtained.

20. In her 18:12 "ED Provider Note," Defendant, DR. SHADY, records a "tension" headache with an onset of two days prior.

21. The progression of the tension headache is described as "constant" with "associated symptoms" recorded as "neck stiffness." Defendant, DR. SHADY, then stated:

> Patient is a 13-year-old male coming in with a headache and neck pain. Patient was sick last week with nausea, vomiting, and fever. Symptoms resolved. Had a residual headache in the front of his head. No photophobia. Patient awoke 2 days ago with neck stiffness, worse on the right. Developed a headache again after this. Headache is (sic) been persistent back pain for one day. Denies any fevers. Denies sick contact. Immunizations up-to-date.

22. No inquiry was made as to the extent of the illness, whether any medicinal treatment had been given, etc. Instead, Defendant, DR. SHADY, made a diagnostic impression of "torticollis," further noting:

> Patient is a 13-year-old male coming in with headache and neck pain. Patient seen by myself and attending physician. Patient's vital stable upon arrival. On exam patient is nontoxic very well appearing. No rash. **Pain with mild neck flexion**. Patient does have tenderness to the right paraspinal muscles. Patient states he did awake from sleep with his neck pain and believes it is due from sleeping the wrong way. Headache followed after that. No focal neurologic deficits. Patient is afebrile. **Low concern or suspicion for meningitis at this time.** Motrin and Valium was

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> given. Upon reevaluation patient has increased range of motion of his neck and states he is feeling much better. Discussed with mother this is likely from sleeping wrong and related to torticollis. She with anti-inflammatory at home.

23. The above-described medication, Valium and ibuprofen, was ordered at 18:41 and given at 18:56. Eleven minutes later, at 19:07, Charles L. Moran, RN completed a nursing note, which recorded, in part:

> **patient complains of head and neck pain – pt observed turning entire upper torso to look left or right; rather than turn at his neck to look.**

24. At 19:29, vital signs were again taken, by Annette Garlow, RN.

25. At 19:39, Cherie Patterson, RN records that Defendant, DR. WELSH, was at the bedside. Nurse Patterson then records the, "Discharge Details Decision Time" at 19:49.

26. Decedent, JUWAD JUMAA, was discharged at 20:15 and is recorded to have left the Emergency Department at 21:33.

27. The records indicate that after Decedent, JUWAD JUMAA, was brought home by his mother, she gave her son 500 mg of Tylenol and 600 mg of Motrin. She also put a Walgreen's medicated pain-relieving patch on Decedent's neck.

28. Decedent's mother checked on Decedent, JUWAD JUMAA, at approximately 1:30 a.m., and Decedent indicated he was feeling a little better. When she tried to wake him up at approximately 10:00 a.m. in the morning, Decedent was not breathing and was cold to the touch. Emergency services were contacted.

29. The police records record medical history that was not obtained at Defendant, GARDEN CITY HOSPITAL, by Defendants, DR. WELSH and DR. SHADY, or the nursing staff. Unlike the hospital records, the police records indicate:

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> Sgt. Mitchell and I spoke to Daher (mom) about Jawad's health conditions within the past week. Daher indicated that Jawad had been experiencing severe headaches and nausea **over the past week or so**. **Jawad had been complaining that his head would ache every five minutes, and Jawad vomited several times during the last week**. Daher explained that Jawad was staying with his father, Mohammad Ihssan Jomma . . . Mohammad called Nawal and explained that **Jawad was still complaining of severe head pain every five minutes**. Nawal said that she went and picked Jawad up after Mohammad had **given Jawad (4) Motrin pills for the pain and the Motrin wasn't helping with Jawad's pain.** Nawal said that she picked Jawad up and took him to the Garden City Hospital to be looked at. Nawal said that Jawad was seen in the Emergency Room of the GCH on 1/15/17 . . .

30. The police report goes on to state:

> Contact with father, Mohammad Ihssan Jomaa: Sgt. Mitchell and I interviewed Mohammad about Jawad's health. Mohammad indicated that the entire time Jawad was at his home on 1/15/17 he was **complaining of severe neck pain and severe headaches. Mohammad said that he gave Jawad 800 mg of Motrin at approximately 1400 hours. Mohammad said that Jawad's neck was hurting him so bad that he was in obvious pain and holding his head to the side**. Mohammad said that he spoke to Jawad on the phone after he got home from the ER and Jawad indicated that he was feeling a little better.

31. The cause of death in the autopsy report was determined to be acute, purulent meningitis.

COUNT I
PROFESSIONAL NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANT PRIME HEALTHCARE SERVICES – GARDEN CITY, LLC d/b/a GARDEN CITY HOSPITAL

32. Plaintiffs hereby reiterate each and every allegation contained in the preceding paragraphs of this Complaint as if fully stated herein.

33. Pursuant to MCL 333.21513 and MCL 333.20141, Defendant, GARDEN CITY HOSPITAL, is responsible for all phases of the operation of its hospital, selection of its medical personnel, and quality of care rendered.

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34. In treating Decedent, JAWAD JUMAA, Defendant, GARDEN CITY HOSPITAL, was required to provide the recognized standard of practice or care as that of the skill and care ordinarily possessed and exercised by a reasonably prudent hospital.

35. When presented with a patient like Decedent, JAWAD JUMAA, the Defendant, GARDEN CITY HOSPITAL, had a direct duty to comply with the above standards of care, as well as the following specific duties, which it failed to do and is, therefore, negligent and/or grossly negligent:

a. Provide Decedent proper medical care based on his known and/or available medical history;

b. Employ or contract with physicians and nurses who possess that degree of skill and learning ordinarily possessed and exercised by practitioners of their profession in the same or similar localities;

c. Adequately supervise, direct, monitor, and control these healthcare providers;

d. Draft, promulgate, adopt, and/or enforce appropriate rules, regulations, policies, and procedures which would enable and engender its healthcare providers, including but not limited to, its physicians and nurses, to render appropriate and timely treatment to patients looking to it for said treatment, including Decedent, and ensure the adequacy of the experience level and expertise of these providers;

e. Other acts of professional negligence yet to be determined.

36. At all times relevant to the care and treatment of Decedent, JAWAD JUMAA, the Defendant, GARDEN CITY HOSPITAL, failed in all respects to comply with the applicable standard of care and was, therefore, professionally and directly negligent in the care and treatment of Decedent, JAWAD JUMAA.

37. The above breaches of the standard of care by Defendant, GARDEN CITY HOSPITAL, allowed the meningitis to permeate Decedent's body and were a proximate cause of JAWAD JUMAA's death. At all times prior to his death, Decedent experienced

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physical pain, suffering, mental anguish, and eventually anoxic encephalopathy and death

38. As a further direct and proximate result of the above breaches of care by Defendant, GARDEN CITY HOSPITAL, Decedent was caused to experience physical pain, mental anguish, cognitive impairment, extensive pain and suffering, emotional distress, humiliation, fright, and depression in the time leading up to his death, as well as various medical, prescriptive, nursing, and hospital expenses, lost earnings, lost earnings capacity, and loss of enjoyment of life, and other damages, all of which are past, present, and future.

39. Decedent, JAWAD JUMAA, left behind parents and siblings who have suffered loss of love, companionship, affection, society, comfort, and solace, as well as all of the services compensable under Michigan law. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, pray for such damages as they are entitled under the Wrongful Death Act, MCL 600.2922, including conscious pain and suffering sustained by Decedent, medical expenses, funeral and burial expenses, and damages for loss of consortium and/or companionship sustained by those persons deemed to be interested persons pursuant to MCL 600.2922.

40. The aforesaid negligence has also caused Decedent to expend, or have expended on his behalf, substantial amounts of money for medical expenses for which reimbursement is sought. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, seek all damages permitted under Michigan statutory and common law, whether known now or whether becoming known during the pendency of this case.

41. Defendant, GARDEN CITY HOSPITAL, is liable for the acts and/or omissions of its agents, ostensible agents, servants, and/or employees who rendered

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care and treatment to Decedent, JAWAD JUMAA, including, but not limited to, DR. WELSH, DR. SHADY, and the nurses who provided care and treatment to Decedent, including but not limited to, Joshua A. Byars, RN; Charles L. Moran, RN; Cherie Patterson, RN; and Annette Garlow, RN, as set forth herein and incorporated by reference herein, pursuant to the doctrines of vicarious liability and/or *respondeat superior*.

WHEREFORE, Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives of JAWAD JUMAA, Deceased, respectfully request that this Honorable Court enter a judgment in their favor and against Defendants in an amount in excess of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, plus costs, interest and attorney fees.

COUNT II
MEDICAL MALPRACTICE/NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANT KELLY W. WELSH, D.O.

42. Plaintiffs hereby reiterate each and every allegation contained in the preceding paragraphs of this Complaint as if fully stated herein.

43. In treating Decedent, JAWAD JUMAA, Defendant, DR. WELSH, was required to provide the recognized standard of practice or care within her specialty of emergency medicine and thus was required to render care as a reasonable and prudent emergency medicine physician of average training, experience, and education under the same or similar clinical circumstances as pertain to Decedent, JAWAD JUMAA, as applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, pertinent to DR. WELSH in rendering care to Decedent, JAWAD JUMAA, as set forth by Michigan statute and case law interpreting same.

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44. The applicable standard of practice/care required Defendant, DR. WELSH, and any physician under her supervision, to timely and appropriately do all of the following, which she failed to do, and is, therefore, professionally negligent:

a. Perform and appreciate a thorough history and physical examination;

b. Admit Decedent to the hospital;

c. Appropriately supervise the resident physician;

d. Consider Decedent's history and symptoms, together with the clinical picture, as to make the proper diagnosis and to treat the pathology while at the same time preventing harmful and fatal effects of same;

e. Perform a lumbar puncture;

f. Diagnose Decedent as having meningitis;

g. Avoid diagnosing Decedent with torticollis without first excluding other more serious and likely diagnoses, including but not limited to, meningitis;

h. Consult with appropriate specialists, including but not limited to, neurology and infectious disease;

i. Commence antibiotic therapy;

j. Perform laboratory work, including but not limited to a complete blood count;

k. Refrain from discharging Decedent from the Emergency Department;

l. Other acts of professional negligence yet to be determined.

45. At all times relevant to the care and treatment of Decedent, JAWAD JUMAA, Defendant, DR. WELSH and any physician under her supervision, failed in all respects to comply with the applicable standard of care and was, therefore, professionally negligent in her care and treatment of Decedent, JAWAD JUMAA.

46. The above breaches of the standard of care by Defendant, DR. WELSH, allowed the meningitis to permeate Decedent's body and were a proximate cause of

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JAWAD JUMAA's death. At all times prior to his death, Decedent experienced physical pain, suffering, mental anguish, and eventually anoxic encephalopathy and death.

47. As a further direct and proximate result of the above breaches of care by Defendant, DR. WELSH, Decedent was caused to experience physical pain, mental anguish, cognitive impairment, extensive pain and suffering, emotional distress, humiliation, fright, and depression in the time leading up to his death, as well as various medical, prescriptive, nursing, and hospital expenses, lost earnings, lost earnings capacity, and loss of enjoyment of life, and other damages, all of which are past, present, and future.

48. Decedent, JAWAD JUMAA, left behind parents and siblings who have suffered loss of love, companionship, affection, society, comfort, and solace, as well as all of the services compensable under Michigan law. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, pray for such damages as they are entitled under the Wrongful Death Act, MCL 600.2922, including conscious pain and suffering sustained by Decedent, medical expenses, funeral and burial expenses, and damages for loss of consortium and/or companionship sustained by those persons deemed to be interested persons pursuant to MCL 600.2922.

49. The aforesaid negligence has also caused Decedent to expend, or have expended on his behalf, substantial amounts of money for medical expenses for which reimbursement is sought. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, seek all damages permitted under Michigan statutory and common law, whether known now or whether becoming known during the pendency of this case.

50. Defendant, GARDEN CITY HOSPITAL, is liable for the acts and/or omissions of its agents, ostensible agents, servants, and/or employees who rendered

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care and treatment to Decedent, JAWAD JUMAA, including, but not limited to, DR. WELSH, pursuant to the doctrines of vicarious liability and/or *respondeat superior*.

WHEREFORE, Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives of the Estate of JAWAD JUMAA, Deceased, respectfully request that this Honorable Court enter a judgment in their favor and against Defendants in an amount in excess of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, plus costs, interest and attorney fees.

COUNT III
MEDICAL MALPRACTICE/NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANT MEAGAN SHADY, D.O.

51. Plaintiffs hereby reiterate each and every allegation contained in the preceding paragraphs of this Complaint as if fully stated herein.

52. In treating Decedent, JAWAD JUMAA, Defendant, DR. SHADY, was required to provide the recognized standard of practice or care of a resident in training in emergency medicine, and thus was required to render care as a reasonable and prudent emergency medicine physician of average training, experience, and education under the same or similar clinical circumstances as pertain to Decedent, JAWAD JUMAA, as applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, pertinent to DR. SHADY in rendering care to Decedent, JAWAD JUMAA, as set forth by Michigan statute and case law interpreting same.

53. The applicable standard of practice/care required Defendant, DR. SHADY, and any physician under her supervision, to timely and appropriately do all of the following, which she failed to do, and is, therefore, professionally negligent:

a. Perform and appreciate a thorough history and physical examination;

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b. Admit Decedent to the hospital;

c. Timely and appropriately communicate signs, symptoms, laboratory results, and diagnostic testing results to the attending physician;

d. Consider Decedent's history and symptoms, together with the clinical picture, as to make the proper diagnosis and to treat the pathology while at the same time preventing harmful and fatal effects of same;

e. Perform a lumbar puncture;

f. Diagnose Decedent as having meningitis;

g. Avoid diagnosing Decedent with torticollis without first excluding other more serious and likely diagnoses, including but not limited to, meningitis;

h. Consult with appropriate specialists, including but not limited to, neurology and infectious disease;

i. Commence antibiotic therapy;

j. Perform laboratory work, including but not limited to a complete blood count;

k. Refrain from discharging Decedent from the Emergency Department;

l. Other acts of professional negligence yet to be determined.

54. At all times relevant to the care and treatment of Decedent, JAWAD JUMAA, Defendant DR. SHADY and any physician under her supervision, failed in all respects to comply with the applicable standard of care and was, therefore, professionally negligent in his care and treatment of Decedent, JAWAD JUMAA.

55. The above breaches of the standard of care by Defendant, DR. SHADY, allowed the meningitis to permeate Decedent's body and were a proximate cause of JAWAD JUMAA's death. At all times prior to his death, Decedent experienced physical pain, suffering, mental anguish, and eventually anoxic encephalopathy and death.

56. As a further direct and proximate result of the above breaches of care by Defendant, DR. SHADY, Decedent was caused to experience physical pain, mental

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anguish, cognitive impairment, extensive pain and suffering, emotional distress, humiliation, fright, and depression in the time leading up to his death, as well as various medical, prescriptive, nursing, and hospital expenses, lost earnings, lost earnings capacity, and loss of enjoyment of life, and other damages, all of which are past, present, and future.

57. Decedent, JAWAD JUMAA, left behind parents and siblings who have suffered loss of love, companionship, affection, society, comfort, and solace, as well as all of the services compensable under Michigan law. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, pray for such damages as they are entitled under the Wrongful Death Act, MCL 600.2922, including conscious pain and suffering sustained by Decedent, medical expenses, funeral and burial expenses, and damages for loss of consortium and/or companionship sustained by those persons deemed to be interested persons pursuant to MCL 600.2922.

58. The aforesaid negligence has also caused Decedent to expend, or have expended on his behalf, substantial amounts of money for medical expenses for which reimbursement is sought. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, seek all damages permitted under Michigan statutory and common law, whether known now or whether becoming known during the pendency of this case.

59. Defendant, GARDEN CITY HOSPITAL, is liable for the acts and/or omissions of its agents, ostensible agents, servants, and/or employees who rendered care and treatment to Decedent, JAWAD JUMAA, including, but not limited to, DR. SHADY, pursuant to the doctrines of vicarious liability and/or *respondeat superior*.

WHEREFORE, Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives of the Estate of JAWAD JUMAA, Deceased, respectfully

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request that this Honorable Court enter a judgment in their favor and against Defendants in an amount in excess of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, plus costs, interest and attorney fees.

COUNT IV
PRIME HEALTHCARE SERVICES – GARDEN CITY, LLC
d/b/a GARDEN CITY HOSPITAL
NURSING MALPRACTICE

60. Plaintiffs hereby reiterate each and every allegation contained in the preceding paragraphs of this Complaint as if fully stated herein.

61. In treating Plaintiff's Decedent, JAWAD JUMAA, Defendant, GARDEN CITY HOSPITAL by and through its nursing staff, including but not limited to, Joshua A. Byars, RN; Charles L. Moran, RN; Cherie Patterson, RN; and Annette Garlow, RN, was required to provide the recognized standard of practice or care as that of the skill or care ordinarily possessed and exercised by practitioners of their profession in the same or similar localities.

62. The applicable standard of practice/care required that Defendant, GARDEN CITY HOSPITAL, by and through its nursing staff, including but not limited to, Joshua A. Byars, RN; Charles L. Moran, RN; Cherie Patterson, RN; Annette Garlow, RN, and any medical providers under their supervision, to timely and appropriately do all of the following, which they failed to do, and are, therefore, professionally negligent:

a. Perform and appreciate a thorough history and physical examination, including obtaining a history of the onset and duration of symptoms, the progression of symptoms, the medications consumed in recent days, and whether that medications provided relief;

b. Timely and appropriately communicate signs, symptoms, laboratory results, and diagnostic testing results to the attending physician and/or resident physician;

c. Provide appropriate discharge instructions and medications;

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d. Utilize the chain of command if the attending physician and/or resident physician is unavailable, inaccessible, or not authorizing appropriate care and treatment of the patient to ensure that the patient receives appropriate care and treatment that conforms with the standard of care;

e. Discuss Decedent's presentation with the attending physician and/or resident physician and have them evaluate and/or reevaluate Decedent upon noting signs and/or symptoms consistent with meningitis and/or a process inconsistent with torticollis;

f. Consider Decedent's history and symptoms together with the clinical picture as to make the proper nursing decisions while at the same time preventing harmful and fatal effects of same;

g. Advocate for an accurate history and physical exam at the time of the patient's presentation to the emergency department;

h. Take measures to advocate for the Decedent;

i. Other acts of professional negligence yet to be determined.

63. At all times relevant to the care and treatment of Decedent, the Defendant, GARDEN CITY HOSPITAL, by and through its nursing staff, including but not limited to Joshua A. Byars, RN; Charles L. Moran, RN; Cherie Patterson, RN; Annette Garlow, RN, and any medical providers under their supervision failed in all respects to comply with the applicable standard of care and were, therefore, professionally negligent in the care and treatment of Decedent, JAWAD JUMAA.

64. The above breaches of the standard of care by the nursing staff at GARDEN CITY HOSPITAL, allowed the meningitis to permeate Decedent's body and were a proximate cause of JAWAD JUMAA's death.

65. As a further direct and proximate result of the above breaches of care by GARDEN CITY HOSPITAL, through its nursing staff, Decedent was caused to experience physical pain, mental anguish, cognitive impairment, extensive pain and suffering, emotional distress, humiliation, fright, and depression in the time leading up to his death,

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as well as various medical, prescriptive, nursing, and hospital expenses, lost earnings, lost earnings capacity, and loss of enjoyment of life, and other damages, all of which are past, present, and future.

66. Decedent, JAWAA JUMAA, left behind parents and siblings who have suffered loss of love, companionship, affection, society, comfort, and solace, as well as all of the services compensable under Michigan law. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, pray for such damages as they are entitled under the Wrongful Death Act, MCL 600.2922, including conscious pain and suffering sustained by Decedent, medical expenses, funeral and burial expenses, and damage for loss of consortium and/or companionship sustained by those persons deemed to be interested persons pursuant to MCL 600.2922.

67. The aforesaid negligence has also caused Decedent to expend, or have expended on his behalf, substantial amounts of money for medical expenses for which reimbursement is sought. Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, seek all damaged permitted under Michigan statutory and common law, whether known now or whether becoming known during the pendency of this case.

68. Defendant, GARDEN CITY HOSPITAL, is liable for the acts and/or omissions of its agents, ostensible agents, servants, and/or employees who rendered care and treatment to Decedent, JAWAD JUMAA, including, but not limited to, Joshua A. Byars, RN; Charles L. Moran, RN; Cherie Patterson, RN; and Annette Garlow, RN, pursuant to the doctrines of vicarious liability and/or *respondeat superior*.

WHEREFORE, Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives of the Estate of JAWAD JUMAA, Deceased, respectfully request that this Honorable Court enter a judgment in their favor and against Defendants

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in an amount in excess of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS, plus costs, interest and attorney fees.

Respectfully submitted,

/s/ Marc S. Berlin

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
Fieger, Fieger, Kenney & Harrington, P.C.
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, MI 48075
(248) 355-5555

Dated: March 18, 2020

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APPENDIX 4

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiff,

vs.

Case No: 20-004169-NH
Hon. Martha M. Snow

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

Defendants.
_____/

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
Fieger, Fieger, Kenney & Harrington, PC
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555 / Fax (248) 355-5148
m.berlin@fiegerlaw.com

DANIEL R. CORBET (P37306)
KENNETH A WILLIS (P55045)
Corbet Shaw Essad & Bonasso, PLLC
Attorneys for Defendants
30500 Van Dyke Ave., Ste 500
Warren, Michigan 48093
(313) 964-6300 / Fax (313) 964-6310
_____/

AFFIDAVIT OF NITIN PARANJPE, PH.D.

STATE OF MICHIGAN)
) ss:
COUNTY OF OAKLAND)

Joint Appendix 029

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NOW COMES, Nitin Paranjpe, Ph.D., being duly sworn upon his oath states the following:

1. Defense has filed a motion and brief for partial summary disposition on future economic damages, based on my economic calculations. Their motion and brief argue that future earnings/capacity damages in a case involving the death of a 13-year-old are remote, speculative, and contingent.

2. In terms of my background as an economist and a statistician, I am currently a partner in an economic and statistical research company, Thomson Econometrics and Employment Research. I joined the company in October 1990. Thomson Econometrics and Employment Research is a firm that provides economic and statistical research services to a wide variety of clients. I primarily provide information concerning economic losses such as earnings capacity or household services in litigation, and I also do statistical work in cases involving age or race or gender discrimination.

3. I have been retained by Plaintiff's Counsel as an economics expert. My curriculum vitae is attached as **Exhibit A** and incorporated herein by reference.

4. I hold a Bachelor's degree in Economics with a minor in Applied Statistics from Poona University in India. I received a Master's degree from Poona University in India and Eastern Michigan University and a Ph.D. from Wayne State University in 1984. I specialized at the Ph.D. in Money & Banking, and Econometrics.

5. My preliminary calculations are based on my education, training, and experience as well as governmental data, including but not limited to the U.S.

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Census Bureau, the U.S. Department of Education, the U.S. Department of Labor, Bureau of Labor Statistics, National Vital Statistics Reports from the National Center for Health Statistics, the State of Michigan legislature, and the Social Security Trustees report. My preliminary calculations are also based on records that have been provided to me by plaintiff's counsel.

6. I provided two reports in this matter, the first preliminary report of July 29, 2019 **(Exhibit B)**, and a second preliminary report of October 27, 2020 **(Exhibit C)**.

7. I was provided with information regarding Jawad's date of birth and death, and his mother and father's educational attainment levels.

8. My report issued on July 29, 2019, was based on earnings data from the US Census Bureau, CPS, 2018 Annual Social and Economic Supplement. As new data became available this report was updated to use earnings data from the US Census Bureau, CPS, 2020 Annual Social and Economic Supplement. Also, the past loss which ran through the year 2019 with future loss in 2020, in the July 29, 2019 report was updated to reflect the current year with past losses through 2020 and future loss starting in 2021.

9. My calculations in both reports noted above were based on the average earnings of Caucasian males with a high school degree or a bachelor's degree, adjusted for age. Jawad Jumaa's mother has a Bachelor of Science degree in nursing (BSN), and his father is a mechanic. Nationally representative data from the National Center for Education Statistics, Statistical Analysis Report, January 1995, titled "High School and Beyond: 1992 Descriptive Summary of 1980

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High School Sophomores 12 Years Later" indicates that if a parent has a Bachelor's degree, it is more likely than not, that the child would meet or exceed the Bachelor's degree, and even if a parent does not have a high school diploma, it is more likely than not that the child would obtain or exceed a high school level of educational attainment.

10. The data I used to support my calculations was compiled by the United States Census Bureau. Specifically, I used the PINC-04 data, which provides personal income data by age, total money earnings, work experience, race, and sex. See https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-04.html.

11. Jawad Jumaa was a student at the time of his death on January 16, 2017. Based on Table PINC-04, a Caucasian male with a high school degree has an average earning of $54,567. Further, a Caucasian male with a bachelor's degree has an earning average of $100,807.

12. In my report (**Exhibit C**), Chart I is a calculation of the loss in earnings capacity based on the average earnings of Caucasian males with a high school level of education. I have assumed 15% for fringe benefits. Earnings grow by 4% per year to the age of 67. There are no offsets in the calculations. The losses are $10,585,244.00.

13. The age of 67 was used as the age at which to stop the earnings capacity calculations, for individuals born in 1960 or later, age 67 is the first age at which they are able to collect full unreduced Social Security benefits.

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14. My methodology for making this calculation was to use data from Table PINC-04 for Caucasian men with either a high school or Bachelor's degree for the year 2019, grow this data by 4%/year to the age of 67 and account for 15% in fringe benefits. That is, for each year, the earnings data provided by Table PINC-04 for the year 2019 by age is multiplied by 1.15 to account for fringe benefits and by 1.04 for the year 2020 and 1.04 squared for the year 2021, and so on.

15. This methodology is generally accepted in the field of economics.

16. In making my calculations for future earnings, I used a 15% adjustment for fringe benefits to be added to earnings.

17. On average, the employer cost for health insurance and retirement benefits was approximately 15% of salary and wages all the way back in 2004. By 2018, while the number had trended upward to 20 percent. I used 15% for fringe benefits based on the data from the U.S. Department of Labor, Bureau of Labor Statistics, Employer Costs for Employee Compensation as a conservative estimate.

18. Customarily, it is generally accepted in making future earnings capacity calculations to include the value of fringe benefits, since the focus is on the total compensation of the individual. The very title of the data from the U.S. Department of Labor, Bureau of Labor Statistics, Employer Costs for Employee Compensation shows that the term compensation is widely used in economics to imply earnings and fringe benefits.

19. Similarly, in my report (**Exhibit C**), Chart II is a calculation of the loss in earnings capacity based on the average earnings of a Caucasian male with a

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bachelor's degree. I have assumed 15% for fringe benefits. I have also assumed that earnings grow by 4% per year to the age of 67. There are no offsets in the calculations. The losses are $19,200,806.00.

20. Hence, the primary element of my opinions is that 4% is a reasonable rate for future wage growth for Jawad. If you look at the educational attainment for Jawad, U.S. Census Bureau data from 1975 – 2017 indicate that on average earnings for Caucasian men with a high school level of education grew by 3.54% every year, and earnings for Caucasian men with a Bachelor's degree, grew at4% every year. Data from the social security trustees report for long term wage growth also support my use of the 4% growth rate. My general methodology was to look at economy-wide wage growth, both historically and prospectively, and then also consider how an individual's own circumstances might suggest a lower, higher, or approximately average rate of wage growth.

21. In arriving at the figure of 4% for wage growth, I have relied upon my own education, training, and experience as an economist. In my opinion, a 4% growth rate is consistent with past trends and future expectations for economy-wide wage growth.

22. My methodology for assuming and using a growth rate is generally accepted in the field of economics

23. Jawad lived at home at the time of his death. While at home he provided household services as a member of the household. My valuation of Jawad's productive ability within the home is based on the free-market value to have an individual come into the home and perform the same services. This is

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known as the replacement cost principle in Economics and is widely known and accepted.

24. In my report (**Exhibit C**), Chart H-I is a sample valuation of the replacement costs of household services (earnings capacity within the home).

25. The data I used to make my calculations comes from the U.S. Department of Labor, Bureau of Labor Statistics from the American Time Use Survey. The American Time Use Survey (ATUS) provides nationally representative estimates of how, where, and with whom Americans spend their time. Data collection began in 2003, and the first estimates were published in 2004. Annual surveys have since been conducted with fairly stable and consistent estimates being provided.

26. According to the American Time Use Survey (2016) the average male provides 2 hours of household services a day, when there are no children in the home. When a man turns 67, the hours of household services go up to 3. And when a man turns 75, the hours of household services drop to 2.5 until life expectancy.

27. In making my calculations, I assumed that Jawad provided household services at 2, 3 and 2.5 hours per day until the age of 67, 75, and life expectancy, just like the average man would according to the American Time Use Survey. Replacement costs are at $24.50 in 2020 and grow by 4% per year to an average life expectancy of 76.7 years of age. The losses amount to $4,856,699.

28. The data I used to support my calculations is reliable and specific to Jawad Jumaa. This methodology is generally accepted by economists in making

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these types of calculations, even outside the scope of litigation. [For example, the United Nations examines the valuation of unpaid household services to better measure total economic growth and living standards, while the Bureau of Economic Analysis which is an agency of the Department of Commerce values production by households].

FURTHER AFFIANT SAYETH NOT.

NITIN PARANJPE, PH.D.

This affidavit subscribed and sworn to
before me this 29th day of June, 2021

Myra Manalo
Oakland, Notary Public
Oakland County, Michigan
My commission expires: 10/14/27

MYRA MANALO
Notary Public, State of Michigan
County of Oakland
My Commission Expires 10-14-2027
Acting in the County of Oakland

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Exhibit A

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CURRICULUM VITAE

NITIN V. PARANJPE, Ph.D.

ADDRESS

Thomson Econometrics and Employment Research
2350 Franklin Road, Suite 200
Bloomfield Hills, Michigan 48302

Phone: (248) 292-0208
Fax: (248)292-0211

EDUCATION

1984 Ph.D. Wayne State University
1980 M.A. Eastern Michigan University
1978 M.A. Poona University (India)
1976 B.A. Poona University (India)

Ph.D. Dissertation: Impact of the Change in the Operating Structure of the Federal Reserve System on Interest Rates.

Ph.D. Fields: Money & Banking
Econometrics
Computer Science

B.A. Major: Economics
Minor: Applied Statistics

ACADEMIC HONORS

Mendelson Research Grant, WSU, Summer 1983.
Levin Award in Economics, WSU, 1983.
Economics Prize in 1973 and 1976, Poona University.
Graduate Fellowship, WSU, 1980-1981.

ACADEMIC EXPERIENCE

2015 – Present Part-Time Faculty
Department of Industrial Engineering
College of Engineering
Wayne State University

2012 – Present Sessional Instructor, Quantitative Studies
Master of Management Program
University of Windsor
Ontario, Canada

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1998-Present Lecturer, Quantitative Methods
Department of Economics & Decision Sciences
Oakland University

2000-2001 Lecturer, Quantitative Methods
Department of Decision Sciences
University of Detroit-Mercy

1993-2005 Lecturer
Dept. of Community Medicine, School of Medicine
Wayne State University

1990-1998 Associate Member of the Graduate Faculty
2001-Present Department of Finance and Business Economics
Wayne State University

1984-1997 Lecturer
Department of Economics
Wayne State University

1978 Lecturer
Department of Economics
Fergusson College, Poona University

PROFESSIONAL EXPERIENCE

1990-Present Partner, Thomson Econometrics and Employment Research II

Thomson Econometrics and Employment Research is a firm that provides economic and statistical research services to its clients. We also provide computer programming and data processing services. Research has been conducted relative to a broad range of economic and statistical issues, ranging from sophisticated analyses of employment policies and practices (generally regarding discrimination claims), to economic calculations and projections of past and future damages. Damage calculations have included earnings and fringe benefits losses, pension and structured settlement evaluations, lost sales and profits, business valuations, education valuations, medical expenses, losses due to physical injury and/or disability, and economic losses in a few other areas. We also provide interested parties with a framework which is useful for evaluating "non-economic" damages, such as pain and suffering, society and companionship, and hedonic damages.

1984-1990 Program Coordinator and Research Associate,
Michigan Health Care Education & Research Foundation.

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OTHER PROFESSIONAL ACTIVITIES

April, 1998 Faculty (Economics), Institute for Continuing Legal Education.

April, 2004 Faculty (Statistics), 29th Annual Labor and Employment Law Institute, sponsored by the Institute for Continuing Legal Education, the Michigan Law Schools, and The Michigan State Bar Association and the FMCS.

Sept. 2006 Referee, Journal of Legal Economics
American Academy of Economic and Financial Experts.

PROFESSIONAL MEMBER

The American Economic Association

REFEREED PUBLICATIONS

1. "Appropriateness of Psychiatric Hospitalization", Strumwasser et al., Medical Care, 1991.

2. "Reliability and Validity of Utilization Review Criteria: Appropriateness Evaluation Protocol, Standardized MedReview Instrument, and Intensity-Severity-Discharge Criteria", Strumwasser et al., Medical Care, 1990.

3. "The Triple Option Choice: Self-Selection Bias in Traditional Coverage, HMOs, and PPOs", Strumwasser et al., Inquiry, Winter 1989.

4. "Efficiency Gains in Utilization Review", Quality Assurance and Utilization Review, 1989.

5. "Focused Utilization Review Strategies", Strumwasser et al., Quality Review Bulletin, 1989.

6. "To Hospitalize or Not to Hospitalize: HMO versus Fee-For-Service", Strumwasser et al., Group Health Association of America, 1988.

NON-REFEREED PUBLICATIONS

1. "Determining Nonacute Hospital Stays", Strumwasser et al., Business and Health, 1987.

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Exhibit B

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A-I. A Preliminary Calculation of Loss in Earnings Capacity - High School

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2021	18.0	$43,450	$0	$43,450
2022	18.9	49,296	0	49,296
2023	19.9	51,268	0	51,268
2024	20.9	53,319	0	53,319
2025	21.9	55,452	0	55,452
2026	22.9	57,670	0	57,670
2027	23.9	59,976	0	59,976
2028	24.9	71,770	0	71,770
2029	25.9	75,529	0	75,529
2030	26.9	78,550	0	78,550
2031	27.9	81,692	0	81,692
2032	28.9	84,960	0	84,960
2033	29.9	100,557	0	100,557
2034	30.9	105,732	0	105,732
2035	31.9	109,961	0	109,961
2036	32.9	114,360	0	114,360
2037	33.9	118,934	0	118,934
2038	34.9	145,350	0	145,350
2039	35.9	153,211	0	153,211
2040	36.9	159,340	0	159,340
2041	37.9	165,714	0	165,714
2042	38.9	172,342	0	172,342
2043	39.9	184,418	0	184,418
2044	40.9	192,284	0	192,284
2045	41.9	199,976	0	199,976
2046	42.9	207,975	0	207,975
2047	43.9	216,294	0	216,294
2048	44.9	222,691	0	222,691
2049	45.9	231,385	0	231,385
2050	46.9	240,641	0	240,641
2051	47.9	250,266	0	250,266
2052	48.9	260,277	0	260,277
2053	49.9	269,100	0	269,100
2054	50.9	279,714	0	279,714
2055	51.9	290,903	0	290,903
2056	52.9	302,539	0	302,539

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A-I. A Preliminary Calculation of Loss in Earnings Capacity - High School

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2057	53.9	314,641	0	314,641
2058	54.9	381,309	0	381,309
2059	55.9	401,675	0	401,675
2060	56.9	417,742	0	417,742
2061	57.9	434,451	0	434,451
2062	58.9	451,829	0	451,829
2063	59.9	429,577	0	429,577
2064	60.9	442,948	0	442,948
2065	61.9	460,666	0	460,666
2066	62.9	479,092	0	479,092
2067	63.9	498,256	0	498,256
2068	64.9	493,200	0	493,200
2069	65.9	510,565	0	510,565
2070	67.0	44,249	0	44,249
	Future:	$11,217,096	$0	$11,217,096
Date of Birth:				[redacted]
Gender:				Male
Race:				Caucasian
Date of death:				January 16, 2017
Earnings are average earnings of caucasian males with a high school degree, adjusted for age.				
Source: PINC-04. Educational Attainment- People 18 Years Old and Over, by Total Money Earnings in 2017, Race, Hispanic Origin, and Sex.				
U.S. Census Bureau, CPS, 2018 Annual Social and Economic Supplement.				
Future growth at:				4.00%
Fringe benefits at:				15.00%
Future losses calculated from:		age 18	to	age 67

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A. A Preliminary Calculation of Loss in Earnings Capacity - Bachelor's

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2026	23.0	$79,432	$0	$79,432
2027	23.9	90,119	0	90,119
2028	24.9	118,736	0	118,736
2029	25.9	125,851	0	125,851
2030	26.9	130,885	0	130,885
2031	27.9	136,120	0	136,120
2032	28.9	141,565	0	141,565
2033	29.9	171,857	0	171,857
2034	30.9	181,059	0	181,059
2035	31.9	188,302	0	188,302
2036	32.9	195,834	0	195,834
2037	33.9	203,667	0	203,667
2038	34.9	228,939	0	228,939
2039	35.9	239,716	0	239,716
2040	36.9	249,304	0	249,304
2041	37.9	259,277	0	259,277
2042	38.9	269,648	0	269,648
2043	39.9	324,531	0	324,531
2044	40.9	341,681	0	341,681
2045	41.9	355,348	0	355,348
2046	42.9	369,562	0	369,562
2047	43.9	384,345	0	384,345
2048	44.9	404,078	0	404,078
2049	45.9	420,653	0	420,653
2050	46.9	437,479	0	437,479
2051	47.9	454,978	0	454,978
2052	48.9	473,178	0	473,178
2053	49.9	510,963	0	510,963
2054	50.9	533,184	0	533,184
2055	51.9	554,511	0	554,511
2056	52.9	576,692	0	576,692
2057	53.9	599,760	0	599,760
2058	54.9	621,239	0	621,239
2059	55.9	645,851	0	645,851
2060	56.9	671,686	0	671,686
2061	57.9	698,553	0	698,553

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A. A Preliminary Calculation of Loss in Earnings Capacity - Bachelor's

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2062	58.9	726,495	0	726,495
2063	59.9	743,913	0	743,913
2064	60.9	772,568	0	772,568
2065	61.9	803,471	0	803,471
2066	62.9	835,610	0	835,610
2067	63.9	869,034	0	869,034
2068	64.9	907,839	0	907,839
2069	65.9	944,535	0	944,535
2070	67.0	81,860	0	81,860
	Future:	$19,073,907	$0	$19,073,907
Date of Birth:				[redacted]
Gender:				Male
Race:				Caucasian
Date of death:				January 16, 2017
Earnings are average earnings of caucasian males with a Bachelor's degree, adjusted for age.				
Source: PINC-04. Educational Attainment- People 18 Years Old and Over, by Total Money Earnings in 2017, Race, Hispanic Origin, and Sex.				
U.S. Census Bureau, CPS, 2018 Annual Social and Economic Supplement.				
Future growth at:				4.00%
Fringe benefits at:				15.00%
Future losses calculated from:		age 23	to	age 67

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Exhibit C

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I. A Preliminary Calculation of Loss in Earnings Capacity - High School

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2021	18.0	$41,115	$0	$41,115
2022	18.9	46,647	0	46,647
2023	19.9	48,513	0	48,513
2024	20.9	50,453	0	50,453
2025	21.9	52,472	0	52,472
2026	22.9	54,570	0	54,570
2027	23.9	56,753	0	56,753
2028	24.9	68,011	0	68,011
2029	25.9	71,581	0	71,581
2030	26.9	74,444	0	74,444
2031	27.9	77,422	0	77,422
2032	28.9	80,519	0	80,519
2033	29.9	98,875	0	98,875
2034	30.9	104,260	0	104,260
2035	31.9	108,431	0	108,431
2036	32.9	112,768	0	112,768
2037	33.9	117,279	0	117,279
2038	34.9	134,105	0	134,105
2039	35.9	140,617	0	140,617
2040	36.9	146,242	0	146,242
2041	37.9	152,091	0	152,091
2042	38.9	158,175	0	158,175
2043	39.9	169,598	0	169,598
2044	40.9	176,864	0	176,864
2045	41.9	183,939	0	183,939
2046	42.9	191,296	0	191,296
2047	43.9	198,948	0	198,948
2048	44.9	210,959	0	210,959
2049	45.9	219,781	0	219,781
2050	46.9	228,572	0	228,572
2051	47.9	237,715	0	237,715
2052	48.9	247,224	0	247,224
2053	49.9	258,085	0	258,085
2054	50.9	268,500	0	268,500
2055	51.9	279,240	0	279,240
2056	52.9	290,410	0	290,410

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I. A Preliminary Calculation of Loss In Earnings Capacity - High School

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2057	53.9	302,026	0	302,026
2058	54.9	339,437	0	339,437
2059	55.9	355,409	0	355,409
2060	56.9	369,625	0	369,625
2061	57.9	384,410	0	384,410
2062	58.9	399,787	0	399,787
2063	59.9	403,978	0	403,978
2064	60.9	419,022	0	419,022
2065	61.9	435,783	0	435,783
2066	62.9	453,214	0	453,214
2067	63.9	471,342	0	471,342
2068	64.9	512,837	0	512,837
2069	65.9	535,491	0	535,491
2070	67.0	46,409	0	46,409
Future:		$10,585,244	$0	$10,585,244
Date of Birth:				[redacted]
Race:				Caucasian
Gender:				Male
Date of death:				January 16, 2017
Earnings are based on average earnings of caucasian men with a high school degree, adjusted for age.				
Source: PINC-04. Educational Attainment-People 18 Years Old and Over, by Total Money Earnings in 2019, Race, Hispanic Origin, and Sex. U.S. Census Bureau, CPS, 2020 Annual Social and Economic Supplement.				
Fringe benefits at:				15.0%
Future growth of:				4%
Future losses calculated from:		age 18	to	age 67
Years after 2020 discounted for present value via MCL 600.6306(2).				

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II. A Preliminary Calculation of Loss in Earnings Capacity - Bachelor's

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2026	23.0	$77,126	$0	$77,126
2027	23.9	87,503	0	87,503
2028	24.9	115,460	0	115,460
2029	25.9	122,391	0	122,391
2030	26.9	127,286	0	127,286
2031	27.9	132,378	0	132,378
2032	28.9	137,673	0	137,673
2033	29.9	163,609	0	163,609
2034	30.9	172,084	0	172,084
2035	31.9	178,968	0	178,968
2036	32.9	186,126	0	186,126
2037	33.9	193,572	0	193,572
2038	34.9	237,123	0	237,123
2039	35.9	249,994	0	249,994
2040	36.9	259,993	0	259,993
2041	37.9	270,393	0	270,393
2042	38.9	281,209	0	281,209
2043	39.9	316,020	0	316,020
2044	40.9	330,888	0	330,888
2045	41.9	344,124	0	344,124
2046	42.9	357,889	0	357,889
2047	43.9	372,204	0	372,204
2048	44.9	391,725	0	391,725
2049	45.9	407,832	0	407,832
2050	46.9	424,145	0	424,145
2051	47.9	441,111	0	441,111
2052	48.9	458,755	0	458,755
2053	49.9	521,832	0	521,832
2054	50.9	546,934	0	546,934
2055	51.9	568,811	0	568,811
2056	52.9	591,563	0	591,563
2057	53.9	615,226	0	615,226
2058	54.9	695,337	0	695,337
2059	55.9	728,397	0	728,397
2060	56.9	757,533	0	757,533
2061	57.9	787,835	0	787,835

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II. A Preliminary Calculation of Loss in Earnings Capacity - Bachelor's

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Projected	Actual	Loss
Year	Age	Compensation	Compensation	Compensation
2062	58.9	819,348	0	819,348
2063	59.9	737,869	0	737,869
2064	60.9	756,582	0	756,582
2065	61.9	786,845	0	786,845
2066	62.9	818,319	0	818,319
2067	63.9	851,052	0	851,052
2068	64.9	837,789	0	837,789
2069	65.9	866,828	0	866,828
2070	67.0	75,125	0	75,125
Future:		$19,200,806	$0	**$19,200,806**
Date of Birth:				[redacted]
Race:				Caucasian
Gender:				Male
Date of death:				January 16, 2017
Earnings are based on average earnings of caucasian men with a bachelor's degree, adjusted for age.				
Source: PINC-04. Educational Attainment-People 18 Years Old and Over, by Total Money Earnings in 2019, Race, Hispanic Origin, and Sex. U.S. Census Bureau, CPS, 2020 Annual Social and Economic Supplement.				
Fringe benefits at:				15.0%
Future growth of:				4%
Future losses calculated from:		age 18	to	age 67

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H-I. A Preliminary Calculation of Loss in Household Services - Average Hours/day

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Hours/	No. of	Projected
Year	Age	Day	Days	Household Services
2021	18.0	2.0	344	$17,530
2022	18.9	2.0	365	19,344
2023	19.9	2.0	365	20,118
2024	20.9	2.0	366	20,980
2025	21.9	2.0	365	21,760
2026	22.9	2.0	365	22,630
2027	23.9	2.0	365	23,535
2028	24.9	2.0	366	24,544
2029	25.9	2.0	365	25,456
2030	26.9	2.0	365	26,474
2031	27.9	2.0	365	27,533
2032	28.9	2.0	366	28,713
2033	29.9	2.0	365	29,780
2034	30.9	2.0	365	30,971
2035	31.9	2.0	365	32,210
2036	32.9	2.0	366	33,590
2037	33.9	2.0	365	34,838
2038	34.9	2.0	365	36,232
2039	35.9	2.0	365	37,681
2040	36.9	2.0	366	39,296
2041	37.9	2.0	365	40,756
2042	38.9	2.0	365	42,386
2043	39.9	2.0	365	44,081
2044	40.9	2.0	366	45,970
2045	41.9	2.0	365	47,678
2046	42.9	2.0	365	49,586
2047	43.9	2.0	365	51,569
2048	44.9	2.0	366	53,779
2049	45.9	2.0	365	55,777
2050	46.9	2.0	365	58,008
2051	47.9	2.0	365	60,328
2052	48.9	2.0	366	62,914
2053	49.9	2.0	365	65,251
2054	50.9	2.0	365	67,861
2055	51.9	2.0	365	70,576
2056	52.9	2.0	366	73,600
2057	53.9	2.0	365	76,335
2058	54.9	2.0	365	79,388

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H-I. A Preliminary Calculation of Loss in Household Services - Average Hours/day

RE: Jawad Jomaa

By: Nitin V. Paranjpe, Ph.D.

(1)	(2)	(3)	(4)	(5)
		Hours/	No. of	Projected
Year	Age	Day	Days	Household Services
2059	55.9	2.0	365	82,564
2060	56.9	2.0	366	86,102
2061	57.9	2.0	365	89,301
2062	58.9	2.0	365	92,873
2063	59.9	2.0	365	96,588
2064	60.9	2.0	366	100,727
2065	61.9	2.0	365	104,469
2066	62.9	2.0	365	108,648
2067	63.9	2.0	365	112,994
2068	64.9	2.0	366	117,836
2069	65.9	2.0	365	122,214
2070	66.9	2.9	365	186,824
2071	67.9	3.0	365	198,281
2072	68.9	3.0	366	206,777
2073	69.9	3.0	365	214,460
2074	70.9	3.0	365	223,039
2075	71.9	3.0	365	231,960
2076	72.9	3.0	366	241,900
2077	73.9	3.0	365	250,888
2078	74.9	2.5	365	220,058
2079	76.7	2.5	273	169,136
Future:				**$4,856,699**
Date of Birth:				[redacted]
Race:				Caucasian
Gender:				Male
Date of death:				January 16, 2017
Household services at hours/day of 2, 3, and 2.5 until age 67, 75, and life expectancy.				
Replacement costs of household services in 2020 at hourly rate of:				$24.50
Future growth of:				4%
Future losses calculated from:		age 18	to	life expectancy
Source: Arias E, Xu JQ. United States life tables, 2017. National Vital Statistics Reports; vol 68 no 7.				76.70
Hyattsville, MD: National Center for Health Statistics. 2019.				

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APPENDIX 5

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

v

Case No. 20-004169-NH
Hon. Martha M. Snow

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.

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNEY & HARRINGTON
Attorneys for Plaintiffs
19390 West Ten Mile Rd.
Southfield, MI 48075
248-355-5555/5148 fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300/6310 fax

DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF FUTURE ECONOMIC DAMAGES

NOW COME defendants, 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., by and through their attorneys, CORBET, SHAW, ESSAD & BONASSO, P.L.L.C., and bring this Motion for Summary Disposition of Future Economic Damages pursuant to MCR 2.116(C)(8) and/or (10) seeking dismissal of plaintiff's claims for future economic damages for the reasons stated in the attached brief.

1. This is a case where medical malpractice is alleged. (Exhibit A – Complaint)

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2. 13 year-old plaintiff decedent died from bacterial meningitis on January 16, 2017.
3. The plaintiff estate is claiming that defendants should have prevented the decedent's death.
4. Plaintiff estate is claiming lost future earnings/capacity (¶65 of Complaint). [Plaintiff has not specified any other future economic damages. Defendants preserve an objection, if plaintiff seeks additional future economic damages.]
5. At the time of his death, the decedent was a 13 year-old boy who was in middle school and was not working and was not financially supporting anyone.
6. 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).

WHEREFORE, defendants respectfully request that claimed future economic damages be dismissed.

Respectfully submitted,

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

/s/ DANIEL R. CORBET

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
Attorneys for Defendants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DATED: April 30, 2021

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BRIEF IN SUPPORT

I. Introduction

The plaintiff estate is claiming millions of dollars ($11,000,000 to $19,000,000) in lost future earnings/capacity in this case involving the death of a 13 year-old. There is no dispute in this case that the decedent was a 13 year-old minor child in middle school and was not working and was not financially supporting anyone. The estate's claim for the decedent's future wages should fail as a matter of law.

(Exhibit B - Report; Exhibit C - Testimony)

II. Legal Argument

A. The Wrongful Death Act does not permit recovery of future wages of a child who was not supporting anyone.

Lost future earnings/capacity are not recoverable in wrongful death actions where the decedent is a minor who was not working and not supporting anyone. In Michigan, "remote, speculative and contingent," are not allowed in Michigan. *Sutter v Biggs*, 377 Mich 80 (1966).

Attached are two opinions/orders from Michigan circuit court judges dismissing claimed future economic damages in two cases, one involving the death of a 15 year old and the other involving the death of a 4 month old.

1.) *Landrum v. Children's Hospital* – 15 years old – future economic damages dismissed:

(Exhibit B – Opinion/Order, Judge Hubbard, 9/12/2018)

> The Michigan Supreme Court has held that *economic* damages include "damages incurred due to the loss of the ability to work and earn money." *Hanney v Department of Transportation*, 497 Mich 45, 67(2014). In the instant case, as previously stated, the decedent did not work or provide financial support. Because plaintiff cannot demonstrate loss of financial support and because plaintiff's decedent was not earning a wage, plaintiff's future wage claim is contrary to the language of the Wrongful Death Act MCL 600.2922 (6).

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2.) *Pan v. University of Michigan* – 4 months old – future economic damages dismissed: (Exhibit C – Order, Judge Timothy Connors, 8/6/2019)

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO PLAINTIFF'S CLAIMS OF LOSS OF EARNING CAPACITY AND HOUSEHOLD SERVICES

At a session of said Court held in the
City Of Ann Arbor, County of Washtenaw,
State of Michigan, on: 8-6-19

PRESENT: Hon. Timothy P. Connors
CIRCUIT COURT JUDGE

This matter having come before the Court by way of written motion of Defendants, oral argument having been heard and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Defendants' Motion for Partial Summary Disposition be GRANTED for the reasons stated on the record.

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 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 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.

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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, which include (1) compensation to the Estate for its expenses, (2) compensation for the decedent's conscious pain and suffering until his death, and (3) compensation to the beneficiaries for their losses:

> 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 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 deceased. MCL 600.2922(6)

1. The Act does not provide for distribution of lost future wages when the decedent was not financially supporting a family member or other beneficiary.

The Act's distribution provisions in MCL 600.2922(6)(d) confirm the limited scope of awardable damages. It directs that, after courts provide payment of medical and funeral expenses, they must distribute the proceeds to the people who actually "suffered damages" and to the estate for pain and suffering of the decedent:

> …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)(d)

The statute provides for distributing three categories of damages:

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- Damages recovered for medical and funeral expenses related to the death go to pay those expenses;
- Damages recovered to compensate people (family) "who suffered damages" are divided among the family for the "damages sustained by each of the persons;" and
- Damages for the deceased's pain and suffering go to the estate.

An award of damages requires that the person receiving the award to have actually suffered damages. There is no provision for distributing damages when the family member/person suffered no damage.

2. Though non-exhaustive, the list of damages in the Wrongful Death Act guide the type of damages that are available in a wrongful death action.

The list of available damages under the Wrongful Death Act is non-exhaustive. *Thorn v Mercy Mem Hospital Corp*, 281 Mich App 644, 650-651 (2008) ("[T]he term 'including' should be construed as merely providing specific examples of the types of damages available, and not an exhaustive list."). So, estates may recover additional items. But those additional items must be consistent with the identified categories. *Hudson v Hudson*, 314 Mich App 28, 34-35 (2016). (When a statue 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.")

For example, an estate can recover the economic value of household services that a mother was providing to her minor children. *Thorn*, 281 Mich App 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. Damages recoverable under the Act have never reached beyond compensating for lost financial support or

other things of value that the family members or beneficiaries were receiving from the decedent before his death.

3. *Denney* does not apply here.

The Plaintiff estate will likely rely on a recent case involving a wrongful death claim under the highway defect exception to governmental immunity. *Denney v Kent Co Rd Comm*, 317 Mich App 727 (2016). Unlike this case, *Denney* involved a married adult, 42 years old, who was a parent, and who was earning wages before he died. Both the facts and law in *Denney* are different from this case.

Denney does not change the legal landscape of recoverable damages in wrongful death cases. It did not overrule a century of Supreme Court case law holding that wrongful death damages are limited to compensating family members and beneficiaries who suffered damages. Simply put, when the decedent was not financially supporting anyone, his or her future wage loss damages do not compensate anyone; they would constitute an impermissible windfall, which the law doesn't allow. Michigan does not allow "remote, speculative and contingent" damages. *Sutter v Biggs*, 377 Mich 80 (1966).

WHEREFORE, defendants respectfully request that claimed future economic damages be dismissed.

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Respectfully submitted,

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

/s/ DANIEL R. CORBET

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
Attorneys for Defendants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DATED: April 30, 2021

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APPENDIX 6

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiff,

vs.

Case No. 20-004169-NH
Hon. Martha M. Snow

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

Defendants.

_____/

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
Fieger, Fieger, Kenney & Harrington, PC
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555/fax (248) 355-5148
m.berlin@fiegerlaw.com

DANIEL R. CORBET (P37306)
KENNETH A WILLIS (P55045)
Corbet Shaw Essad & Bonasso, PLLC
Attorneys for Defendants
30500 Van Dyke Ave., Ste. 500
Warren, MI 48093
(313)964-6300/fax (313)964-6310

_____/

PLAINTIFFS' RESPONSE OPPOSING DEFENDANT' MOTION FOR SUMMARY DISPOSITION OF FUTURE ECONOMIC DAMAGES

NOW COMES Plaintiff, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives of the Estate of JAWAD JUMAA a/k/a JAWAD JOMAA, Deceased, by and through their attorneys FIEGER, FIEGER, KENNEY, & HARRINGTON, P.C., and for their *Response Opposing Defendants' Motion for Summary Disposition of Future Economic Damages*, respectfully state as follows:

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1. Plaintiffs admit that their Complaint alleges that Defendants' medical malpractice caused the untimely death of their 13-year-old daughter, Jawad.

2. Admitted that Jawad died on January 16, 2017.

3. Admitted that Plaintiffs seek to recover all damages allowable under the Michigan Wrongful Death Act, which includes damages for the lost future earnings that Jawad could have earned but for him untimely death caused by Defendants' negligence.

4. Denied in the manner alleged. Plaintiffs' Complaint seeks recovery of all damages allowable under the Wrongful Death Act. These damages include damages for lost future earnings/capacity.

5. Plaintiff does not contest that Jawad, a 13-year-old, was not working at the time he died. (Child labor laws, and common decency, preclude forcing a child to work.) Defendants do not get a "free pass" simply because their negligence caused the death of a child as opposed to an adult.

6. Denied. The future economic damages that Plaintiffs seek to recover are allowable under the Wrongful Death Act, and the damages are supported by the expert analysis provided by Dr. Nitin Paranjpe, an economist and statistician. (Exhibit 1, Affidavit of Dr. Nitin Paranjpe and Supporting Calculations) The damages are not remote or speculative, but rather calculations based on reliable methodology using data published by the US Labor Department and US Census Bureau. The methodology that Dr. Paranjpe utilized to reach his conclusions in this case is sound because it relies on reliable data, and is dependably applied to the facts of this case. Plaintiff is entitled to present evidence for the lost earnings capacity damages to a jury. See *Thorn v Mercy*

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Memorial Hospital Corp, 281 Mich App 644, 660; 761 NW2d 414 (2008); accord *Denney v Kent County Road Commission*, 317 Mich App 727, 731; 896 NW2d 808 (2016), app. denied, 500 Mich 997, 894 NW2d 608 (2017).

WHEREFORE Plaintiffs, NAWAL DAHER and MOHAMAD JOMAA, as Co-Personal Representatives of the Estate of JAWAD JUMAA a/k/a JAWAD JOMAA, Deceased, respectfully requests that this Honorable Court DENY Defendants' Motion for Summary Disposition.

Respectfully submitted,

/s/ Marc S. Berlin
GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
Fieger, Fieger, Kenney & Harrington, P.C.
Attorneys for Plaintiffs

Dated: June 30, 2021

BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE OPPOSING DEFENDANT' MOTION FOR SUMMARY DISPOSITION OF FUTURE ECONOMIC DAMAGES

This medical malpractice action arises out of the untimely and preventable death of Jawad Jumaa, a 13-year-old child, as a result of Defendants' negligence. Defendants seek summary dismissal of Plaintiffs' economic damages claim for Jawad's future lost earnings. Defendants' argument ignores binding precedent, *Denney v Kent County Road Commission*, 317 Mich App 727, 731; 896 NW2d 808 (2016), app. denied, 500 Mich 997, 894 NW2d 608 (2017). Under *Denney*, Jawad's Estate is allowed to recover damages for him lost earnings. Defendants' motion must be denied.

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STANDARD OF REVIEW

Defendants' motion seeks summary disposition based on MCR 2.116(C)(8) and (10). MCR 2.116(C)(8) challenges the legal sufficiency of the plaintiff's complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), citing *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Such a motion may only be granted were the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade*, 439 Mich at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

When reviewing a motion under (C)(10), the 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. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "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'l Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine the facts. *Hines v Volkswagen of America, 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). *Hines, supra.*

Joint Appendix 066

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LEGAL ARGUMENT

I. The Estate seeks damages for the loss of Jawad's earning capacity. Published case law interpreting the most recent version of the Wrongful Death Act permits the recovery of such damages. Based on applicable law and the evidence presented, Defendants' motion should be denied.

Defendant asks this Court to ignore binding and on-point precedent and hold that future economic damages for lost earnings capacity are not allowed in Michigan. This request should be rejected outright.

i. The Wrongful Death Act (WDA) and Michigan Case Law interpreting the WDA Allows Plaintiff to Receive any Damages that a Decedent had against his Tortfeasor had he Survived.

The Wrongful Death Act (WDA) provides that a plaintiff may stand in the shoes of his or her 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 decedents who were children at the time of their death. Defendants would have this Court believe there are two separate interpretations of the WDA—one for individuals who are working adults, and one for those who died as children. No such qualifier exists in the Act.

Michigan law has long allowed an Estate to stand in the shoes of his or her decedent when claiming damages. *See*, e.g., *Jorgenson v Grand Rapids & I R Co*, 189 Mich 537, 541; 155 NW 535 (1915). When the Wrongful Death Act (WDA) was subsequently enacted, the Legislature enumerated a non-exhaustive list of those damages which a

Joint Appendix 067

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decedent's Estate could claim as damages. The most recent version of the WDA, MCL 600.2922, provides in pertinent 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 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 added]

"All actions and claims survive death." MCL 600.6921. Michigan's Wrongful Death Act, MCL 600.2922, is an "integrated" act that combines the two remedies of "survival" and "wrongful death" claims. Before passage of the WDA, the "survival" and "wrongful death" actions were separate acts. The WDA combined them, creating a single integrated act, and all claims for wrongful death are brought under it. There are two classes of potential claims within each WDA claim: 1) Those suffered by the Deceased, who is represented through the Personal Representative standing in their 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.

Courts have consistently ruled that the WDA neither limits nor precludes the type of damages recoverable in a death case, as Defendants now assert. *See, e.g., Thorn v Mercy*

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Mem'l Hosp Corp, 281 Mich App 644, 660; 761 NW2d 414 (2008). In *Thorn*, a panel of this Court held that the Legislature intended an expansive view of the WDA in response to a challenge similar to that 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, supra*, at 659-660, with emphasis added.

Thorn held that the term "including" in section 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 'consider[ed] fair and equitable, under all the circumstances' while simultaneously limiting a plaintiff's recovery only to those items specified in the list following the term including.'" *Id.* The court found that "such an interpretation conflicts with rules of statutory interpretation." *Id.*

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As well, in *Thorn*, the Court of Appeals addressed many prior cases which suggested a narrow interpretation of Section 2922(6). The Court found such citations unavailing. Instead, the 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 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." *Id* at 660.

Similarly, the Supreme Court affirmed in *Wesche v Mecosta County Rd Comm* that: "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 damage available." 480 Mich 75, 89; 746 NW2d 847 (2008), quoting *Jenkins v Patel*, 471 Mich 158, 165-166; 684 NW2d 346 (2004), quoting *Hawkins v Regional Med Laboratories PC*, 415 Mich 420, 436; 329 NW2d 729 (1982).[1]

These principles were further discussed by the Supreme Court in *Estate of Shinholster v Annapolis Hosp*, 471 Mich 540, 564-565 (2004); 685 NW2d 275:

> ... 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

[1] Defendants misinterpret an aside from *Wesche* to mean that a child cannot recover lost earnings capacity damages. The holding that Defendants cite (that the plaintiff was allowed to recover economic damages for what the decedent "would" have earned, instead of "could" have earned) is actually in reference to the category of damages allowable under the No-Fault Act. Those economic damages are narrower than the scope of economic damages allowable for medical malpractice cases.

Joint Appendix 070

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> policy decision that the survivors of dead medical malpractice victims are entitled to lesser damages than are living medical malpractice victims … we see no indication in the statute that the Legislature, in fact, made such a decision; rather, we believe that the Legislature made a quite contrary policy decision in §2922(1),(2), and (6) by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived. [Emphasis in original].

ii The Court of Appeals decision in* Denney *Affirms that the Estate can recover Damages for Loss of Earning Capacity and Defendants' Improper Challenges to Denney should be rejected.

Building upon this line of cases, in 2016, the Court of Appeals issued its published decision in *Denney v Kent County Road Commission*, 317 Mich App 727; 896 NW2d 808 (2016) lv denied 500 Mich 997 (2017). That case involved the wrongful death of a man in a motorcycle accident. In *Denney*, the plaintiff sought to recover the decedent's lost future earnings. Although the underlying case involved the Government Tort Liability Act (GTLA), the Court provided extensive analysis of the WDA:

> 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." Under the wrongful-death statute "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." Relevant to this case, our Supreme Court has stated that economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." However, "[b]ecause an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, any statutory or common-law limitations on the underlying claim apply to a wrongful-death action."
>
> As previously stated, the damages available under the wrongful-death statute, MCL 600.2922(6), include "any type of damages, economic and noneconomic, deemed justified by the facts of the particular case." **And economic damages include "damages incurred due to the loss of the ability to work and earn money . . . ." Therefore, damages for lost earnings are allowed under the wrongful-death statute.** *Denney* at 731-732, with emphasis added and internal citations omitted.

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The *Denney* Court further noted, citing Supreme Court precedent, that:

> **"As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries." "'[T]he cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued . . . .'"**

Id at 734, with internal citations omitted and emphasis added.

Denney is consistent with Supreme Court precedent that, "permit[ting] a decedent's Estate to recover everything that the decedent would have been able to recover had she lived," *Shinholster, supra,* at 565. This is consistent with Michigan's long-standing legal doctrine, "effecting a continuance of the right of action that had vested in the decedent, with such damages as he could have recovered, including the present worth of his probable future earning had he lived." *Jorgenson*, 189 Mich at 541.

The Hon. David Lawson issued an opinion in *White v FCA US, LLC*, 350 F Supp.3d 640 (ED Mich, Nov 19, 2018) that also considered whether an Estate can recover for loss of earning capacity. (Exhibit 2, *White* Opinion) *White* involved the Estates of a mother ***and her unborn child***. Judge Lawson concluded that, under *Denney*, *Thorn*, and *Shinholster*, the **Estate of the unborn child was entitled to recover damages for loss of earning capacity**.

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. The same analysis is equally applicable to this matter.

Recently, the Court of Appeals, in *Estate of Langell by Touma v McLaren Port Huron*, unpublished opinion of the Court of Appeals, issued July, 30, 2020 (Docket No. 347274), affirmed that *Denney* allows for the loss of wages and future earnings capacity in medical malpractice cases. (Exhibit 3) Defendants' argument to the contrary is wrong and must be rejected.

iii. Application of Thorn, Shinholster, Denney, and White to this case allows for Plaintiff's claim of decedent's loss of earning capacity to be heard by a jury.

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The conclusion reached in *Thorn*, *Shinholster*, *Denney* and *White*, *supra*, allowing an Estate to recover all damages that could have been recovered by the decedent had he lived, is equally applicable to this case. Under the statute and this line of binding precedent, Jawad's Estate may stand in his shoes for purposes of recovering all damages that he could have recovered had he lived. *See* MCL 600.6301(a) (future damages by definition include loss of earnings and loss of earning capacity), and MCL 600.6303(1) (discussing plaintiff's right to seek recovery for lost wages and loss of earning capacity). *See* also MCL 600.6305:

> (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.
> (ii) **Lost wages or earnings or lost earning 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**. [emphasis added]

Through the interplay of MCL 600.2921 and MCL 600.2922, and the case law interpreting these provisions, the Legislature has preserved Jawad's loss of earning capacity claim for the time he would have lived, despite his resulting death. Nothing in the statute requires Jawad to have been an adult for her Estate to make such a recovery.

It is important to note the absurd position taken by Defendants' argument. A tortfeasor whose negligence gravely injures (but does not kill) a plaintiff would be held

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liable for far more in damages than one that succeeded in killing them, even though the injury resulted from precisely the same wrongful behavior. *See Thorn* at 660 (noting 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"). This is wholly inconsistent with the statute. The Survival Act and WDA are part of the Revised Judicature Act (RJA), which by its own terms is required to be *construed liberally*. MCL 600.101 *et seq.* This act is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof. MCL 600.102. *Wood v Detroit Edison Co*, 409 Mich 279, 295; 294 NW2d 571 (1980) ("the wrongful death act is part of the Revised Judicature Act. The Legislature has provided that the RJA is remedial in character and should be liberally construed.").

iv. **Denney** ***is a decision founded in the WDA and Michigan law. The enumeration of "Loss of Support" damages in the WDA does not preclude "loss of earning capacity" damages from being presented to a jury.***

Defendants also contend that future earnings are not available to Jawad's Estate because loss of support would have been available to his Estate *if* he were supporting someone at the time of his death. As previously discussed, there can be no dispute that, had Jawad survived, he would have been able to pursue a claim to recover loss of earning capacity as a result injury he suffered due to Defendants' negligence. MCL 600.6303(1). Defendants argue that because he died, his Estate can no longer make a claim for damages suffered by Jawad arising out of his inability to earn an income and support

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himself. This assertion simply has no foundation in Michigan law, and is contrary to the statutes and published authority discussed above.

Furthermore, the *Denney* Court went to great pains to discuss how *loss of future earnings* is an alternate and separate theory of damages from *loss of support*:

> ...a claim for lost financial support under the wrongful-death statute is not the same as a claim for lost earnings. Specifically, lost earnings are damages that decedent could have sought on his own behalf had he lived, whereas damages for lost financial support would be sought by one who depended on the decedent for financial support. Because the damages are distinct, the fact that the wrongful-death statute allows for recovery of lost financial support does not change the character of plaintiff's claim for damages for the decedent's lost earnings. *Denney* at 737.

If the Legislature wished to limit what was collectable under alternative theories, it presumably could and would have done so. Instead, the Legislature chose to use inclusive, but not exclusive statutory language. MCL 600.2922(6). *See* also *Denney, supra,* and *Thorn, supra.*

As discussed above, there is no meaningful dispute that, had Jawad survived, he would have been able to pursue a claim to recover damages for loss of income and earning capacity as a result of his brain injury. That is because MCL 600.6303(1) provides in part:

> In a personal injury action in which the plaintiff seeks to recover for the expense of medical care, rehabilitation services, loss of earnings, **loss of earning capacity**, or other economic loss...

v. Plaintiff's claims for loss of earning capacity are not speculative or contrary to the WDA.

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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, require 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 benefitting 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 is well established that an 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. In *May*, the Court considered the future loss of earning capacity for an infant who was injured at birth. The Court categorically held that such damages are allowed and affirmed a jury verdict awarding

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the infant loss future earnings capacity for $30,784 per year. (Notably, *May* was decided in 1989, over 32 years ago.)

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 the injury. The prevailing American rule holds that, "a tort victim suing for damages for permanent injuries is permitted to base his recovery '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 Gaudet*, 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.

In support of the loss of earning capacity claim, Plaintiff submitted as evidence the economic loss projections for Jawad, assuming that that he completed high school or some college. (Exhibit 1, Affidavit and Calculations of Dr. Paranjpe) Those calculations

Joint Appendix 078

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were performed by Nitin Paranjpe, PhD.[2] 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 in their motion. As such, the Court must accept the testimony as evidence supporting the Estate's claim for Jawad's loss earnings 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 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 Corporation*, 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

[2] Dr. Paranjpe has been an economist for over 25 years, and is an instructor at Wayne State University, Oakland Community College, the University of Windsor, and Michigan State University. *Id.*

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of this case, expert medical testimony, and Federal Life Tables laid a proper foundation from which the jury could decide loss of earning capacity.

vi. Defendants' reliance on inapposite case law and unbinding unpersuasive trial court orders, provided without any substantive analysis, should be rejected.

Defendants largely ignore the binding precedent and statutory authority discussed above and, instead, rely on inapposite case law and unpersuasive orders to form the backbone of their argument.

Defendants first rely on *Sutter v Biggs*, 377 Mich 80; 139 NW2d 684 (1966), ostensibly to argue that the Estate's claim for future earnings capacity is "remote, speculative, and contingent." But *Sutter* is not even a wrongful death case. In *Sutter*, the plaintiff sued a doctor who performed a surgery on her 19 years before she sued for malpractice. In that initial surgery to remove her appendix, the defendant doctor removed the plaintiff's right fallopian tube and ovary, without consent. The procedure was discovered 19 years later, when the plaintiff was about to undergo surgery to remove a cyst from her left fallopian tube. That surgery, unfortunately, resulted in the plaintiff also losing her left fallopian tube. The plaintiff sued her initial doctor, seeking damages not just for the removal of her ovary, but also for the loss of her ability to have children due to the loss of her left tube 19 years later.

Under these circumstances, the Supreme Court held that the possibility that the plaintiff *could* injure and need to remove her left tube was speculative and remote 19 years earlier when her right tube was removed. As a result, the fact that she could lose

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the ability to have children was considered a remote possibility at the time the malpractice occurred and the Supreme Court disallowed the damages flowing from the loss of ability to bear children. The Court reasoned "[u]nder facts adduced in this case, it is too tenuous a proposition to say that the element of damages in dispute, inability to bear children, et cetera, is a legal and natural consequence of defendant's wrongful act." *Id.* at 87.

Sutter has nothing to do with the Estate's claims here. It is absolutely foreseeable that the death of a 13-year-old child will result in the loss of earnings capacity over the child's lifespan, had he lived. The loss of earnings are a legal and natural consequence of Jawad's death and, as a result, are not too remote or speculative for recovery. As discussed extensively in the prior sections of this brief, Michigan law contemplates and allows for the recovery of just such damages. Defendants' reliance on *Sutter* is meritless and should be ignored.

Defendants' reliance on two unpublished, unpersuasive, nonbinding Circuit Court orders is likewise without merit. Defendants cite to two orders, one issued in *Landrum v Children's Hospital*, and another in *Pan v University of Michigan*. (See Defense Exhibits B and C). What is missing from both of those orders is any analysis of the extensive precedent and statutory authority that the Estate has provided to the Court here. The *Pan* order likewise provides no background facts and it is impossible to discern whether the case is analogous, or whether the plaintiff there presented any evidence in support of the claim for loss of earnings capacity. Here, Plaintiff has attached the affidavit of Dr. Paranjpe to support the loss earnings claim, along with a breakdown of Dr.

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Paranjpe's calculations. This evidence, like the evidence presented to the jury in May, 180 Mich App at 756, supports a claim for loss earnings for a minor who was injured and projected to be unable to earn an income in the future because of that injury. In *May*, the child was disabled; here, the child was killed. Defendants do not get a windfall because Jawad died as a result of their malpractice, as opposed to being disabled.

This Court, in making its ruling, should rely on the Supreme Court and Court of Appeals authority discussed in this brief, and reject the unpublished unbinding orders by sister courts.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, the Estate of JAWAD JUMAA, by and through its attorneys, ask that this Honorable Court DENY Defendants' Motion for the reasons explained above.

Respectfully submitted,

/s/ Marc S. Berlin
GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
Fieger, Fieger, Kenney & Harrington, P.C.
Attorneys for Plaintiff

Dated: June 30, 2021

Joint Appendix 082

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PROOF OF SERVICE

The undersigned hereby certifies that on 06/30/2021 she served a copy of the foregoing via MIFLE upon all counsel of record. I declare under penalty of perjury that this statement is true to the best of my knowledge, information, and belief.

/s/ Sharon S. Meade

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APPENDIX 7

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

v

Case No. 20-004169-NH
Hon. Martha M. Snow

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.

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNEY & HARRINGTON
Attorneys for Plaintiffs
19390 West Ten Mile Rd.
Southfield, MI 48075
248-355-5555/5148 fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300/6310 fax

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY DISPOSITION OF FUTURE ECONOMIC DAMAGES

NOW COME defendants, 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., by and through their attorneys, CORBET, SHAW, ESSAD & BONASSO, P.L.L.C., and state in reply to plaintiff's response:

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Plaintiffs claim that the heirs of the decedent's estate are entitled to lost earnings capacity (to age 67) and loss of household services (to age 76)[1] of the decedent pursuant to the Wrongful Death Act (WDA), MCL 600.2922. However, plaintiffs' response conveniently ignores portions of the WDA. MCL 600.2922 (3) identifies the decedent's heirs "who suffer damages …" who may be eligible to recover under the WDA. It reads in pertinent part:

> …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).

Here, plaintiffs cannot establish that the heirs have or will suffer damages related to the decedent's alleged lost earning capacity or lost services. Statutes are to be interpreted as a whole and construed so as to give effect to each provision. *Linton v. Arenac Co Rd Comm*, 273 Mich App 107, 112; 729 NW2d 883 (2006). It is long an accepted principle of statutory construction, in discerning the legislative will through its enactments, to construe a statute so as to give full effect to all its provisions. *Drouillard v. Stroh Brewery Co*, 449 Mich 293, 295; 536 NW2d 530 (1995).

Plaintiffs cannot establish a reasonable expectation that they would benefit from the decedent's alleged lost earning capacity or lost services. In this case, there is no evidence that any of the decedent's family members had any reasonable expectation of support or services from him in the future. Plaintiff concedes that at age 13, the decedent did not provide support for his parents or siblings or that he had made any promises to his parents or siblings to provide any support in the future. Therefore, any evidence or argument as to loss of earnings capacity or loss of services should be precluded. *Thompson v. Ogemaw County Board of Road Commissioners*, 357 Mich 482 (1959). Plaintiffs' claims regarding alleged lost earning capacity and lost services are far too

[1] Plaintiffs' claim of lost household services is new. Defendants preserved an objection to any new economic damages claims by plaintiff. See ¶4 to Defendants' Motion.

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speculative in this case. The Michigan Court of Appeals has observed that, "[u]ltimately, to conclude that a person injured at birth would have followed any particular career path "but for" the injury is the hallmark of "speculation," and it is well established that a plaintiff may not recover tort damages that are speculative or contingent." *Craig v Oakwood Hosp*, 249 Mich App 534, 543 n 2; 643 NW2d 580 (2002), rev'd on other grounds, 741 Mich 67 (2004). While plaintiffs do not allege a birth injury, the principle still follows; it is entirely speculative that a 13-year-old with not work history would have followed any particular career path or had the capacity to earn a specific income or that he would have provided any of his income or services to his family in the future. Further, it is speculative as to whether plaintiff's decedent would have survived his illness with or without comorbidities even assuming he was given the medical treatment claimed appropriate by plaintiffs.

Plaintiff's reliance upon *Thorn v. Mercy Mem Hosp Corp*, 281 Mich App 644 (2008) is misplaced. In *Thorn*, the plaintiff sought to recover damages pursuant to the wrongful death act (WDA), MCL 600.2922, including the economic value of **household services** the **adult decedent** had provided to her minor children. That scenario is not present this case. Rather, it is not contested that plaintiff's decedent in this case was a 13-year-old minor who was not working or financially supporting anyone. Defendants submit that *Thorn* is distinguishable to the present case and does not provide support for plaintiffs' claim that a minor decedent's alleged future lost earnings or future loss of services are available under the WDA.

Further, plaintiff's citation of *Estate of Shinholster v. Annapolis Hosp*, 471 Mich 540 (2004) is likewise misplaced. *Shinholster's* analysis was specific to three issues: (1) whether, and to what extent, a plaintiff's own pre-treatment negligence offset the defendants' fault; (2) whether the medical malpractice noneconomic damages cap applied, and if so, whether an action filed

under the wrongful death act was subject to the upper cap; and, (3) whether, and to what extent, MCL 600.6311 applied in a wrongful death action. The dicta cited by plaintiff from *Shinholster* offered no analysis of alleged future lost earnings or future loss of services of a deceased minor under the WDA.

The unpublished case cited by plaintiff, *Langell v. McLaren* (Plaintiffs' Exhibit 3), is likewise unpersuasive. *Langell* involved the alleged wrongful death of an adult female patient. The opinion does not state the decedent's age at death, however, a local newspaper article identifies the decedent as 47 years old at the time of her death with surviving heirs (Exhibit A – 3/02/2018 *Times Herald* article). That fact of *Langell* are very different from plaintiff's decedent in this case was a 13-year-old minor who was not working or financially supporting anyone.

Plaintiff's criticisms of the Circuit Court Orders attached as Exhibit B and Exhibit C to Defendant's motion are unfounded. Both cases involved the estates of minor children and are very comparable and analogous to the present issues in this case. In *Pan v. University of Michigan* (Exhibit C to initial motion), Circuit Court Judge Timothy Connors dismissed plaintiff's claims of lost earning capacity and household services (the exact claims in this case) arising out of a medical malpractice claim of a child who was not quite five months old (Exhibit B – Pan Motion). Likewise, in *Landrum v. Children's Hospital*, Circuit Court Judge Hubbard dismissed claims of future economic damages arising out of a medical malpractice claim of a 15-year-old child. (Exhibit C – Landrum motion). Upon finding that "the decedent did not work or provide financial support. Because plaintiff cannot demonstrate loss of financial support and because plaintiff's decedent was not earning a wage…" Judge Hubbard dismissed the plaintiff's claim of future economic damages (Exhibit B to initial motion). Both cases are extremely persuasive examples of why plaintiffs' claims of future economic damages should be dismissed in the present case.

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WHEREFORE, defendants respectfully request that claimed future economic damages be dismissed.

Respectfully submitted,

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

/s/ KENNETH A. WILLIS

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
Attorneys for Defendants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DATED: July 7, 2021

I served a copy of this document upon the attorneys of record of all parties on July 7, 2021 by:

___ First Class Mail
___ Facsimile
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___ E-mail
_X_ Other: E-filing

I declare that the statement above is true to the best of my information, knowledge and belief.

/S/ MARTHA McCOMBS

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APPENDIX 8

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STATE OF MICHIGAN

IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE
CIVIL DIVISION

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

Plaintiff,

-vs- Case No. 20-004169-NH

PRIME HEALTHCARE SERVICES-GARDEN
CITY; L.L.C. d.b.a GARDEN CITY
HOSPITAL; KELLY W. WELSH, D.O., and
MEGAN SHADY, D.O., Jointly & Severally.

Defendants.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE MARTHA M. SNOW
CIRCUIT COURT JUDGE

Wednesday - July 21, 2021

APPEARANCES:

MS. SIMA PATEL (P-69541),
Appearing on behalf of the Plaintiff,

MR. DANIEL CORBET (P-37306),
Appearing on behalf of the Defendants.

Transcribed by:
Suzanne L. Kinsey, CSMR 4477
Official Court Reporter

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Motion for Summary Disposition

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July 21, 2021

Detroit, Michigan

(Proceedings commencing at 11:59 a.m.)

THE COURT: Okay.

I have, uh, read your Briefings, and reviewed any exhibits that were attached.

I, I just, so you know, those will be made part of, uhm, any record, so don't feel badly if you fail to argue every nuance, because it will be preserved for appellate purposes.

Okay?

Calling case number 20-004169-NH, Daher versus Prime Health Care Services.

Your Appearances?

MS. PATEL: Good morning, Your Honor. Sima Patel on behalf of Plaintiff.

I am here arguing on behalf of Mr. Berlin, who is not able to be here, today.

THE COURT: Okay.

Very good.

MR. CORBET: Good morning, Your Honor. Dan Corbet on behalf of Defendants.

THE COURT: Okay.

This is Defendants' Motion for Summary Disposition, pursuant to a C-8, and a C-10.

Uhm, Defendants have filed the instant Motion for Summary Disposition, arguing that, because the decedent was only thirteen years old, at the time of his death, and was not working, and was not financially supporting anyone, Plaintiff's claim for the decedent's future wage loss, should fail, as a matter of law.

So, go ahead, Defendants, and then I'll allow Plaintiff to respond.

MR. CORBET: Yes, Your Honor.

I, I spent considerable time looking over everything, including the Motions that we attached to our Reply Brief, that were argued in the other two cases, uhm, where we had similar issues.

And I'll try to cut to the chase, a little bit.

I think Judge Hubbard, and Judge Connors got it correctly, and with all due respect to Judge Lawson, I don't think he got it correctly.

And the one thing I will point out, with Judge Lawson's Opinion, is that he cited a case called Brown versus Department of State Highways, for the proposition that the Supreme Court, Michigan Supreme Court, in Baker, was no longer good law, according to Brown versus Department of State.

And I would just point out that, he quoted,

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in 1983, I believe.

And I would point out that the most important part of that, was where it says that, we need not determine here, determine here whether Baker v Slack retained its viability after the statute was amended.

And I would point out that Judge Connors and Judge Hubbard got it right.

And under Black -- I'm sorry, Baker versus Slack, if you read the wrongful death act that was ina -- applicable in 1959, when Black was decided, versus what it is now, it, there's no substantive change.

Instead of using pecuniary injury, they use the term, financial loss.

But if you read both statutes, which is, is not fun, find, or do, uh, there is no substantive difference in them.

And I think the Court of Appeals specifically pointed out, we are not saying, Black -- or Baker, was wrong.

We're just -- they were just saying that, uhm, they were noting that pecuniary injury was removed.

So, when Judge Lawson used that, he didn't complete the paragraph, where they said, we're not

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saying it's wrong.

Uhm, and if you look at Baker, it was a sixty-three year old widow, who was not supporting anybody.

And her children were claiming, uh, under the wrongful death act, that, uh, they wanted, uh, you know, whatever loss of inheritance they could get from her death.

And the Michigan Supreme Court said that they, they were not allowed to get it.

She wasn't supporting them.

She wasn't supporting anybody.

And if you look at all of the cases, that both sides have, have cited, uh, none of them indic -- none of them are with respect to a child, being involved, who is, who's died, and the parents are seeking recovery, except for Judge Hubbard, Judge Connors, and Judge Lawson.

Those are the only three cases we could find, that involve, uh, where a child died.

And I'm just saying, Judge, Judge Connors, Judge Hubbard got it right.

And for the reasons I've mentioned, Judge Lawson didn't get it right.

And that's kind of a quick summary of what I

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wanted to say to you, this morning, Judge.

THE COURT: All right.

Plaintiff?

MS. PATEL: Good morning, Your Honor.

Uhm, I think that one thing that defense counsel didn't mention, is, uh, what we're actually here for, which is -- it's a Denney Motion.

And Denney is exactly on point.

Uhm, it's published, Court of Appeals law.

It built on Thorn.

It built on Shinholster.

And it establishes that under the damages that are available, under the wrongful death act, the wrongful death act is there to put the Plaintiff, uhm, put the estate in, in, and make the estate whole.

So, any damages, had the decedent survived, are allowable.

And Denney went that one step further, and said, yes, that includes loss of earning capacity, as well.

Uhm, whether it be decedent is a child, or is an adult, that shouldn't matter.

That's left up to the proofs.

And, uh, whether those damages are speculated or not -- speculative or not, uhm, I think comes down

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to the proofs that the Plaintiffs present.

And here, we have a Affidavit that we provided, with our Response, from Dr. Franjay (phonetic). He's an Economist, and a Statistician.

And he's going to provide testimony, and he's going to use facts, and data, uh, to support his testimony, about what the loss of earning capacity would have been for the child, here.

Uhm, and, and I think, based on Denney, based on Shinholster, and Thorn, we're allowed to seek those damages.

Defendants assailed Mr. Franjay's opinions. That's not an issue before the Court, right now.

The only issue is, are we allowed to, as a matter of law, recover these lost earning capacity damages?

And we are.

Uhm, these two Circuit Court Orders, that are cited, I think, with the Reply, they included the Motion.

Uhm, because a Denney Motion is -- when you're talking about speculative evidence, it comes down to what proofs have the Plaintiff presented.

And while Defense counsel did provide copies of Defendant's Motions, we don't know what the

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Plaintiffs' Responses to those Motions were.

We don't know what record was before those Circuit Judges, what -- in front of Judge Connors, or Judge Hubbard.

What evidence that they were evaluating.

Here, uh, we've provided the Court with evidence that shows, that, to support our claim for damages, for Jawad.

So, uhm, I think, under Denney, and under the other established law that we talked about in our, in our Response, uh, the Motion should be denied.

THE COURT: Thank you.

Uhm, defense, did you want to reply?

MR. CORBET: Just quickly, Your Honor.

Thorn was an adult woman who died, and the question was whether or not her children could recover for lost household services.

Denney, also, was likewise, was an adult male, with surviving children.

Same with Lingale.

They all were.

THE COURT: Okay.

Uh, Plaintiff, did you want to add anything?

MS. PATEL: The only thing I would add, is, I don't see a difference.

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It's a -- I feel like it's a difference without a distinct -- a distinction without a difference.

Uh, whether it's an adult, or whether it's a child, we're still going to using actuarial data.

We're still going to be using prospective -- we're going to be evaluating the data that we have, to make these projections into the future.

And while, yes, and adult, who is working, might have more data that can be used to form these calculations, that doesn't make that calculations that were performed by Dr. Franjay, junk science, or speculative.

It's still based on reliable method, and principles, in his field, as a Statistician, and as, using actuarial data, to make these calculations, for what the loss or earnings could have been.

And that's it.

THE COURT: Okay.

Defense --

MS. PATEL: If the Court has any questions --

THE COURT: I, I do not.

Defense, anything else?

MR. CORBET: Just, I would just pick up on the last phrase that Plaintiff's counsel, or Defense

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coun -- Plaintiff's counsel used, and that was, could have made.

And that -- all of this assumes that the patient would have survived the Meningitis, and would have survived without any comorbidities, and then would have gone on to have some sort of job, where he supported his parents.

And just common sense, dictates, Your Honor, that, how many kids nowadays, eighteen, and older, support their parents?

It's just the opposite.

Uhm, and that's just log -- general logic.

And the only other thing I wanted to say, Judge, in their Response Brief, they did, uhm, attach some information about louse -- loss of household services.

That's, as you saw in my first Motion, I pointed out that the only thing they pled, so far, was, loss of future earnings.

And I reserve the right to, if, with your permission, Judge, to be able to address that issue in a subsequent Motion, if that's all right?

THE COURT: I don't think that's necessary.

MR. CORBET: Okay.

MR. SULLIVAN: Okay.

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So, I, uhm, I agree with the Plaintiff.

This is a, a clear Denney Motion.

The Defendant cited the wrongful death statute, 600.2922, specifically sections, uhm, three and six.

And it's clear that the Michigan Court of Appeals has held that, uhm, 600.29226 does not provide an exhaustive list of damages, but merely provides specific examples of available damages.

So, to limit it to loss of financial support, uhm, that's not accurate.

And that was held in Thorn versus Mercy Memorial Hospital, 281 Mich App 644, a 2016 case.

Uhm, and Defe, Defendants additionally pointed to, uh, 29226D, uh, which provides for distribution of damages.

Uhm, but in response, Plaintiffs argue that the wrongful death act, and Michigan case law interpreting the act, allow Plaintiff to, to receive any damages, that a decedent had, against his tortfeaser, had he survived, including future wage loss damages.

And I agree with that.

Uhm, it should be noted, uhm, that there is no Michigan court case, published, or otherwise, uh,

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that addressed the specific issue of whether a minor decedent is entitled to future earnings, uhm, damages, in a wrongful death action.

Uhm, but it's clear, the way that Thorn is set forth, and Denney, uhm, that that is available, uhm, if the proofs allow for it.

Uhm, while Defendants argue that it's not relevant, in, in the present case, Plaintiffs rely on Denney versus Kent County Road Commission, 317 Mich App 727, again, a 2016 case, where the Court of Appeals addressed the availability of future earnings in a wrongful death action.

In Denney, the decedent was forty years old, forty-one years old, as, as defense has pointed out, married, with children, and employed at the time of death.

And the holding that future earnings were compensable, under the act, the Denney Court noted that lost earnings were not specifically included, in 600.29226, but stated that the word, including, as used in the provision, indicated an intent by the Legislature to permit the award of any type of damages, economic, and non-economic, deemed justified by the facts of the particular case.

Uhm, the Court of Appeals stated that the act

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neither limits, nor precludes, the type of damages that could have been recovered by the person, had the person survived the injury.

Economic damages include: Damages incurred due to the loss of the ability to work and earn money.

Therefore, damages for lost earnings are allowed, under the wrongful death statute.

And, uhm, also cited within Denney, is the Hannay versus Department of Transportation, 497 Mich 45, a 2014 case.

The Denney Court also addressed the argument Defendants make here, namely, that whether -- that where a decedent was not providing support for a family member, the estate may not make a claim for lost future earnings.

The Denney Court drew a distinction between a claim for loss of support, and a loss -- and a claim for the decedent's lost earnings.

That's exactly what's happening here.

Uhm, the Denney Court stated, a claim for lost financial support, under the wrongful death statute, is not the same as a claim for lost earnings.

Specifically, lost earnings are damages that the decedent could have sought, on his own behalf, had he lived.

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Whereas, damages for lost financial support would be sought by one who depended on the decedent, for financial support.

Because the damages are distinct, the fact that the wrongful death statute allows for recovery of lost financial support, does not change the character of Plaintiff's claim for damages from the decedent's lost earnings.

Thus, under the Denney holding, damages for lost earnings are not precluded, merely because a decedent was not providing support at the time of his death.

Defendants, and you did it, briefly in your argument. You did it more fully in your Briefing.

Uh, you attempted to distinguish the holding of Denney, from the facts of the instant case, by pointing out that Denney involved a married parent, who, uh, was earning, before he died.

However, nothing in Denney appears to limit its holding to decedents who were earning a wage, at the time of their death.

Further, nothing in the wrongful death statute, itself, attempts to distinguish between minor and adult decedents, and the type of damages recoverable.

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I, I know that you've cited three Circuit Court cases.

But I, too, am a Circuit Court Judge.

And those, uh, decisions, uhm, are not binding, on me.

Uhm, and particularly, Judge Connors' Order, out of Washtenaw County, uhm, does not contain any facts about the underlying case, and merely cites to the record, which has not been provided by Defendants.

Thus, it's impossible for me to decipher, should I want to follow another Circuit Court Judge's Opinion, why the Motion concerning future wage loss was granted.

And, well, I won't address Judge Hubbard's decision.

Uhm, I, I don't know enough about her decision, uhm, to weigh in on it.

And frankly, it's not my job to weigh in on a fellow colleague's Opinion.

Plaintiffs also cite White versus F.C.A. U.S., L.L.C., 350.

Uhm, it's a Federal case. 2018 case.

A U.S. District Court case, in the Eastern District of Michigan, in support of their contention that a minor's future earnings may be considered as

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damages in a wrongful death action.

In that action, the Federal District Court, after analyzing Denney, and other relevant Michigan case law, concluded that the wrongful death act did not preclude an unborn child, from recovering damages, for lost wages, and earning capacity.

I mean, I think that's pretty on point, and even more severe than this case.

At least we have a, a thirteen year old, uh, child, not an unborn child.

Uh, the Federal Court reasoned that the Personal Representative stands in the shoes of the decedent, and may recover all damages the deceased would have been entitled to, had she or he not died.

So, I am denying your Motion under a C-8, and a C-10.

Uhm, and this case shall go on.

MR. CORBET: Thank you, Judge.

THE COURT: Okay.

And I'm sorry it was so detailed, but I wanted to make sure that if there, uhm, if there is an appeal, that the Court of Appeals had something to read.

MR. CORBET: Thank you, Your Honor.

THE COURT: Okay.

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MS. PATEL: Thank you, Your Honor.

THE COURT: Thank you.

Uhm, I don't know what your, the, the next step is.

Uhm, this is a 2020 case.

Uh, have you had Case Eval, yet?

MR. CORBET: Yes, we have.

THE COURT: Okay.

And, uhm --

MR. CORBET: It wasn't unanimous.

THE COURT: All right.

When -- you haven't had Settlement Conference, yet, have you, with me?

MR. CORBET: We, we had a real preliminary one.

We have another one, coming up, I think, in August, Your Honor.

THE COURT: Okay.

And are you Facilitating, then?

MR. CORBET: I think we've tried that, once.

Now, with this decision, we might have to go back.

THE COURT: Okay.

Well, well, you might as well.

And let's not wait 'til August for me to

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order you to go back.

So, I, I want you to go back to Facilitation, now that you have this decision.

MR. CORBET: Got it.

THE COURT: Okay?

MR. CORBET: Yep.

THE COURT: And, uhm, if we need to push out that August date, then, uhm, then happy to do so, to allow you to have a, a -- the ability to Facilitate.

Who did you Facilitate with, first time?

MR. CORBET: Uh, Bob Riley, I believe.

THE COURT: No one's better.

All right.

Well, uhm, let me know if you need me to push that date out.

MR. CORBET: Okay.

Thanks, Judge.

We'll, we'll give him a call, and uhm, I know he's, he's booked, but, sometimes he lets people that have Facilitated before, get a, get a little bit up in the line.

THE COURT: Okay.

Sounds great.

MR. CORBET: Okay.

Thanks, Judge.

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THE COURT: All right.

Thank you.

Have a good day.

MS. PATEL: All right.

Thank you, Your Honor.

THE COURT: Thank you.

MS. PATEL: Bye.

(Proceedings concluded for the day at 12:17 p.m.)

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CERTIFICATION OF COURT REPORTER

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

I, SUZANNE L. KINSEY, Official Court Reporter in and for the Third Circuit Court for the County of Wayne, State of Michigan, do hereby certify that the foregoing pages 1 through 22, inclusive, comprises a full, true and correct rendition, to the best of my ability, of the proceedings and testimony recorded by the Court, via Zoom technology, in the matter of Jawad Jumaa Estate versus Garden City Hospital, et al, Case No. 20-004169-NH, on July 21, 2021 (Motion for Summary Disposition).

Suzanne L. Kinsey

Suzanne L. Kinsey, CSMR 4477
Official Court Reporter

Dated: August 18, 2021

Detroit, Michigan

The authenticity of the foregoing transcript is null and void unless affixed with an ***original*** signature of the Court Reporter in blue ink.

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APPENDIX 9

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Court of Appeals No. 358209

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

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNEY & HARRINGTON
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Rd.
Southfield, MI 48075
248-355-5555/5148 fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants-Appellants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DEFENDANTS-APPELLANTS'

CORRECTED APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

APPENDIX

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STATEMENT OF BASIS OF JURISDICTION

Defendants PRIME HEALTHCARE – GARDEN CITY, LLC d/b/a GARDEN CITY HOSPITAL, KELLY W. WELSH, D.O., and MEGAN SHADY, D.O., seek interlocutory leave to appeal from Wayne County Circuit Court Judge Martha Snow's order of July 28, 2021, denying Defendants' motion to dismiss future economic damages (claimed loss of future earnings and future earnings capacity) where plaintiffs allege delay in diagnosing and treating bacterial meningitis in 13-year-old decedent. This Honorable Court has jurisdiction over this matter pursuant to MCL 600.308(2)(C) and MCR 7.205(A)(1).

Defendants filed a motion to dismiss the claimed loss of future economic damages based upon the Wrongful Death Act, as the Wrongful Death Act (MCL 600.2922) does not permit recovery for damages where the decedent was not providing financial support to anyone. In addition, these claims of lost future economic damages are speculative and as such, are not recoverable.

At the July 21, 2021, hearing, the trial court denied defendants' motion. On July 28, 2021, the order denying the motion was entered. A statement that the transcript of the July 21, 2021 hearing has been ordered (as required by MCR 7.204(C)(2)), (APPX 166). The lower court docket entries are attached (as required by MCR 7.205(B)(2)) (APPX 163 – 165).

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INTRODUCTION AND NEED FOR APPELLATE REVIEW

This is a medical malpractice action arising out of the death of 13-year-old middle school child, who died on January 16, 2017, from bacterial meningitis. The Trial Court erred by concluding that Plaintiffs may recover lost future economic damages (lost future earnings and earnings capacity), under the Wrongful Death Act. Contrary to the Trial Court's conclusion, the Wrongful Death Act only allows the heirs of the decedent to recover the decedent's lost future wages to the extent that those heirs can establish the decedent was providing support and/or had a legal obligation of support. *Baker v. Slack*, 319 Mich 703 (1948).

The Trial Court relied on a 2016 decision by this Court in *Denney v Kent Co Rd Comm'n*, 317 Mich App 727 (2016), a case which dealt with the highway defect exception to governmental immunity and whether future lost wages are recoverable under that immunity statute. The controlling case should be *Baker*, *id*.

Denney does not and cannot trump the *Baker* Court's decision on recoverable economic damages in wrongful death cases. The Trial Court erred in following *Denney*.

This issue needs to be addressed, as trial courts within Michigan are issuing inconsistent opinions on this issue. Direction is needed from this Court. Defendants throughout Michigan might have one case with a judge who follows *Denney* and another case with a judge who does not follow *Denney*. Attached to this application are opinions/orders from six different courts:

Judge Martha Snow – 7/28/2021 – Denied this motion (APPX 167 – 168)

Judge Susan Hubbard – 9/12/2018 – Granted a similar motion (APPX 169 – 170)

Judge Timothy Connors – 8/6/2019 – Granted a similar motion (APPX 171 – 172)

Judge James Jamo – 6/28/2021 – Granted a similar motion (APPX 173 – 182)

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Judge Carol Kuhnke – 5/26/2021 – Denied a similar motion (an application for leave to appeal is pending – See COA No. 357511)

U.S. District Court Judge David Lawson – 11/19/2018 – Denied a similar motion. (APPX 178 – 182)

Consistency in legal decisions at the trial court level could and would likely lead to more settlements, which would help reduce the congestion in the civil trial courts' dockets.

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FACTS SHOWING THE APPELLANTS WOULD SUFFER SUBSTANTIAL HARM BY AWAITING JUDGEMENT BEFORE TAKING AN APPEAL

Damages are a crucial issue in any wrongful death action This case presents a significant damage issue which should be considered by this Court on an interlocutory basis. This would allow the parties to properly evaluate the potential damages that are allowed under Michigan law before preparing for and proceeding through a trial. The claimed economic damages in this matter may exceed $19,000,000 (and another $4,000,000 in claimed lost services).

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STATEMENT OF QUESTION PRESENTED

I. Whether the trial court erred by finding the Wrongful Death Act allows an estate to recover lost future earnings and earnings capacity (and lost services) in a case involving the death of a 13-year-old child who was not working and who was not supporting anyone?

Plaintiff says "No."

Defendants say "Yes."

The trial court says "No.

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STATEMENT OF FACTS

A. Factual Background

This is a wrongful death medical malpractice action in which Plaintiff alleges Defendants failed to 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 the plaintiff estate lost the future earnings and futures earnings capacity of the decedent. (APPX 3 – 21, ¶¶38-39)[1] Plaintiff's retained economic expert estimated the lost economic damages are between $11,000,000 and $19,000,000.

B. Motion for Partial Summary Disposition

On or about April 30, 2021, Defendants filed a motion for partial summary disposition under MCR 2.116(C)(8) and (10), seeking dismissal of plaintiff's damage claims for lost economic damages (lost future earnings and earnings capacity). (APPX 22 - 57). Defendants argued that the Wrongful Death Act (WDA), MCL 600.2922, does not permit recovery of lost future earnings and earnings capacity, where the decedent was not and would not be providing support or services to anyone allowed to recover under the Wrongful Death Act. Two trial court orders/opinions granting similar motions were attached to the motion. In response, Plaintiff argued in large part, that based on this Court's decision in *Denney, supra*, that lost future earnings and earning capacity are recoverable under Michigan's Wrongful Death Act. (APPX 58 - 117).

[1] Plaintiff-decedent's estate generally claims economic damages pursuant to the Wrongful Death Act (¶¶38-39 of Complaint). However, during litigation, plaintiff only specified and attempted to support claims for lost future earnings/capacity with a report from economics expert Nitin Paranjpe, Ph.D. Defendants preserved an objection to any new economic damages claims at the time they filed Defendants' Motion for Partial Summary Disposition. It was only when Plaintiffs filed their Response to Defendants' Motion for Partial Summary Disposition that Plaintiffs added an affidavit and new report from expert Dr. Paranjpe claiming loss of household services. (APPX 80 – 103). Defendants repeated their objection to these new claims in their Reply Brief. Defendants continue to object to these new loss of household services claims.

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Plaintiffs also relied on *Shinholster v Annapolis Hosp*, 471 Mich 540, 564; 685 NW2d 275 (2004), where it wrote that "a decedent's estate [can] recover everything that the decedent would have been able to recover had she lived." Plaintiffs further asserted that neither the alleged lost future earnings nor the lost services were speculative. (APPX 58 - 117). Defendants filed a reply in further support of their motion (APPX 118 - 162).

On July 21, 2021, a hearing was held (hearing transcript pending, APPX 166) on Defendants' motion where defendants discussed the issues, the attached trial court cases, and explained that *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948) is the controlling case on this issue. Defendants also explained that *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016) was not applicable as the decedent in *Denney* was a husband and father, unlike the decedent in this case, who was 13 years old with no dependents.

The Trial Court denied the motion and an order was entered on July 28, 2021. (APPX 1 - 2).

ARGUMENT

With all due respect to the Trial Court, it erred when it denied Defendants' motion to dismiss to the future economic damages claim. The Court relied heavily on *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016). However, *Denney* did not discuss the same issue as here, whether the decedent was working and supporting anyone to come within the Wrongful Death Act. *Denney* was an adult male with a wife and a child. This case involves a 13-year-old who was not supporting anyone. The Wrongful Death Act does not allow an estate of a 13-year-old decedent to recover future earnings or future earning capacity when he was not supporting anyone. The Act only allows recovery if loss of support is proven. In addition, such future wage calculation is speculative and thus not recoverable.

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The Trial Court incorrectly concluded that Plaintiffs can recover for the decedent's potential lifetime of future earnings/earnings capacity. The Wrongful Death Act does not allow recovery of a lifetime of work in a wrongful death action when the decedent had no spouse or dependents. The Wrongful Death Act allows recovery for proven loss of support to those heirs allowed to recover under the Act. The Trial Court relied on a Court of Appeals decision addressing lost wages that can be recovered under the governmental immunity act. That is not the issue here.

A. Standard of Review.

This Honorable Court reviews a trial court's decision on interpretation of a statute de novo. *In re Brown*, 229 Mich App 496, 502 (1998). Also, this Court also reviews a summary disposition motion under a de novo standard. *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345 (1995). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. Summary disposition should be granted where the claim is unenforceable as a matter of law and no factual development could possibly justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). A motion under MCR 2.116(C)(10) for lack of a genuine issue of material fact, must be granted if the evidence in support and in opposition to the motion shows that there is no genuine issue of material fact to resolve at trial and the moving party is entitled to judgment as a matter of law. *Shallal v Catholic Social Services*, 455 Mich 604, 609 (1997).

B. The Wrongful Death Act does not allow an estate to recover a decedent's potential lost future wages or potential lost future earning capacity.

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

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Act 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, which include (1) compensation to the Estate for its expenses, (2) compensation for the decedent's conscious pain and suffering until his death, and (3) compensation to the beneficiaries for their losses:

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 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

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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 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 amount of the decedent's potential lost future earnings/earning capacity. The Wrongful Death Act does not contain any reference to damages for "loss of future wages or loss of earning capacity."

C. The *Denney* case does not apply.

In *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016), the decedent sustained fatal injuries after he hit potholes on his motorcycle while riding on the highway. His estate filed a lawsuit against the governmental agency in charge of maintaining the highway where the decedent crashed. The lawsuit was brought under the highway-defect exception to governmental immunity. The defendant moved for partial summary disposition, asserting that it was liable for lost financial support to the decedent's heirs under the highway-defect exception, for damages to "bodily injury" only, but denying it was liable for "loss of financial support."

The defendant cited *Wesche v Mecosta Co Rd Comm'n*, 480 Mich 75, 87; 746 NW2d 847 (2008), which held that a spouse was not able to recover loss of society damages under the motor-vehicle exception to governmental immunity. The trial court granted defendant's motion as it agreed with the defendant's position.

On appeal in *Denney*, this Court discussed the Wrongful Death Act analysis in *Thorn v Mercy Memorial Hosp Corp*, 281 Mich App 644; 761 NW2d 414 (2008) and noted that the Wrongful Death Act allowed "any type of damages, economic and noneconomic, deemed justified by the facts of the particular case" as if the person survived. *Denney*, 317 Mich App at 731, quoting *Thorn*, 281 Mich App at 651, 660. The *Denney* Court discussed the damages

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available to a living plaintiff under the Governmental Tort Liability Act (GTLA), MCL 691.1401 et seq. The Court never discussed *Baker v. Slack*, 319 Mich 703 (1948) and similar cases. It cited to *Hannay v Dept of Transp*, 497 Mich 45; 860 NW2d 67 (2014), and a number of other cases, that did not address the issue at hand in this case. For instance, *Hannay* was not a death case and thus, it was not brought under the Wrongful Death Act. *Hannay* did not address wrongful death damages. Regardless, the *Denney* Court relied on *Hannay* and decided that claims under the Wrongful Death Act would allow recovery of a decedent's lost future earnings. Again, the *Denney* Court did not discuss *Baker* or any of the other similar cases following *Baker*.

D. In Baker v Slack, economic recovery is limited to loss of support, if proven.

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 Michigan Supreme Court wrote:

> **"The next question presented is whether recovery may be had under the wrongful death act, as amended, 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."**

The Michigan 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."**

The MI Supreme 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**

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scenes funeral and burial, force plaintiff and defendant conceded that plaintiff was entitled to have judgment for $190."

The Trial Court in our case also referred to an opinion authored by U.S. District Court for the Eastern District of Michigan Judge David Lawson where he addressed economic damages in a case where the plaintiffs were a pregnant woman and her unborn baby. *White v FCA US, LLC*, 350 F Supp 3d 640 (ED Mich 2018). (APPX 178 – 182). Judge Lawson wrote that the holding of *Baker* could be disregarded because the Wrongful Death Act's reference to "pecuniary loss" was deleted in the 1971 amendment to the Wrongful Death Act. In *White*, the estate of the decedent and her unborn fetus brought a products liability claim against the defendant vehicle manufacturer seeking, among other damages, lost wages and earning capacity of both decedents. Defendants sought partial summary disposition of these damages, arguing that the Wrongful Death Act limited recovery solely to damages for loss of support, upon proof that they had a reasonable expectation of receiving same from the deceased. Judge Lawson cited to a portion of this Court's decision in *Brown v Dep't of State Highways*, 126 Mich App 392, 394; 337 NW2d 76 (1983), stating that although the *Baker* Court "held that damages for loss of a potential inheritance were not recoverable in an action for wrongful death," "the Court's holding was based on the requirement of "pecuniary injury," which was later removed from the statute by 1971 PA 65..." *White*, 350 F Supp 3d at 646, citing *Brown*, 126 Mich App at 394. However, the next sentence following this cited portion of *Brown* was absent from Judge Lawson's opinion in *White*. Notably, the *Brown* opinion went on to state that the damages issue could be resolved on other grounds, and therefore it was unnecessary to determine "whether *Baker v. Slack* retained its viability after the statute was amended." *Brown*, 126 Mich App at 394-395. Judge Lawson also failed to note the Michigan Supreme Court's subsequent decision in *Wood v Detroit Edison Co*, 409 Mich 279; 294 NW2d 571 (1980) which noted that the Wrongful Death Act amendment

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was made with the "sole purpose" of correcting the Supreme Court's ruling in *Breckon v Franklin Fuel Co.*, 383 Mich 251; 174 NW2d 836 (1970) regarding non-economic damages. The reliance on *White* to clear up the conflict between *Denney* and *Baker* is misplaced. In 1985, the Legislature added "loss of financial support" to the Wrongful Death Act, which allows recovery by the decedent's beneficiaries entitled to such support.

E. The U.S. District Court case *White v. FCA US* should not apply.

In the present case, the Trial Court also relied on *White v. FCA US, LLC*, 350 F Supp 3d 640 (ED Mich 2018) in announcing its ruling on July 28, 2021. (hearing transcript pending, APPX 166). However, in his well-reasoned opinion dated June 28, 2021, Judge James Jamo of the Ingham County Circuit Court clearly held why *White* does not apply (APPX 173 – 177):

> However, there is older, binding case law that is applicable in the interpretation of the wrongful death statute: *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1949). The US District Court in *White* specifically addressed *Baker* and, following *Brown v Department of State Highways*, 126 Mich App 392, 395; 337 NW2d 76, 77 (1983), found that *Baker* had been superseded by the 1971 amendment to the wrongful death statute because the amendment removed the phrase "pecuniary injury resulting from such death" and replaced it with "under all the circumstances." But this change only allowed non-economic losses to be made recoverable, such as lost society or companionship; it did not change the compensable pecuniary losses. This Court therefore finds that *Baker* was not superseded by the statutory amendment of 1971 and *Baker*, being the binding Michigan Supreme Court case, cannot be abrogated by a Court of Appeals determination absent an acceptance by Supreme Court case law, and thus still controls in determining which pecuniary losses are compensable by the wrongful death statute. Under *Baker*, lost earning capacity is not recoverable as a part of the wrongful death statute alone.

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At a minimum, Judge Jamo's opinion demonstrates the need for appellate review on this issue and why Defendants Appellants' Application for Leave to Appeal should be granted.

F. Baker is Controlling.

Baker v. Slack, 319 Mich 703 (1948) has not been overruled. It is the controlling case on point and it is binding on the lower courts. Trial Courts are required to follow the precedent of the Supreme Court. *Maier v Maier*, 311 Mich App 218; 874 NW2d 725 (2015). As written by the Court of Appeals in *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009):

> [T]his Court remains bound by our Supreme Court's decision . . . until such time as our Supreme Court instructs otherwise: 'it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v. WG Wade Shows*, 443 Mich. 515, 523, 505 N.W.2d 544 (1993), overruled on other grounds *Karaczewski v. Farbman Stein &Co.*, 478 Mich. 28, 732 N.W.2d 56 (2007). "The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." *Paige v. Sterling Hts.*, 476 Mich. 495, 524, 720 N.W.2d 219 (2006).

Baker is the controlling case on point.

G. 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

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

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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.

RELIEF REQUESTED

WHEREFORE, Defendants/Appellants respectfully request that this Honorable Court grant leave to appeal and reverse the July 28, 2021, order denying the motion for partial summary disposition based upon plaintiff's claims of lost future economic damages and remand for entry of an order dismissing these damages.

Respectfully submitted,

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

/s/ DANIEL R. CORBET

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
Attorneys for Defendants-Appellants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DATED: August 18, 2021

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APPENDIX 10

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Court of Appeals No. 358209

Plaintiffs-Appellees,

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

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.

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNEY & HARRINGTON
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Rd.
Southfield, MI 48075
248-355-5555/5148 fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants-Appellants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

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DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

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Authority

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ORDER APPEALED FROM

Defendants/Appellants Prime Healthcare – Garden City, LLC d/b/a Garden City Hospital, Kelly W. Welsh, D.O., and Megan Shady, D.O., seek leave to appeal from the July 28, 2021 order of Wayne County Circuit Court Judge Martha Snow, denying 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 plaintiff's decedent.

After a hearing on July 21, 2021, the trial court denied the motion. The order was entered on July 28, 2021 (APPX 1-2). The transcript of the July 21, 2021 hearing is attached as (APPX 163-184).

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STATEMENT OF BASIS OF JURISDICTION

The Michigan Court of Appeals entered its order on October 13, 2021 granting Defendants', PRIME HEALTHCARE – GARDEN CITY, LLC d/b/a GARDEN CITY HOSPITAL, KELLY W. WELSH, D.O., and MEGAN SHADY, D.O., application for leave to appeal from Wayne County Circuit Court Judge Martha Snow's order of July 28, 2021, denying Defendants' motion to dismiss future economic damages (claimed loss of future earnings, future earnings capacity and future household services). This Honorable Court has jurisdiction over this matter pursuant to MCR 7.203(B)(1) and MCR 7.205.

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STATEMENT OF QUESTION PRESENTED

I. Whether the trial court erred by finding the Wrongful Death Act allows an estate to recover lost future earnings and earnings capacity in a case involving the death of a 13-year-old who was not supporting anyone?

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes."

The trial court says "No."

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

Plaintiffs-Appellees say "No."

Defendants-Appellants say "Yes."

The trial court says "No."

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STATEMENT OF FACTS

Defendants/Appellants Prime Healthcare – Garden City, LLC d/b/a Garden City Hospital, Kelly W. Welsh, D.O, and Megan Shady, appeal from Wayne County Circuit Court Judge Martha Snow's order of July 28, 2021, denying Defendants' motion to dismiss future economic damages (claimed loss of future earnings, future earnings capacity and household services)[1] where plaintiffs allege delay in diagnosing and treating bacterial meningitis in 13-year-old decedent.

A. Factual Background.

This is a wrongful death medical malpractice action in which Plaintiff alleges Defendants failed to 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 the plaintiff estate lost the future earnings and future earnings capacity of the decedent. (APPX ¶¶38-39)[2] Plaintiff retained economic expert, Nitin Paranjpe, Ph.D., who estimated the lost economic damages are between $11,000,000 and $19,000,000.

B. Motion for Partial Summary Disposition.

On April 30, 2021, Defendants filed a motion for partial summary disposition under MCR 2.116(C)(8) and (10), seeking dismissal of plaintiff's damage claims for lost economic damages (lost future earnings and earnings capacity). (APPX 22-57). Defendants argued that the Wrongful Death Act (WDA), MCL 600.2922, does not permit recovery of loss of future earnings and

[1] This Court recently granted leave to appeal in another case raising the same issues. See *Estate of Rowyn Vasquez v. Clark Nugent, M.D.*, et al, Court of Appeals Docket No. 357511.

[2] Plaintiff-decedent's estate generally claims economic damages pursuant to the Wrongful Death Act (¶¶38-39 of Complaint). However, during litigation, plaintiff only specified and attempted to support claims for lost future earnings/capacity with a report from economics expert Nitin Paranjpe, Ph.D. Defendants preserved an objection to any new economic damages claims at the time they filed Defendants' Motion for Partial Summary Disposition. It was only when Plaintiffs filed their Response to Defendants' Motion for Partial Summary Disposition that Plaintiffs added an affidavit and new report from expert Dr. Paranjpe claiming loss of household services. (APPX 80-103). Defendants repeated their objection to these new claims in their trial court Reply Brief. Defendants continue to object to these new loss of household services claims.

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earnings capacity, where the decedent was not and would not be providing support or services to anyone allowed to recover under the Wrongful Death Act. Two trial court orders/opinions were attached to the motion. In response, Plaintiff primarily argued that, based on this Court's decision in *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016), that loss of future earnings and earning capacity are recoverable under Michigan's Wrongful Death Act. (APPX 58-117).

Plaintiff also relied on the Supreme Court's statement in *Shinholster v Annapolis Hosp*, 471 Mich 540, 564; 685 NW2d 275 (2004), that "a decedent's estate [can] recover everything that the decedent would have been able to recover had she lived." Plaintiff further asserted that neither the alleged loss of future earnings or services were speculative, noting that several other cases allowed living infant plaintiffs and a deceased teenager to recover lost earning capacity damages (APPX 58-117). Subsequently, Defendants filed a reply in further support of their motion (APPX 118-162).

On July 21, 2021, a hearing (APPX 163-184) was held where defendants explained that *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948) is the controlling case on this issue, and that *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016) was not applicable as the decedent in *Denney* was a husband and father, unlike the decedent in this case, who was 13 years old with no dependents. The trial court denied the motion and an order was entered on July 28, 2021. (APPX 1-2).

Defendants submitted their application for leave to appeal to this Court of Appeals on August 19, 2021 pursuant to MCR 7.205(A) (APPX 185-203), which was granted on October 13, 2021 (APPX 204).

ARGUMENT

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With all due respect to the Trial Court, it erred when it concluded that Plaintiff can recover for the decedent child's potential lifetime of future wages. The Court relied principally on *Denney.* However, *Denney* was an adult male with a wife and a child. This case involves a 13-year-old who was not supporting anyone. The Wrongful Death Act does not allow an estate of a 13-year-old decedent to recover future earnings or future earning capacity when he was not supporting anyone or obligated to support anyone. The Act only allows recovery if loss of support is *proven*. The trial court disregarded Supreme Court precedent, *Baker*, relying instead on a more recent Court of Appeals decision, *Denney*, addressing lost wages that can be recovered under the Governmental Immunity Act.

Before *Denney*, 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."). Now, claims for a decedent's earning capacity after death are called "*Denney* damages", reflecting the fact that *Denney* allegedly changed Michigan law. However, there were no legislative changes to the Wrongful Death Act immediately before *Denney*.

Denney's holding affects every wrongful-death case in which the decedent had a capacity to earn income. Estates are now claiming millions of dollars in damages that they apparently forgot to claim before *Denney*. In addition, such future wage calculation is speculative and thus not recoverable. Defendants' motion for partial summary disposition should have been granted.

A. <u>Standard of Review</u>

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This Honorable Court reviews a trial court's decision on interpretation of a statute de novo. *In re Brown*, 229 Mich App 496, 502 (1998). Also, this Court reviews a summary disposition motion under a de novo standard. *Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345 (1995). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. Summary disposition should be granted where the claim is unenforceable as a matter of law and no factual development could possibly justify recovery. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). A motion under MCR 2.116(C)(10) for lack of a genuine issue of material fact, must be granted if the evidence in support and in opposition to the motion shows that there is no genuine issue of material fact to resolve at trial and the moving party is entitled to judgment as a matter of law. *Shallal v Catholic Social Services*, 455 Mich 604, 609 (1997).

B. <u>The Wrongful Death Act does not allow an estate to recover a decedent's potential lost future wages or potential lost future earning capacity.</u>

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 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

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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 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."

C. <u>In *Baker v Slack*, economic recovery is limited to loss of support, if proven.</u>

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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.]

The Michigan Supreme 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. The Court wrote:

> **"The next question presented is whether recovery may be had under the wrongful death act, as amended, 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."**

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."**

The Supreme 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"**

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The Supreme Court concluded that the plaintiff estate could not recover for "probable future earnings, without diminution for cost of maintenance, regardless of whether the decedent left a surviving spouse or next of kin to whom decedent was legally obligated to contribute support." *Baker*, 319 Mich at 711, 714.

The development and evolution of the Wrongful Death Act indicates that *Baker* remains good law and is therefore binding on the lower courts. There can be no doubt that this Court and the trial court are bound to follow the precedent of the Supreme Court. *Maier v Maier*, 311 Mich App 218; 874 NW2d 725 (2015).

D. A brief history of the Wrongful Death Act reveals that *Baker* is good law.

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 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

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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. As a review of the history of the WDA reveals, the amendment did not and does not impact the ruling in *Baker*.

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 the Supreme 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.

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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 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).[3]

b. The Supreme Court decides *Baker*.

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

[3] 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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> 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, the Michigan Supreme Court decided *Baker*, which resolved whether an estate could recover the decedent's earning capacity under the post-1939 Wrongful Death Act. The Supreme 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 for lost earning capacity without proof of support. Equally important, the Supreme 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).

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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, 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.]

This amendment was in direct response to the Supreme 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

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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. Contrary to plaintiff's belief, it has not been given effect beyond that narrow aim. Even after the 1971 amendment, the Michigan Supreme 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).[4] 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 his dissent 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.[5]

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

[4] *Miller* was a suit instituted to recover benefits under an automobile policy.
[5] 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).

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> 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 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 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 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"

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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*,[6] 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 the Supreme 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.

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

[6] *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482; 98 NW2d 620 (1959).

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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 "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***

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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 governed by the common law limiting recovery to compensatory damages only.

e. 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 the Supreme Court's opinion in *Baker*, the Act continues to only permit recovery of loss of support, if such 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.

E. *Denney* does not apply, and the Trial Court erroneously disregarded *Baker*.

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The trial court accepted the plaintiff's argument that the decision in *Denney v Kent Co Road Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016), allows a trial court to disregard the *Baker* decision and permit Plaintiff to recover the claimed loss of earning capacity of the 13-year-old decedent, regardless of any proof of loss of support. However, the trial court erred with its reliance on *Denney.*

a. *Denney's* holding and its implications.

In *Denney*, the decedent 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 the Supreme 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. This Court, however, looked first to the *Thorn v Mercy Memorial Hosp 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.

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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 the prior survival act, even though this very conclusion was rejected in *Baker*. *Touma v McLaren Port Huron*, 965 NW2d 550 (Mich 2021).[7]

The *Denney* Court did not address the Supreme 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

[7] *Touma v McLaren Port Huron*, 965 NW2d 550 (Mich 2021). (J. Viviano).

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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*, the Supreme 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 the Supreme 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," 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." 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 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."

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There are other issues with *Denney*, including that it conflicts with other Supreme Court cases. For example, in *Thompson*, the Michigan Supreme 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*, 357 Mich at 488-499. *Denney* would moot or negate those limitations. 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*). *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).

b. *Baker* is the ruling precedent and lower courts should adhere to it.

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*. Since *Baker* clearly has not been overruled or superseded, the lower courts should have followed *Baker*. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) ("The Court of Appeals is bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded and is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined.") (Footnote and emphasis omitted). *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.

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The trial court in our case referred to an opinion authored by Judge David Lawson in a federal case in which he addressed economic damages where the plaintiffs were a pregnant lady and her unborn baby. This is the only post-*Denney* case in Michigan addressing *Baker*. Judge Lawson of the United States District Court for the Eastern District of Michigan reasoned that the holding of *Baker* could be disregarded because the Wrongful Death Act's reference to "pecuniary loss" was deleted in the 1971 amendment to the act. *White v FCA US, LLC*, 350 F Supp 3d 640 (ED Mich 2018).

In *White*, the estate of the decedent and her unborn fetus brought a products liability claim against the defendant vehicle manufacturer seeking, among other damages, lost wages and earning capacity of both decedents. Defendants sought partial summary disposition of these damages, arguing that the Wrongful Death Act limited recovery solely to damages for loss of support, upon proof that they had a reasonable expectation of receiving same from the deceased. Judge Lawson cited to a portion of this Court's decision in *Brown v Dep't of State Highways*, 126 Mich App 392, 394; 337 NW2d 76 (1983), stating that although the *Baker* Court "held that damages for loss of a potential inheritance were not recoverable in an action for wrongful death," "the Court's holding was based on the requirement of "pecuniary injury," which was later removed from the statute by 1971 PA 65..." *White*, 350 F Supp 3d at 646, citing *Brown*, 126 Mich App at 394.

However, the next sentence following this cited portion of *Brown* stated that the damages issue could be resolved on other grounds, and therefore it was unnecessary to determine "whether *Baker v Slack* retained its viability after the statute was amended." *Brown*, 126 Mich App at 394-395. Judge Lawson also failed to recognize the Supreme Court's subsequent decision in *Wood* confirming that the 1971 amendment was made with the "sole purpose" of correcting the Supreme Court's ruling in *Breckon* regarding non-economic damages, without overruling any other

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Supreme Court decisions interpreting the statute. Any reliance on *White* to resolve the conflict between *Denney* and *Baker* is therefore sorely misplaced.

This issue over whether *Baker* is still applicable was recently taken up by Judge James S. Jamo in the 30th Circuit Court for Ingham County in *Hinkley v McLaren Health Care Corp.* (APPX 205-209)[8] Judge Jamo heard oral arguments in a wrongful death case where the plaintiffs sought economic damages arising out of both the loss of the decedent's lifetime lost earning capacity and the loss of support of decedent's dependents. In his order, Judge Jamo vehemently upheld the ruling in *Baker*. Specifically, Judge Jamo criticized the US District Court of the Eastern District of Michigan's ruling in *White*, where the US District Court, proceeding under state law, "found that *Denney* should be binding on Michigan courts because *Denney* has not been criticized by the Michigan Supreme Court and because there is an absence of a "strong showing that the [state's supreme court] would decide the issue differently." *Hinkley*. Judge Jamo commented specifically on *White*, criticized its holding, and ruled that the amendment to the statute in 1971:

> only allowed non-economic losses to be made recoverable, such as lost society or companionship; it did not change the compensable pecuniary losses. This court therefore finds that *Baker* was not superseded by the statutory amendment of 1971 and *Baker*, being the binding Michigan Supreme Court case, cannot be abrogated by a Court of Appeals determination absent an acceptance by Supreme Court case law, and thus still controls in determining which pecuniary losses are compensable by the wrongful death statute. Under *Baker*, lost earning capacity is not recoverable as part of the wrongful death statute alone. *Hinkley*.

Judge Jamo looked to precedent and applied the ruling in *Baker*. Because *Baker* has not be abrogated or overruled by the Michigan Supreme Court, it remains good law and is controlling in this case.

[8] *Stewart-Hinkley v McLaren Health Care Corp*, an Opinion & Order from Hon. James S. Jamo, Circuit Court Judge on June 28, 2021. Case No: 19-815-NH.

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F. <u>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.</u>

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). Plaintiff has failed to meet this burden. 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 plaintiff has preserved a claim for lost services of the minor decedent (see footnote #2), 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.

The Supreme 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

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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 is a tragic case, but the claimed economic damages are speculative and stretch the bounds of logic and reality.

RELIEF REQUESTED

WHEREFORE, Defendants/Appellants respectfully request that this Honorable Court reverse the July 28, 2021 order denying the motion for summary disposition based upon plaintiff's claim of lost future economic damages and remand for entry of an order of dismissal of these damages.

Respectfully submitted,

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

/s/ Daniel R. Corbet

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
Attorneys for Defendants-Appellants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DATED: December 8, 2021

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APPENDIX 11

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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.

Court of Appeals No. 358209

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

GEOFFREY N. FIEGER (P30441)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNEY & HARRINGTON
Attorneys for Plaintiffs-Appellees
19390 West Ten Mile Rd.
Southfield, MI 48075
248-355-5555/5148 fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants-Appellants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

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DEFENDANTS-APPELLANTS' REPLY BRIEF TO PLAINTIFF-APPELLEES BRIEF ON APPEAL

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ARGUMENT

A. *Baker* remains good law and is binding precedent on the lower courts.

Baker v Slack, 319 Mich 703; 30 NW2d 403 (1948), remains good law. *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016), is not applicable to the issue here. *Denney* is a case which examined the highway defect exception to governmental immunity and whether future lost wages are recoverable under that immunity statute. That case did not deal with the issue in front of this Court. *Denney* cannot and should not be allowed to upend the *Baker* Court's limit on recoverable damages in wrongful death cases. Despite plaintiff's contention, *Baker* remains the controlling precedent. Supreme Court opinions remain controlling even when they are contradicted by a subsequent Court of Appeals decision.

The facts of *Denney* and a later case upholding *Denney*, are inconsistent with the facts in this instance. In *Denney*, the decedent was an adult who was survived by dependents. In *Touma v McLaren Port Huron*, 965 NW2d 550 (Mich 2021), the decedent was an adult who was survived by dependents. As compared to the present case, the decedent was 13-years old, had no dependents, and was not earning a wage. These differences must not be overlooked.

Plaintiff attempts to argue that this Court of Appeals must follow *Denney* essentially because that decision comes from this Court and is more recent than Baker, without explaining the differences in the cases. The *Baker* case remains good law and is binding on the lower courts. This Court and the trial court are bound to follow the precedent of the Supreme Court. *Maier v Maier*, 311 Mich App 218; 874 NW2d 725 (2015). As explained in *State Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009):

> [T]his Court remains bound by our Supreme Court's decision . . . until such time as our Supreme Court instructs otherwise: 'it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v. WG Wade Shows*, 443 Mich 515, 523, 505 NW2d 544 (1993), overruled on other

grounds *Karaczewski v. Farbman Stein & Co.*, 478 Mich 28, 732 NW2d 56 (2007). **"The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions. Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete."** *Paige v. Sterling Hts.*, 476 Mich 495, 524, 720 NW2d 219 (2006).

The Supreme Court very recently reaffirmed this proposition in *Estate of Pearce v Eaton County Rd Comm'n*, 2021 Mich LEXIS 1037 (APPX 1-13). The Supreme Court reversed two published decisions by the Court of Appeals that had relied on a previous published Court of Appeals decision which improperly disregarded the precedential effect of a portion of a Supreme Court opinion that had not been overruled, and was therefore binding on the Court of Appeals. The Supreme Court traced the evolution of Michigan's presuit-notice doctrine for cases involving the highway exception to governmental immunity, and concluded that its 1996 decision in *Brown v Manistee Co Rd Comm,* 452 Mich 354; 550 NW2d 215 (1996), applying a 120-day notice provision to a negligence action against a county road commission, controlled regardless of a subsequent Supreme Court opinion finding that the road commission was not required to show actual prejudice before the notice provision could be enforced. The Supreme Court found the Court of Appeals erred by failing to follow the portion of *Brown* that had not been "clearly [] overruled or superseded." *Id*. at 10, citing *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016)). The Court made this ruling despite having stated in a post-*Brown* decision that "nothing can be saved from [*Brown*] because the analysis [it] employs is deeply flawed." *Id*., citing *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214; 731 NW2d 41 (2007). As explained in Defendants-Appellant's opening brief[1], the evolution of Michigan's wrongful death jurisprudence indicates that the Supreme Court's limitation on lost earnings damages in *Baker* has

[1] Please refer to Defendants-Appellant's Brief on Appeal, pages 7-16, for the full analysis of the history of the WDA. (APPX 14-46)

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likewise never been "clearly overruled or superseded," and was therefore binding on the Court of Appeals in *Denney* and the trial court in this case.

Further, 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.

The only Court of Appeals panel to consider the holding in *Denney* to date has found that it was correctly decided. *Touma*, 965 NW2d 550 (Mich 2021). The Supreme Court recently denied leave to appeal. In his dissent from the decision to deny leave to appeal, Justice Viviano, joined by Justice Zahra, described *Touma* as a case which "presents a significant and recurring question of law involving a complicated statute" "in which the Court of Appeals has reached a conclusion seemingly at odds with our precedent." Id. Justice Viviano notes the conflict between *Baker* and *Denney* as set forth by Defendants in this case, and observes that, although the Supreme Court previously declined to review that issue in *Denney*, "the defendants [in *Denney*] 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*" Id.

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B. <u>The Legislature's 1971 Amendment to the WDA – A distinction without a difference.</u>

Plaintiff argues that the *Baker* decision should 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 subsequently amended the statute to allow recovery for the ***non-economic*** damages of loss of society and companionship. Throughout Plaintiff's brief, Plaintiff repeats that its case is governed by the most recent version of MCL 600.2922, which did not exist when *Baker* was decided and therefore *Baker's* holding is not binding or even legally relevant. However, Plaintiff fails to discuss, or even mention, how these two versions substantively differ, whereas Defendants provided a lengthy analysis[2] on how there is no difference and that the Legislature adopted *Baker's* holding in the current version of the WDA.[3]

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, 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.]

[2] Refer to Defendants-Appellant's Brief on Appeal, pages 7-16, for the full analysis of the history and evolution of the Wrongful Death Act. (APPX 14-46).

[3] Refer to section (d) "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" on p. 13 of Defendants-Appellant's Brief on Appeal.

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This amendment was in direct response to the Supreme 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. Contrary to plaintiff's argument, it has not been given effect beyond that narrow aim. Even after the 1971 amendment, the Michigan Supreme 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).[4] 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

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

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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 his dissent 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.[5] Similarly, in *Wood*, the Supreme 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 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

[5] 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).

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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.")

This analysis supports that this one change in the WDA that plaintiff has rested its entire argument on, fails to make a difference in the application and purpose of the WDA. Therefore, the version of the WDA from *Baker* maintains its meaning, making *Baker's* interpretation of that statute good law.

C. The expansive interpretation of damages available under the WDA is subject to statutory and common law limitations.

The Michigan Supreme Court supports an expansive interpretation of damages available under the Wrongful Death Act, but 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). Defendants agree that the Legislature intended an expansive interpretation, however Plaintiff overlooks these significant limitations on the damages allowed under the WDA. The passage from *Denney,* cited in Plaintiff's brief, stated it best: "However, '[b]ecause an underlying claim 'survives by law' and must be prosecuted under the wrongful-death act, **any statutory or common-law limitations on the underlying claim apply to a wrongful-death action**.'" *Denney*, 317 Mich. App. 727, 732, quoting *Wesche*, 480 Mich at 89 (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 this 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,

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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).

Further, the Legislature's addition in 1985 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 does not fall into either category, and is therefore not a type of damages authorized by the broader term. Id.

The Act's specific reference to "loss of financial 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.

Although the *Denney* Court correctly recognized the Wrongful Death Act as a "'filter' through which the underlying claim may proceed," 317 Mich App at 735, quoting *Wesche*, 480

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Mich at 88, the Court failed to apply this "filter" to the estate's recovery of damages "as limited by the wrongful death act." 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 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."

D. <u>Future wages are too speculative to allow recovery.</u>

The Plaintiff Estate claims that it can recover a thirteen-year-old child's potential lifetime of future wages through this wrongful death action. It's a novel theory. To our knowledge, no Michigan Court has ever allowed recovery of a lifetime of work in a wrongful death action where the decedent had no spouse or dependents. Both the plain language and the historical interpretation of the Wrongful Death Act limit recovery of future wages to cases in which the decedent had a spouse or dependents. There is no dispute in this case that the decedent, a minor child, was not financially supporting anyone. So the Estate's claim for the decedent's future wages should fail as a matter of law.

The Plaintiff Estate's Claim for future wages should also fail because it is completely speculative. The economic damages in this case are speculative and based on a number of variables, including the patient recovering from the fatal bacterial meningitis, completion of middle school and high school, marriage, children, grades, future education, and whether the

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decedent would have contributed $$ to his parents and siblings, at the expense of his own wife and children, if he had any. The Plaintiff Estate's expert provides a completely absurd and unsubstantiated wage loss range of $11,217.096 with a high school diploma to $19,073,907 with a bachelor's degree. There is no basis for assuming that the decedent would have earned an average income for any particular level of education. It is pure speculation. So again, the claim for future wages fails as a matter of law.

RELIEF REQUESTED

WHEREFORE, Defendants/Appellants respectfully request that this Honorable Court reverse the July 28, 2021 order denying the motion for summary disposition based upon plaintiff's claim of lost future economic damages and remand for entry of an order of dismissal of these damages.

Respectfully submitted,

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

/s/ Daniel R. Corbet

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
ELENA T. SIMOPOULOS (P85501)
Attorneys for Defendants-Appellants
30500 Van Dyke Ave., Suite 500
Warren, MI 48093
(313) 964-6300

DATED: January 10, 2022

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APPENDIX 12

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

NAWAL DAHER and MOHAMAD JOMAA, Co-Personal Representatives of the ESTATE OF JAWAD JUMAA, also known as the ESTATE OF JAWAD JOMAA,

Plaintiffs-Appellees,

v

PRIME HEALTHCARE SERVICES-GARDEN CITY, LLC, doing business as GARDEN CITY HOSPITAL, KELLY W. WELSH, D.O., and MEAGAN SHADY, D.O.,

Defendants-Appellants.

FOR PUBLICATION
December 1, 2022
9:40 a.m.

No. 358209
Wayne Circuit Court
LC No. 20-004169-NH

Before: RONAYNE KRAUSE, P.J., and JANSEN and SWARTZLE, JJ.

RONAYNE KRAUSE, P.J.

In this medical malpractice action under the wrongful-death act, MCL 600.2922, defendants appeal by leave granted[1] the trial court's denial of defendants' motion for partial summary disposition, pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (no genuine issue of material fact). At least for purposes of summary disposition, it is not disputed that the decedent, Jawad Jumaa, who was then 13 years old, died of bacterial meningitis shortly after being treated by defendants. Plaintiffs allege that defendants committed medical malpractice by failing to diagnose and treat Jawad's bacterial meningitis. Defendants moved for summary disposition, arguing that plaintiff's claims for lost future earnings were speculative. The trial court disagreed. We affirm.

[1] *Estate of Jawad Jumaa v Prime Healthcare Services-Garden City, LLC*, unpublished order of the Court of Appeals, entered October 13, 2021 (Docket No. 358209).

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I. STANDARD OF REVIEW

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), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. A motion brought under MCR 2.116(C)(8) should 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 damages is recoverable for a given cause of action is a question of law, which we review de novo. See *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 242; 82 NW2d 660 (2013). The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

II. WRONGFUL DEATH DAMAGES

Pursuant to MCL 600.2921, "[a]ll actions and claims survive death." However, "[a]ctions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to [the wrongful-death statute, MCL 600.2922]." *Id*. Such claims may be brought by the personal representative of the decedent's estate to the same extent the decedent could have brought those claims if the decedent had survived. MCL 600.2922(1) and (2). The decedent's parents are within the class of persons entitled to damages under the wrongful-death statute. MCL 600.2922(3)(a). Pursuant to MCL 600.2922(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.

Our Supreme Court has explained that "the wrongful-death act is essentially a 'filter' through which the underlying claim may proceed," noting that a wrongful-death action is not created upon the death of the decedent, but rather *survives* the death of the decedent. *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 88-89; 746 NW2d 847 (2008).

A. ENTITLEMENT TO DAMAGES

In *Wesche*, our Supreme Court explained that a wrongful-death action is a derivative claim brought by a decedent's personal representative in the decedent's shoes, the touchstone being whether the decedent could have maintained the action if death had not occurred. *Wesche*, 480 Mich at 90-91. Our Supreme Court explicitly described *Endykiewicz v State Highway Comm*, 414 Mich 377; 324 NW2d 755 (1982), as having espoused "a repudiated understanding of the

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wrongful-death act" to the extent the *Endykiewicz* Court described a wrongful-death claim as a new action brought for the benefit of the beneficiaries named in the wrongful-death statute. *Wesche*, 480 Mich at 90.

In *Denney v Kent Co Road Comm*, 317 Mich App 727, 731-732; 896 NW2d 808 (2016), this Court explained that although lost earnings are not explicitly specified in MCL 600.2922(6), the 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 allowed under the wrongful-death statute." In *Denney*, the decedent could have brought a claim sounding in negligence under the highway exception to governmental immunity for lost earnings resulting from bodily injury that the decedent suffered when two potholes caused the decedent to lose control of his motorcycle. *Id*. at 729, 735-737. Under the circumstances of that case, this Court agreed that a claim for lost financial support could not have been brought under the highway exception. *Id*. at 736. However, this Court observed that "a claim for lost financial support under the wrongful-death statute is not the same as a claim for lost earnings," the former being a claim brought by a person who depended upon the decedent, and the latter being a claim brought by the decedent on his or her own behalf. *Id*. at 736-737. "Because the damages are distinct, the fact that the wrongful-death statute allows for recovery of lost financial support does not change the character of plaintiff's claim for damages for the decedent's lost earnings." *Id*. at 737. This Court further expressly rejected the argument that the distribution of damages to the decedent's beneficiaries rather than to the estate altered its analysis. *Id*.

Defendants argue that the *Denney* Court's interpretation of MCL 600.2922(6) irreconcilably conflicts with precedent from our Supreme Court. Under MCR 7.215(J)(1), however, "[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." We observe that *Denney* has not itself been overturned by our Supreme Court. Furthermore, the relevant legal principle from *Denney* has also not been overturned by our Supreme Court. Nevertheless, defendants argue that *Denney* was wrongly decided at the time pursuant to *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948). We disagree.

In *Baker*, our Supreme Court addressed whether, under a predecessor to the current wrongful-death statute, the decedent's adult son, with whom the decedent lived, could recover damages for "pecuniary injury as the result of [the decedent's] death." *Baker*, 319 Mich at 705-706. "No testimony was introduced to establish that anyone was or had been dependent upon [the] decedent for support or maintenance or that there was anyone to whom she was morally or legally obligated to contribute." *Id*. at 706. In fact, to the contrary, the decedent was dependent upon the son, although she did have some "established earning capacity." *Id*. at 707-708. At that time, the applicable statute provided:

> Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every 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

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> 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 . . . [1940 CL Supp 14062; 1939 PA 297, § 2.]

Our Supreme Court interpreted the above language as providing for " 'pecuniary injury' to [the] decedent's surviving spouse or next of kin," which the Court observed "must be predicated upon the existence of some next of kin having a legally enforceable claim to support or maintenance by [the] deceased." *Baker*, 319 Mich at 714.

Critically, as discussed, our Supreme Court has explained that a wrongful-death action *used to be* construed as providing a new cause of action for the benefit of the beneficiaries. *Wesche*, 480 Mich at 90. The obsolete understanding of the nature of a wrongful-death action would be consistent with the *Baker* Court's analysis and holding. However, although not expressly cited in *Wesche*, our Supreme Court has necessarily—if implicitly—overruled the fundamental principle underlying the analysis and holding in *Baker*. We recognize that we are "bound to follow decisions by [our Supreme] Court except where those decisions have *clearly* been overruled or superseded," and we may not anticipate that a decision from our Supreme Court will be overturned. *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) (emphasis in original). Although "it is not always so easy to determine whether a case has been 'clearly overruled or superseded' by intervening changes in the positive law," such a conclusion may be easily drawn where "the Legislature has entirely repealed or amended a statute to expressly repudiate a court decision." *Id*. at 191 n 32. The statutory amendment at issue here is less extreme. 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. Either way, *Baker* has clearly been overruled or superseded, and it was no longer "good law" long before this Court decided *Denney*.

We therefore conclude that *Denney* is controlling, and pursuant to *Denney*, plaintiffs may recover damages for Jawad's lost future earnings to the same extent Jawad could have recovered those damages had he survived.

B. CALCULATION OF DAMAGES

"The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Although "there is inherent uncertainty regarding what the future may hold," "the measure of damages attributable to the loss of future earnings is left to the sound judgment of the jury despite the time element being uncertain, and the jury's award will not be disturbed if reasonable and within the range of the testimony and proofs presented." *Id*. at 104, citing *Vink v House*, 336 Mich 292, 296-297; 57 NW2d 887 (1953). Recovery of damages is not precluded "for lack of precise proof," nor must a plaintiff provide "mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable, particularly in circumstances in which the defendant's actions created

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the uncertainty." *Hannay v Dep't of Transp*, 497 Mich 45, 79; 860 NW2d 67 (2014) (quotations omitted).

In an action for medical malpractice, an injured party may recover damages for future economic losses. MCL 600.1483(2); *Taylor v Kent Radiology*, 286 Mich App 490, 519; 780 NW2d 900 (2009). "Although economic losses are not defined under MCL 600.1483 or MCL 600.6305,[2] this Court has turned to the definition provided in MCL 600.2945(c) in order to determine whether a claim for damages in a medical malpractice action should be characterized as economic or noneconomic losses." *Taylor*, 286 Mich App at 519. Under MCL 600.2945(c), economic losses are defined as "objectively verifiable pecuniary damages arising from . . . loss of wages, loss of future earnings . . . or other objectively verifiable monetary losses." In *Hannay*, our Supreme Court explained that there was a difference between "work-loss damages" and "loss of earning capacity damages," the former being for income a person *would have* earned, and the latter being for income a person *could have* earned. *Hannay*, 497 Mich at 80-82.

In *Hannay*, our Supreme Court found evidence of work-loss damages for the plaintiff too speculative, despite evidence that the plaintiff was fully expected by a dentist and an experienced dental hygienist to become a dental hygienist, because too many contingencies needed to occur, such as admission to a dental hygienist program, successful completion of the program, and passing a licensing exam. *Hannay*, 497 Mich at 86-88. By necessary implication, loss of earning capacity permits much greater latitude. See *Health Call of Detroit*, 268 Mich App at 104. Nevertheless, the calculation must still be reasonably based on some evidence. See *May v William Beaumont Hosp*, 180 Mich App 728, 756; 448 NW2d 497 (1989)

We have found little clear authority in Michigan regarding a claim for a child decedent's lost wages or lost earning capacity. An early case did discuss a claim by parents for their child's lost earning potential. *Lincoln v Detroit & M. Ry Co*, 179 Mich 189, 193-195; 146 NW 405 (1914). However, at that time, "two statutes existed under which an action could be brought in cases of injury resulting in death: the survival act and the wrongful death act." *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 428; 329 NW2d 729 (1982). The two "claims were mutually exclusive and the measure of damages was substantially different." *Id*. at 430. We find *Lincoln* unhelpful because it was decided under a significantly different statutory scheme; furthermore, it concerned the child's earning potential during his minority, which would have belonged to the parents, and it did not discuss whether that earning potential was speculative. *Lincoln*, 179 Mich at 193-195. More recently, our Supreme Court discussed parents' entitlement under the wrongful-death act for loss of benefits they reasonably expected to receive from a deceased child after the child's majority, concluding that a majority of states permitted such recovery. *Thompson v Ogemaw Co Bd of Road Commrs*, 357 Mich 482, 488-489; 98 NW2d 620 (1959). The Court noted that "the most difficult of all questions involved in wrongful death cases" was "how definite must the evidence bearing upon pecuniary injury be to support a jury award?" *Id*. at 489-490. The

[2] Under MCL 600.6305(1)(b)(*ii*), a verdict or judgment rendered in a personal injury action shall include findings regarding any future damages, including "[l]ost wages or earnings or lost earning capacity and other economic loss."

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Court concluded that, under the circumstances, there was evidence that the decedent had been healthy, intelligent, industrious, and had a history of earning money and contributing to family support, all of which "could reasonably be forecast into the future." *Id*. at 491-492.

The issue has also been addressed in other states.[3] In *Howard v Seidler*, 116 Ohio App 3d 800; 689 NE2d 572 (1996), the plaintiff brought a wrongful-death action for the death of her 11-year-old son, Vencinn, who died after being struck by an automobile. The plaintiff argued on appeal that the trial court erred by not allowing the jury to consider awarding damages for loss of the child's expected financial contributions to his mother's support. *Id*. at 808-809. The court held that, pursuant to Ohio law and precedent, parents were entitled to recover damages based on a minor child's lost future earning capacity, even if the child had never been gainfully employed; however, the trier of fact must consider "knowledge of the age, sex, and physical and mental characteristics of the child." *Id*. at 810-811. In *Howard*, the court found that "testimony regarding Vencinn's age, mental and physical characteristics, activities, and plans for his future," and testimony regarding Vencinn's sister's financial contributions to their mother's support, was sufficient to create an issue for the jury "as to whether Vencinn would have provided support to his family members, particularly his mother, after emancipation, and the dollar amount of that support." *Id*. at 812. The court also concluded that the trial court erred by excluding testimony from an economics expert to establish the decedent's lost future earnings. *Id*. at 807, 812-813. The court stated:

> 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. Under the facts of the instant case, there was evidence that Vencinn was a normal eleven-year-old boy who had a good relationship with his family and who had aspirations to do something with his life in adulthood. There was clear evidence that his sister was well educated and well employed. There was also evidence that his sister provided financial support to Vencinn's mother. Upon these facts, there clearly was a foundation laid for the issue of whether Vencinn would have also provided support in adulthood to his mother.
>
> 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 [the expert's] testimony, under the facts of this case, was reversible error. [*Id*. at 813.]

In *Mecca v Lukasik*, 366 Pa Super 149, 154; 530 A2d 1334 (1987), several teenagers were killed in an automobile accident. At issue was, in part, whether an expert's testimony regarding the future earning potentials of the deceased teenagers was impermissibly speculative. *Id*. at 158-

[3] "Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 727 n 5; 957 NW2d 858 (2020).

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159. The plaintiffs introduced evidence of the decedents' educational and career plans, including one girl's expectation to complete college and medical school. *Id*. at 159-160. The court acknowledged the difficulty of "project[ing] future wage loss of a deceased child," but found that economic expert's projections were supported by testimony regarding the decedents' parents' and siblings' careers and academic achievements. *Id*. at 160-161.

We think the above cases establish that a child's expected future earning potential is not *inherently* too speculative to permit recovery. The touchstone is whether that future earning potential can be proven with reasonable certainty based on the child's unique and known traits and abilities. There is no reason why the child must have an employment history. We decline to specify how old is "old enough," because different people mature at different rates, so that inquiry will inevitably depend on the specific child at issue. 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 or role models, and similar extrinsic influences will affect the child's future earning potential. We do not purport to set forth an exhaustive list of characteristics and influences, nor do we suggest that any of the above characteristics and influences are necessary. 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.

We further express no opinion regarding Jawad specifically. We granted leave to appeal limited to the issues in defendants' application, which in turn was limited to the argument that lost future earning potential was *inherently* impermissible or speculative for a 13-year-old who was neither working nor supporting anyone. We reject defendants' argument. The trial court therefore correctly denied defendants' motion for summary disposition. 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.

Affirmed. We direct that the parties shall bear their own costs. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Kathleen Jansen

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APPENDIX 13

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

NAWAL DAHER and MOHAMAD JOMAA, Co-Personal Representatives of the ESTATE OF JAWAD JUMAA, also known as the ESTATE OF JAWAD JOMAA,

Plaintiffs-Appellees,

v

PRIME HEALTHCARE SERVICES-GARDEN CITY, LLC, doing business as GARDEN CITY HOSPITAL, KELLY W. WELSH, D.O., and MEAGAN SHADY, D.O.,

Defendants-Appellants.

FOR PUBLICATION
December 1, 2022

No. 358209
Wayne Circuit Court
LC No. 20-004169-NH

Before: RONAYNE KRAUSE, P.J., and JANSEN and SWARTZLE, JJ.

SWARTZLE, J. (*concurring dubitante in the judgment*).

I respectfully concur dubitante in the judgment. I agree with the majority that this Court's earlier decision in *Denney v Kent Co Road Comm*, 317 Mich App 727; 896 NW2d 808 (2016) is squarely controlling here. Under our principle of *stare decisis*, MCR 7.215(C)(2),(J)(1), this panel is bound to follow the holding in *Denney*, and that holding is broad enough to control the outcome in this case. With that said, I question the soundness of *Denney* for at least two reasons:

First, as the majority recognizes, *Denney* did not confront our Supreme Court's decision in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948) or the subsequent court decisions or legislative amendments since *Baker*. In their briefs, defendants and amici curiae set forth this history in great detail, and they argue that history is on their side. While I tend to read the plain text of MCL 600.2922(6)—*in isolation*—as broadly as the *Denney* Court did, this leads me to my next point.

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 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.

This is all to say that there are complicated questions of statutory interpretation, legislative history, and binding precedent, and yet all of these questions are short-circuited by *Denney*. For these reasons, as well as those more fully set forth by Justice VIVIANO in his dissenting statement in *Touma v McLaren Port Huron*, 965 NW2d 550, 551-553 (Mich, 2021) (VIVIANO, J, dissenting), I encourage our Supreme Court to take up this question and definitively answer it.

But, given the current state of the law under *Denney* as illustrated by the majority, I must concur dubitante in the judgment.

/s/ Brock A. Swartzle

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APPENDIX 14

HOUSE BILL No. 4504

March 16, 1971, Introduced by Reps. O'Neill, Suski, Kildee and Del Rio and referred to the Committee on Judiciary.

A bill to amend section 2922 of Act No. 236 of the Public Acts of 1961, entitled

"Revised judicature act of 1961,"

as amended by Act No. 146 of the Public Acts of 1965, being section 600.2922 of the Compiled Laws of 1948.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 2922 of Act No. 236 of the Public Acts of 1961, as amended by Act No. 146 of the Public Acts of 1965, being section 600.2922 of the Compiled Laws of 1948, is amended to read as follows:

806 '71

Sec. 2922. (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damage in respect thereof, then and in every such case, the perso who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section.

(2) 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,~~ UNDER ALL OF THE CIRCUMSTANCES to those persons who may be entitled to such damages when recovered ~~and also~~ 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

Joint Appendix 195

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 SHALL NOT BE LIMITED AND SUCH DAMAGES MAY ALSO INCLUDE RECOVERY FOR THE LOSS OF THE SOCIETY AND COMPANIONSHIP OF THE DECEASED. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action ~~for pecuniary injury resulting from such death~~ shall be distributed to the surviving spouse and next of kin who suffered ~~such pecuniary~~ injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the probate court by written opinion as to the amount thereof representing the ~~total pecuniary~~ loss suffered by the surviving spouse and all of the next of kin, and the proportion of such total ~~pecuniary~~ loss suffered by the surviving spouse and each of the next of kin

Joint Appendix 196

of such deceased person, as shown by the evidence ~~introduced upon the trial of such case~~. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total ~~pecuniary~~ loss suffered by the surviving spouse and next of kin shall be distributed and the proportionate share thereof to be distributed to the surviving spouse and the next of kin. The remainder of the proceeds of such judgment shall be ~~assets of the estate of the deceased~~ DISTRIBUTED ACCORDING TO THE INTESTATE LAWS

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APPENDIX 15

House
Legislative
Analysis
Section

650 Roosevelt Building
Phone: 517/373-6466

HOUSE BILLS 4486 and 4487 Substitutes H-1
First Analysis (5-23-85)

Sponsor: Rep. Ernest Nash
Committee: Judiciary

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THE APPARENT PROBLEM:

When a person dies without leaving a will, the actual heirs-at-law (i.e., spouse and next-of-kin) inherit the deceased's estate as prescribed in the Probate Code's provisions for intestate succession. When a person dies as a result of another party's negligence or wrongdoing, the deceased's relatives may sue that party for damages in a wrongful death action. While determining who gets what from an intestate succession is not a problem, there has been some confusion over who may recover damages in a wrongful death action. The wrongful death statute (MCL 600.2922(2)) specifies those persons who "would be entitled to inherit the personal property of the deceased had he died intestate," and that the amount recovered would be "distributed to the surviving spouse and next of kin who suffered injury..." Another part of the statute states that the amount of damages recoverable in a wrongful death action may "include recovery for the loss of society and companionship of the deceased." The Michigan Court of Appeals recently concluded that the statute permitted only **actual** heirs-at-law and nearest of kin to seek recovery for wrongful death. However, the Supreme Court reversed this decision, ***Crystal*** v ***Hubbard***, 414 Mich 297 (1982), holding that those who may recover for damages under the wrongful death statute include **all potential** heirs-at-law under the intestate statute. While the decision effectively allows almost any relative who suffers a loss to sue to recover damages, there is concern that it expanded the class of persons entitled to recover beyond what is reasonable, and what attorneys and courts can reasonably handle. What is needed is a clearer definition of those entitled to recover damages in a wrongful death action, which reflects both kinship and suffering due to the loss of a loved one.

THE CONTENT OF THE BILL:

House Bill 4487 would amend the Revised Judicature Act to require the personal representative of the deceased's estate, within 30 days of the commencement of a wrongful death action, to serve notice of the action upon any persons entitled to damages. Those entitled to damages would be limited to any of the following who suffered damages and survived the deceased:

(a) the deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and if none of these persons survived the deceased, those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the deceased's date of death;
(b) the children of the deceased's spouse; and,
(c) devisees under the deceased's will, including beneficiaries of a trust under the will, those designated in the will as persons who could be entitled to wrongful death damages, and beneficiaries of a living trust of the deceased if there was a devise to that trust in the deceased's will.

Notification to those entitled to recover damages would have to include the name and address of the personal representative and his or her attorney, and a statement that the claimant would be notified of a hearing to determine the distribution of the proceeds after the settlement of the claim, if damages were awarded. In addition, a person entitled to recover would have to be notified of the fact that:

(a) the personal representative's attorney would have to be advised within 60 days of any material fact which could constitute evidence of any claim for damages, and that failure to do so could bar the person's right to any claim at a hearing to distribute proceeds; and,
(b) he or she would have to present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds, and that failure to do this within the time provided would bar the person from making any claim.

Finally, the bill would allow a claim for damages for wrongful death to be settled out of court if an action for those damages was pending in a court other than the probate court. The personal representative would have to file a motion asking leave of the court to settle the claim, and the court would, with or without notice, hold a hearing to approve or reject the proposed settlement. If a claim for damages for wrongful death was to be settled and no action for wrongful death was pending, the procedures prescribed in the Probate Code would be applicable to the distribution of the proceeds.

MCL 600.2922

House Bill 4486 would amend the Revised Probate Code to provide that the same persons entitled to damages under House Bill 4487 would be entitled to damages in a wrongful death action in a probate court proceeding. Provisions for notification of hearings and requirements for presentation of claims for damages parallel those in House Bill 4487. The bill would delete a provision which exempts wrongful death proceedings from court supervision.

The bill would bar anyone who feloniously and intentionally killed or aided in the killing of the deceased from recovering any damages in an action for wrongful death. Such persons are already barred from receiving any benefits from intestate succession or the deceased's will.

MCL 700.221 et al.

The bills are tie-barred.

FISCAL IMPLICATIONS:

There is no fiscal information available at this time.

OVER

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ARGUMENTS:

For:

The provision of useful work for prisoners is invaluable for the management of prison populations. It rescues prisoners from idleness and boredom and the disruptive behavior these conditions breed; it prepares them for a future outside the walls by enhancing self-esteem and by teaching them skills, and it provides them with some money to spend while they are still serving their sentences as well as a nest egg for use after release. The present limitations on prison industries mean that relatively few of the inmates of this state's correctional system can have such work. The bill holds the promise of significantly expanding the number of prisoners who can be usefully employed.

For:

The average cost to the state of housing one prisoner for one year, as of 1983, was $13,000, but this figure does not fully express the cost to the taxpayer of maintaining an idle prison population. To the extent that this idleness contributes to prison disturbances the taxpayer pays the cost of the idleness in the expense of quelling those disturbances and in repairing the damage done. The taxpayer also pays the cost of supporting the dependents of many prisoners on the welfare rolls. Finally, prisoners who are discharged without money and without skills that can give them the hope of employment are likely to turn again to crime, inflicting on the taxpayer the pain and expense of more crime and the costs of apprehension, prosecution, and further incarceration. Since up to 80 percent of the earnings of prisoners under the bill's provisions would be recaptured by the state, this proposal could result in a significant easing of the taxpayer's burden.

Against:

Michigan continues to struggle with high unemployment. To provide work for sentenced felons while law-abiding citizens go jobless is offensive to the thousands of Michigan citizens who are without jobs. Since the prison population is composed almost entirely of unskilled or semi-skilled people, any work they could be provided under this program is likely to be work which could be done by unemployed people in the general population. The bill is bound to produce profound resentment among people who will perceive the state to be more concerned with the welfare of prisoners than it is with the welfare of ordinary citizens.

Response:

No project could be organized under the bill's provisions if it resulted in the displacement of employed workers or the production of items using skills which are in surplus in the labor market of the surrounding community. This severe restriction will certainly ensure that no one currently employed will be harmed by a prison project and will reduce the possibility that any jobs which might have been created in the "free world" will be created instead within the walls of prisons. It is the purpose of this bill to attract jobs which would not otherwise exist in the state, such as assembly jobs that a manufacturer might contract out to the Far East if prison labor were not available. To deprive prison industries of such jobs will not make them available to the general population in Michigan.

Against:

Businesses in Michigan could be seriously injured if prison industries produce goods or services in competition with them. If a private business can find a market for a product which it has had manufactured in prison, it is reasonable to presume that that market is also available for exploitation by a private business operating without the advantages of prison labor. This bill could shrink the markets of Michigan businesses. Prison industries do not have to pay worker's compensation, unemployment compensation taxes, or single business tax, giving them an enormous edge in pricing. The bill should be amended to ensure that some margin will be added to the price of any prison product to guarantee that they are not priced so as to undercut the products of normal businesses.

Response:

Businesses are protected in the bill by the prohibition of the production of any goods which would result in the impairment of existing contracts for services or which would create direct competition resulting in a loss of business to a competitor already operating in the state. Language already in the act provides further protection by authorizing prison industries to add a margin to the price of products in excess of actual costs "for purposes consistent with (the) act." The bill's notice requirements would guarantee that businesses which feel threatened will have the opportunity to be heard by the advisory council or the commission. It is inevitable that prison products, if they find markets at all, will be providing goods or services that might have been provided by another business, but this could as well be said of the blankets and shoes manufactured and consumed in the prisons now. If they were not made in the prisons the DOC would have to buy them from someone else. Unless we insist that the operation of our correctional system be entirely parasitic and as expensive as possible, we must tolerate some impact on markets from prison industries.

Against:

If Michigan businesses are to avail themselves effectively of prison labor they should be required to pay prisoners only the minimum wage, not the wage prevailing in the surrounding community.

Response:

If businesses could obtain prison labor at the minimum wage while workers in the surrounding community are being paid at a higher rate, then this bill would indeed create an incentive to deprive people in the working world of their jobs. It is unreasonable of business interests to protest simultaneously that prison products can be manufactured too cheaply and that the cost of prison labor is not cheap enough.

For:

The bill requires that the DOC report on the effectiveness of the program after three years. If any of the fears of labor or business are realized in the course of those three years, the act can be amended or the program cancelled. It would be imprudent to neglect so promising an opportunity out of fears which may prove illusory.

POSITIONS:

The Department of Corrections supports the bill. (5-22-85)

The National Federation of Independent Business/Michigan supports the bill. (5-22-85)

ARGUMENTS:

For:

The provision of useful work for prisoners is invaluable for the management of prison populations. It rescues prisoners from idleness and boredom and the disruptive behavior these conditions breed; it prepares them for a future outside the walls by enhancing self-esteem and by teaching them skills, and it provides them with some money to spend while they are still serving their sentences as well as a nest egg for use after release. The present limitations on prison industries mean that relatively few of the inmates of this state's correctional system can have such work. The bill holds the promise of significantly expanding the number of prisoners who can be usefully employed.

For:

The average cost to the state of housing one prisoner for one year, as of 1983, was $13,000, but this figure does not fully express the cost to the taxpayer of maintaining an idle prison population. To the extent that this idleness contributes to prison disturbances the taxpayer pays the cost of the idleness in the expense of quelling those disturbances and in repairing the damage done. The taxpayer also pays the cost of supporting the dependents of many prisoners on the welfare rolls. Finally, prisoners who are discharged without money and without skills that can give them the hope of employment are likely to turn again to crime, inflicting on the taxpayer the pain and expense of more crime and the costs of apprehension, prosecution, and further incarceration. Since up to 80 percent of the earnings of prisoners under the bill's provisions would be recaptured by the state, this proposal could result in a significant easing of the taxpayer's burden.

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Michigan continues to struggle with high unemployment. To provide work for sentenced felons while law-abiding citizens go jobless is offensive to the thousands of Michigan citizens who are without jobs. Since the prison population is composed almost entirely of unskilled or semi-skilled people, any work they could be provided under this program is likely to be work which could be done by unemployed people in the general population. The bill is bound to produce profound resentment among people who will perceive the state to be more concerned with the welfare of prisoners than it is with the welfare of ordinary citizens.

Response:

No project could be organized under the bill's provisions if it resulted in the displacement of employed workers or the production of items using skills which are in surplus in the labor market of the surrounding community. This severe restriction will certainly ensure that no one currently employed will be harmed by a prison project and will reduce the possibility that any jobs which might have been created in the "free world" will be created instead within the walls of prisons. It is the purpose of this bill to attract jobs which would not otherwise exist in the state, such as assembly jobs that a manufacturer might contract out to the Far East if prison labor were not available. To deprive prison industries of such jobs will not make them available to the general population in Michigan.

Against:

Businesses in Michigan could be seriously injured if prison industries produce goods or services in competition with them. If a private business can find a market for a product which it has had manufactured in prison, it is reasonable to presume that that market is also available for exploitation by a private business operating without the advantages of prison labor. This bill could shrink the markets of Michigan businesses. Prison industries do not have to pay worker's compensation, unemployment compensation taxes, or single business tax, giving them an enormous edge in pricing. The bill should be amended to ensure that some margin will be added to the price of any prison product to guarantee that they are not priced so as to undercut the products of normal businesses.

Response:

Businesses are protected in the bill by the prohibition of the production of any goods which would result in the impairment of existing contracts for services or which would create direct competition resulting in a loss of business to a competitor already operating in the state. Language already in the act provides further protection by authorizing prison industries to add a margin to the price of products in excess of actual costs "for purposes consistent with (the) act." The bill's notice requirements would guarantee that businesses which feel threatened will have the opportunity to be heard by the advisory council or the commission. It is inevitable that prison products, if they find markets at all, will be providing goods or services that might have been provided by another business, but this could as well be said of the blankets and shoes manufactured and consumed in the prisons now. If they were not made in the prisons the DOC would have to buy them from someone else. Unless we insist that the operation of our correctional system be entirely parasitic and as expensive as possible, we must tolerate some impact on markets from prison industries.

Against:

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Response:

If businesses could obtain prison labor at the minimum wage while workers in the surrounding community are being paid at a higher rate, then this bill would indeed create an incentive to deprive people in the working world of their jobs. It is unreasonable of business interests to protest simultaneously that prison products can be manufactured too cheaply and that the cost of prison labor is not cheap enough.

For:

The bill requires that the DOC report on the effectiveness of the program after three years. If any of the fears of labor or business are realized in the course of those three years, the act can be amended or the program cancelled. It would be imprudent to neglect so promising an opportunity out of fears which may prove illusory.

POSITIONS:

The Department of Corrections supports the bill. (5-22-85)

The National Federation of Independent Business/Michigan supports the bill. (5-22-85)

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APPENDIX 16

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HOUSE BILL No. 4487

March 26, 1985, Introduced by Reps. Nash and Perry Bullard and referred to the Committee on Judiciary.

A bill to amend section 2922 of Act No. 236 of the Public Acts of 1961, entitled as amended

"Revised judicature act of 1961,"

being section 600.2922 of the Michigan Compiled Laws.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 2922 of Act No. 236 of the Public Acts of 1961, being section 600.2922 of the Michigan Compiled Laws, is amended to read as follows:

Sec. 2922. (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or ~~default~~ FAULT OF ANOTHER, and the act, neglect, or ~~default~~ FAULT is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, ~~in respect thereof, then and in every such case,~~ the person who ~~,~~ or the corporation which would have been liable, if death had not

HOUSE BILL No. 4487

ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death ~~shall have been~~ WAS caused under ~~such~~ circumstances ~~as amount in law to~~ THAT CONSTITUTE A felony. ~~All actions for such death, or injuries resulting in death, shall be brought only under this section.~~

(2) Every ~~such~~ action UNDER THIS SECTION shall be brought by, and in the ~~name's~~ NAME of, the personal ~~representatives~~ REPRESENTATIVE of ~~such~~ THE ESTATE OF THE deceased person. ~~, and in~~ WITHIN 30 DAYS OF THE COMMENCEMENT OF AN ACTION, THE PERSONAL REPRESENTATIVE SHALL SERVE A COPY OF THE COMPLAINT AND NOTICE AS PRESCRIBED IN SUBSECTION (4) UPON THE PERSON OR PERSONS WHO MAY BE ENTITLED TO DAMAGES UNDER SUBSECTION (3) IN THE MANNER AND METHOD PROVIDED IN THE RULES APPLICABLE TO PROBATE COURT PROCEEDINGS.

(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:

(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 OR THE DECEASED'S SURVIVING SPOUSE.

(C) THOSE PERSONS WHO ARE DEVISEES UNDER THE WILL OF THE DECEASED, INCLUDING BENEFICIARIES OF A TRUST UNDER THE WILL, THOSE PERSONS WHO ARE DESIGNATED IN THE WILL AS PERSONS WHO MAY

Joint Appendix 204

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.

(4) THE NOTICE REQUIRED IN SUBSECTION (2) SHALL CONTAIN THE FOLLOWING:

(A) THE NAME AND ADDRESS OF THE PERSONAL REPRESENTATIVE AND THE PERSONAL REPRESENTATIVE'S ATTORNEY.

(B) A STATEMENT THAT THE ATTORNEY FOR THE PERSONAL REPRESENTATIVE SHALL BE ADVISED WITHIN 60 DAYS AFTER THE MAILING OF THE NOTICE OF ANY MATERIAL FACT WHICH MAY CONSTITUTE EVIDENCE OF ANY CLAIM FOR DAMAGES AND THAT FAILURE TO DO SO MAY ADVERSELY AFFECT HIS OR HER RECOVERY OF DAMAGES AND COULD BAR HIS OR HER RIGHT TO ANY CLAIM AT A HEARING TO DISTRIBUTE PROCEEDS.

(C) A STATEMENT THAT HE OR SHE WILL BE NOTIFIED OF A HEARING TO DETERMINE THE DISTRIBUTION OF THE PROCEEDS AFTER THE ADJUDICATION OR SETTLEMENT OF THE CLAIM FOR DAMAGES.

(D) A STATEMENT THAT TO RECOVER DAMAGES UNDER THIS SECTION THE PERSON WHO MAY BE ENTITLED TO DAMAGES MUST PRESENT A CLAIM FOR DAMAGES TO THE PERSONAL REPRESENTATIVE ON OR BEFORE THE DATE SET FOR HEARING ON THE MOTION FOR DISTRIBUTION OF THE PROCEEDS UNDER SUBSECTION (6) AND THAT FAILURE TO PRESENT A CLAIM FOR DAMAGES WITHIN THE TIME PROVIDED SHALL BAR THE PERSON FROM MAKING A CLAIM TO ANY OF THE PROCEEDS.

(5) IF, FOR THE PURPOSE OF SETTLING A CLAIM FOR DAMAGES FOR WRONGFUL DEATH WHERE A CIRCUIT COURT ACTION IS PENDING, A MOTION IS FILED BY THE PERSONAL REPRESENTATIVE ASKING LEAVE OF THE COURT

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TO SETTLE THE CLAIM, THE COURT SHALL, WITH OR WITHOUT NOTICE, CONDUCT A HEARING AND APPROVE OR REJECT THE PROPOSED SETTLEMENT.

(6) IN every ~~such~~ action UNDER THIS SECTION the court or jury may ~~give such~~ AWARD damages ~~,~~ as ~~,~~ the court or jury ~~,~~ shall ~~deem~~ CONSIDER fair and ~~just~~ EQUITABLE, 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~~ THE 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. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action shall be distributed to the surviving spouse and next of kin who suffered injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the probate court by written opinion as to the amount thereof representing the loss suffered by the surviving spouse and all of the next of kin, and the proportion of such total loss suffered~~

~~by the surviving spouse and each of the next of kin of such deceased person, as shown by the evidence. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total loss suffered by the surviving spouse and next of kin shall be distributed, and the proportionate share thereof to be distributed to the surviving spouse and the next of kin. The remainder of the proceeds of such judgment shall be distributed according to the intestate laws.~~ INJURY AND DEATH; AND DAMAGES FOR THE LOSS OF FINANCIAL SUPPORT AND THE LOSS OF THE SOCIETY AND COMPANIONSHIP OF THE DECEASED. THE PROCEEDS OF A SETTLEMENT OR JUDGMENT IN AN ACTION FOR DAMAGES FOR WRONGFUL DEATH SHALL BE DISTRIBUTED AS FOLLOWS:

(A) THE PERSONAL REPRESENTATIVE SHALL FILE WITH THE COURT A MOTION FOR AUTHORITY TO DISTRIBUTE THE PROCEEDS. UPON THE FILING OF THE MOTION, THE COURT SHALL ORDER A HEARING.

(B) UNLESS WAIVED, NOTICE OF THE HEARING SHALL BE SERVED UPON ALL PERSONS WHO MAY BE ENTITLED TO DAMAGES UNDER SUBSECTION (3) IN THE TIME, MANNER, AND METHOD PROVIDED IN THE RULES APPLICABLE TO PROBATE COURT PROCEEDINGS.

(C) IF ANY INTERESTED PERSON IS A MINOR, A DISAPPEARED PERSON AS DEFINED IN SECTION 4 OF THE REVISED PROBATE CODE, ACT NO. 642 OF THE PUBLIC ACTS OF 1978, BEING SECTION 700.4 OF THE MICHIGAN COMPILED LAWS, OR A LEGALLY INCAPACITATED PERSON FOR WHOM A FIDUCIARY IS NOT APPOINTED, A FIDUCIARY OR GUARDIAN AD LITEM SHALL BE FIRST APPOINTED, AND THE NOTICE PROVIDED IN

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SUBDIVISION (B) SHALL BE GIVEN TO THE FIDUCIARY OR GUARDIAN AD LITEM OF THE MINOR, DISAPPEARED PERSON, OR LEGALLY INCAPACITATED PERSON.

(D) AFTER A HEARING BY THE COURT, THE COURT SHALL ORDER PAYMENT FROM THE PROCEEDS OF THE REASONABLE MEDICAL, HOSPITAL, FUNERAL, AND BURIAL EXPENSES OF THE DECEDENT FOR WHICH THE ESTATE IS LIABLE. THE PROCEEDS SHALL NOT BE APPLIED TO THE PAYMENT OF ANY OTHER CHARGES AGAINST THE ESTATE OF THE DECEDENT. 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. IF THERE IS A SPECIAL VERDICT BY A JURY IN THE WRONGFUL DEATH ACTION, DAMAGES SHALL BE DISTRIBUTED AS PROVIDED IN THE SPECIAL VERDICT.

(E) IF NONE OF THE PERSONS ENTITLED TO THE PROCEEDS IS A MINOR, A DISAPPEARED PERSON, OR A LEGALLY INCAPACITATED PERSON AND ALL OF THE PERSONS ENTITLED TO THE PROCEEDS EXECUTE A VERIFIED STIPULATION OR AGREEMENT IN WRITING IN WHICH THE PORTION OF THE PROCEEDS TO BE DISTRIBUTED TO EACH OF THE PERSONS IS SPECIFIED, THE ORDER OF THE COURT SHALL BE ENTERED IN ACCORDANCE WITH THE STIPULATION OR AGREEMENT.

(7) A PERSON WHO MAY BE ENTITLED TO DAMAGES UNDER THIS SECTION MUST PRESENT A CLAIM FOR DAMAGES TO THE PERSONAL REPRESENTATIVE ON OR BEFORE THE DATE SET FOR HEARING ON THE MOTION FOR DISTRIBUTION OF THE PROCEEDS UNDER SUBSECTION (6).

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THE FAILURE TO PRESENT A CLAIM FOR DAMAGES WITHIN THE TIME PROVIDED SHALL BAR THE PERSON FROM MAKING A CLAIM TO ANY OF THE PROCEEDS.

(8) A PERSON WHO MAY BE ENTITLED TO DAMAGES UNDER THIS SECTION SHALL ADVISE THE ATTORNEY FOR THE PERSONAL REPRESENTATIVE WITHIN 60 DAYS AFTER SERVICE OF THE COMPLAINT AND NOTICE AS PROVIDED FOR UNDER SUBSECTION (2) OF ANY MATERIAL FACT OF WHICH THE PERSON HAS KNOWLEDGE AND WHICH MAY CONSTITUTE EVIDENCE OF ANY CLAIM FOR DAMAGES. THE PERSON'S RIGHT TO CLAIM AT A HEARING ANY PROCEEDS MAY BE BARRED BY THE COURT IF THE PERSON FAILS TO ADVISE THE PERSONAL REPRESENTATIVE AS PRESCRIBED IN THIS SUBSECTION.

(9) IF A CLAIM UNDER THIS SECTION IS TO BE SETTLED AND NO CIRCUIT COURT CIVIL ACTION IS PENDING UNDER THIS SECTION, THE PROCEDURES PRESCRIBED IN SECTIONS 221 AND 222 OF THE REVISED PROBATE CODE, ACT NO. 642 OF THE PUBLIC ACTS OF 1978, BEING SECTIONS 700.221 AND 700.222 OF THE MICHIGAN COMPILED LAWS, SHALL BE APPLICABLE TO THE DISTRIBUTION OF THE PROCEEDS.

Section 2. This amendatory act shall not take effect unless House Bill No. 4486 (request no. 00852'85 a) of the 83rd Legislature is enacted into law.

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APPENDIX 17

House
Legislative
Analysis
Section

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

REFERENCES TO THE ESTATES AND PROTECTED INDIVIDUALS CODE

RECEIVED by MSC 12/15/2023 3:28:14 PM House Bills 5485 - 5498 (4-7-00)

House Bill 5485 as enrolled
Public Act 55 of 2000
Sponsor: Rep. Andrew Richner

House Bill 5486 as enrolled
Public Act 56 of 2000
Sponsor: Rep. Marc Shulman

House Bill 5487 as enrolled
Public Act 57 of 2000
Sponsor: Rep. Jack Minore

House Bill 5488 as enrolled
Public Act 58 of 2000
Sponsor: Rep. Gerald Law

House Bill 5489 as enrolled
Public Act 59 of 2000
Sponsor: Rep. Triette Reeves

House Bill 5490 as enrolled
Public Act 60 of 2000
Sponsor: Rep. Joanne Vorhees

House Bill 5491 as enrolled
Public Act 61 of 2000
Sponsor: Rep. Doug Hart

House Bill 5492 as enrolled
Public Act 62 of 2000
Sponsor: Rep. Alan Sanborn

House Bill 5493 as enrolled
Public Act 63 of 2000
Sponsor: Rep. Alan Sanborn

House Bill 5494 as enrolled
Public Act 64 of 2000
Sponsor: Rep. Gloria Schermesser

House Bill 5495 as enrolled
Public Act 65 of 2000
Sponsor: Rep. Michael Switalski

House Bill 5496 as enrolled
Public Act 66 of 2000
Sponsor: Rep. James Koetje

House Bill 5497 as enrolled
Public Act 67 of 2000
Sponsor: Rep. Andrew Richner

House Bill 5498 as enrolled
Public Act 68 of 2000
Sponsor: Rep. Marc Shulman

Second Analysis (4-7-00)
Committee: Family and Civil Law

THE APPARENT PROBLEM:

Michigan's Revised Probate Code (RPC) governs matters pertaining to the settlement of the estates of deceased persons. Enacted in 1978, the code replaced a 1939 law that was considered extremely vague and unnecessarily complex. Although the RPC was viewed as a major overhaul at the time, many people have since believed that a complete reorganization of the law was called for. Approximately 10 years ago, the Council of the Probate and Estate Planning Section of the State Bar began a review of the entire RPC. The result of this review was the Estates and Protected Individuals Code (EPIC), which was enacted during the 1997-98 session. It will repeal the RPC and take effect on April 1, 2000. This new code takes into account changes in the rules, case law and society that have occurred since the RPC was adopted in 1978, and addresses

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internalinconsistencies that exist in the RPC. In addition, the EPIC will make Michigan's probate law more consistent with that of other states.

Although the EPIC has been enacted and will take effect on April 1, 2000, a number of other acts still refer to and cite the RPC. Bills have been introduced to update these references to comport with the appropriate provisions of the EPIC.

THE CONTENT OF THE BILLS:

The bills are largely technical in nature and would help effect the implementation of the Estates and Protected Individuals Code, which was enacted to replace the Revised Probate Code and which takes effect on April 1, 2000. The bills would amend a variety of laws to replace existing references to the Revised Probate Code with the appropriate references to the Estates and Protected Individuals Code and to remove certain provisions that would conflict with the Estates and Protected Individuals Code.

House Bill 5485 would amend the Probate Code (MCL 710.23e, 712A.2, 712A.18, 712A.19b). House Bill 5486 would amend the Revised Judicature Act (MCL 600.816, 600.841, 600.880, 600.880b, 600.880c, 600.1021, 600.1517, 600.2922). House Bill 5487 would amend the Mental Health Code (MCL 330.1498h and 330.1498j). House Bill 5488 would amend the Public Health Code (MCL 333.1106 and 333. 5653). House Bill 5489 would amend the Michigan Do-not-resuscitate Procedure Act (MCL 333.1052). House Bill 5490 would amend the Child Custody Act (MCL 722.26b). House Bill 5491 would amend the Social Welfare Act (MCL 400.11b and 400.115j). House Bill 5492 would amend the Banking Code of 1999 (MCL 487.14402). House Bill 5493 would amend the Savings Bank Act (MCL 487.3422). House Bill 5494 would amend the Michigan Vehicle Code (MCL 257.236). House Bill 5495 would amend the Natural Resources and Environmental Protection Act (324.20101b and 324.80312). House Bill 5496 would amend the Michigan Penal Code (MCL 750.145n). House Bill 5497 would amend the Revised Judicature Act (MCL 600.834). House Bill 5498 would amend the Powers of Appointment Act (MCL 556.114). The bills would provide accurate references to the new code and make other technical amendments.

In addition, House Bill 5495 would clarify that, where otherwise appropriate, petitions by a person other than a surviving spouse for title of water craft valued at $100,000 or less stemming from the death of the owner would be taken in the order specified in Estates and Protected Individual's Code.

House Bill 5497 would also allow a probate register or deputy probate register to exercise any authority granted under the Estates and Protected Individuals Code. House Bill 5498 will also delete language stating that a power of appointment cannot be generally created where the deed, will, trust agreement or other writing or document which creates or reserves the power of appointment explicitly directs that the instrument must contain a specific reference to that power in order to be valid. Finally, the enrolled version of House Bill 5485 does not include a section of the Probate Code (MCL 712A.19b) that was contained in an earlier version of the bill. This section was recently amended by Public Act 46 of 2000 (enrolled House Bill 5145) with the EPIC citations added without deleting the RPC citations. [Since the double citation will has no legal consequence and it is difficult to amend an enrolled bill before it becomes law, the decision was made to simply remove that section from House Bill 5485.] House Bill 5496 would specify, with regard to the language of the Revised Judicature Act establishing where circuit and probate courts may hold sessions, that a probate or circuit judge could hold a hearing regarding an individual who was alleged to need protection at a site the court considers appropriate as provided by the Estates and Protected Individuals Code. This would be in addition to language that would already allow hearings regarding allegedly incapacitated individuals or allegedly mentally ill persons at other sites.

All of the bills would take effect on April 1, 2000.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bills would have no fiscal impact. (4-7-00)

ARGUMENTS:

For:

The bills are technical in nature and would assure the effectiveness of the Estates and Protected Individuals

Code. The acts amended by the bills contain references to the Revised Probate Code, which will be repealed on April 1, 2000 and, thus need to be changed in order to work in conjunction with the new code.

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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APPENDIX 18

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

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House Bill 4777 (Substitute H-1 as reported without amendment)
Sponsor: Representative William Van Regenmorter
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 11-28-05

RATIONALE

It appears that the courts in Michigan will not allow a wrongful death action brought on behalf of an embryo or a nonviable fetus (a fetus that would not be able to survive outside the womb). Michigan's wrongful death statute is found in Section 2922 of the Revised Judicature Act (RJA). This section allows an action for damages against a person who caused the death of an individual, when the deceased individual would have had a claim if he or she had survived. The action must be brought by the personal representative of the decedent. After the Michigan Supreme Court in 1997 rejected a claim for the wrongful death of a nonviable fetus, Public Act 211 of 1998 added Section 2922a to the RJA. Under this section, a person who commits a wrongful or negligent act against a pregnant woman is liable for damages if the act results in the woman's miscarriage or stillbirth, or physical injury to or the death of the embryo or fetus.

Despite the enactment of Section 2922a, a 2003 opinion of the Michigan Court of Appeals did not mention that section in a case that involved the miscarriage of an 18-week-old fetus caused by alleged medical malpractice. In *McClain* v *The University of Michigan Board of Regents*, the Court stated, "…under Michigan law, an action for wrongful death, MCL 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a 'person' within the meaning of the wrongful-death act" (256 Mich App 492). Apparently, this decision has contributed to uncertainty among the circuit courts and within the legal community as to whether Section 2922a allows actions on behalf of an embryo or nonviable fetus. According to a June 2004 article in the *Michigan Bar Journal*, Section 2922a is not classified as a wrongful death act by various authorities, including Michigan Civil Jurisprudence ("Prenatal Torts in Michigan", by Marks and Marks). Also, although Section 2922a establishes civil liability, the language does not specify that the estate of the embryo or fetus may bring an action or otherwise indicate who the plaintiff may be.

To address this situation, it has been suggested that the wrongful death statute, Section 2922 of the RJA, should encompass the death of an embryo or fetus caused by the negligent or wrongful conduct of another.

CONTENT

The bill would amend the Revised Judicature Act to allow a wrongful death action to be based on the death of an embryo or fetus caused by a person who committed a wrongful or negligent act against a pregnant woman. The bill also would require that a wrongful death action be brought by the personal representative of the deceased, rather than the deceased "person".

Section 2922 of the RJA specifies that, whenever the death of a person or injuries resulting in death are caused by wrongful act, neglect, or fault of another, which would have entitled the injured party to maintain an action and recover damages had death not ensued, the person or corporation that would have been liable if the individual had not died is liable in an action for damages notwithstanding the death. The bill would refer to the death of a person, injuries

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resulting in death, "or death as described in Section 2922a".

In addition, the RJA requires that a wrongful death action be brought by, and in the name of, the personal representative of the estate of the "deceased person". The bill would delete "person" from that provision.

MCL 600.2922

BACKGROUND

Public Acts 211 and 238 of 1998 amended the Revised Judicature Act and the Michigan Penal Code, respectively, to establish civil and criminal liability for conduct against a pregnant woman that caused miscarriage or stillbirth, or injured the embryo or fetus. Before these laws were enacted, several decisions of the Michigan Supreme Court and Court of Appeals demonstrated the state of the law concerning the death of or injury to a fetus. As a rule, the courts based their decisions on whether the fetus was viable or "born alive".

In 1971, the Michigan Supreme Court allowed a common law negligence action brought on behalf of a surviving child for injuries suffered during the fourth month of pregnancy (*Womack* v *Buckhorn*, 384 Mich 718). The same year, the Supreme Court allowed a wrongful death claim involving the death of an eight-month-old fetus, reasoning that the decedent would have had an action for damages if he had survived (*O'Neill* v *Morse*, 385 Mich 130). In 1975, the Michigan Court of Appeals, finding that the *O'Neill* decision applied to a *viable* fetus, denied a wrongful death claim brought on behalf of a three-month-old fetus (*Toth* v *Goree*, 65 Mich App 296). Citing that decision, the Michigan Supreme Court stated in 1997, "Since at least 1975 it has been held that a non-viable fetus is not a 'person' within the meaning of the Wrongful Death Act *(McDowell* v *Stubbs*, 455 Mich 853).

In light of these decisions, Public Acts 211 and 238 were enacted to address what was considered a shortfall in the law: the absence of penalties for a person who injures a pregnant woman through negligence, assault, or other misconduct, in a manner that causes her to have a miscarriage or stillbirth, or that injures the embryo or fetus. The provisions enacted in 1998 were subsequently amended after the Oakland County Circuit Court ruled that a man, who was convicted of killing his pregnant wife, could not be charged with the death of her embryo because his actions did not technically result in either a miscarriage or a stillbirth (because the embryo was not expelled from the woman's body). In response, Public Act 2 of 2001 and Public Act 164 of 2002 amended the Michigan Penal Code and the Revised Judicature Act, respectively, to extend criminal and civil liability to conduct causing the "death" of an embryo or fetus.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Despite the enactment of Section 2922a of the RJA, courts in Michigan apparently are not allowing wrongful death actions brought on behalf of an embryo or nonviable fetus. Although the *McClain* case involved a cause of action that arose *after* Section 2922a was enacted, the Court of Appeals entirely omitted any mention of that law, and essentially reiterated previous holdings that a wrongful death action may not be brought on behalf of a nonviable fetus. Although Section 2922a makes it clear that a person is liable for damages if his or her negligence or wrongful conduct causes the death of an embryo or fetus, the *McClain* decision evidently is being cited by defense attorneys to defeat wrongful death actions involving nonviable fetuses. In addition, it appears that Section 2922a simply is not recognized as a wrongful death statute. According to the June 2004 *Michigan Bar Journal* article, West Publishing classifies Section 2922a under "Assault and Battery"; in Michigan Civil Jurisprudence, the act is classified as "Damages to Pregnant Women"; and in Michigan's Non-Standard Jury Instructions, Civil, the act is in the "Stalking" chapter and is classified as a wrongful act against a pregnant woman. As the article points out, "These interpretations…treat the statute (not to mention its explicit legislative history) like a nullity…".

This situation might result from a lack of clarity in the law itself. Although Section 2922a is codified beside the wrongful death provisions of Section 2922, the language added in 1998 does not spell out that an

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action may be brought on behalf of the embryo or fetus, or otherwise indicate who may bring an action for damages. The section states, "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages…", but it does not say liable to whom.

Under the bill, the death of an embryo or fetus as described in Section 2922a would be treated as any other death for purposes of a wrongful death action. Since the courts evidently do not recognize a wrongful death action on behalf of a nonviable fetus, the legislation would do so in statute. An action could be brought by the estate of the embryo or fetus that died. Because an embryo or fetus is not considered a complete person under the law, the bill would require a wrongful death action to be brought by the personal representative of the "deceased", rather than the "deceased person".

Supporting Argument

Allowing a wrongful death action on behalf of a nonviable fetus would be consistent with public policy in Michigan. In 2002, the Michigan Court of Appeals decided a criminal case in which a woman who evidently was in the early stages of pregnancy killed her boyfriend after he hit her twice in the stomach (*People* v *Kurr*, 253 Mich App 317). The Court held that the "defense of others" concept should extend to the protection of a fetus, viable or nonviable. The Court based its decision on the "fetal protection act", which sets forth criminal penalties for harming or causing the death of a fetus or embryo during an intentional assault on a pregnant woman (sections of the Penal Code added by Public Act 238 of 1998 and amended by Public Act 2 of 2001). According to the Court, "The plain language of these provisions shows the Legislature's conclusion that fetuses are worthy of protection as living entities as a matter of public policy…Moreover, in enacting the fetal protection act, the Legislature did not distinguish between fetuses that are viable…and those that are nonviable."

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The fiscal impact of this legislation is indeterminate. To the extent that the bill would pave the way for an increase in civil suits, there could be an increase in costs to the courts, but it is difficult to predict. There are no data on how many lawsuits of this type are filed.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

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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.,

Defendants-Appellants.

MSC No. 165377
Court of Appeals No. 358209

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

GEOFFREY N. FIEGER (P30441)
ROBERT G. KAMENEC (P35283)
MARC S. BERLIN (P37140)
FIEGER, FIEGER, KENNY & HARRINGTON
Attorneys for Plaintiffs-Appellees
19390 W. 10 Mile Rd
Southfield, MI 48075
(248) 355-5555/(248) 355-5148 Fax

DANIEL R. CORBET (P37306)
KENNETH A. WILLIS (P55045)
CORBET, SHAW, ESSAD & BONASSO, PLLC
Attorneys for Defendants-Appellants
30500 Van Dyke Ave, Ste 500
Warren, MI 48093
(313) 964-6300

MICHAEL J. COOK (P71511)
COLLINS EINHORN FARRELL PC
Co-Counsel for Defendants-Appellants
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141/(248) 355-2277 Fax
Michael.Cook@ceflawyers.com

Stipulation for Joint Appendix on Appeal

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The parties stipulate to use the Joint Appendix filed with defendants-appellants brief on appeal. MCR 7.312(D); MCR 7.212(J)(4)(a). The parties also stipulate that either party may file a supplemental appendix containing additional portions of the record not covered by the joint appendix to the extent necessary to fairly present their argument. MCR 7.312(D); MCR 7.212(J)(4)(b).

/s/Robert G. Kamenec
ROBERT G. KAMENEC (P35283)
GEOFFREY N. FIEGER (P30441)
ADAM G. WINN (P84137)
FIEGER, FIEGER, KENNY & HARRINGTON
Attorneys for Plaintiffs-Appellees
19390 W. 10 Mile Rd
Southfield, MI 48075
(248) 355-5555/(248) 355-5148

/s/Michael J. Cook
MICHAEL J. COOK (P71511)
Collins Einhorn Farrell PC
Co-Counsel for Defendants-Appellants
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Michael.Cook@ceflawyers.com

Dated: December 1, 2023

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2015 WL 11118067
Only the Westlaw citation is currently available.
United States District Court, D. New Mexico.

Andres RIVERA, as parent and next friend of A.R., a minor, Plaintiff,

v.

VOLVO CARS OF NORTH AMERICA, LLC, a Delaware Corporation; Roe Corporations I-X, inclusive; and John Does, I-X, inclusive, Defendants.

Civ. No. 13-397 KG/KBM
|
Filed 06/08/2015

Attorneys and Law Firms

Turner W. Branch, Margaret Moses Branch, Mark Daniel Trujillo, Branch Law Firm, Albuquerque, NM, James B. Ragan, Law Offices of James B. Ragan, Corpus Christi, TX, for Plaintiff.

Jeffrey M. Croasdell, Shannon Sherrell, Todd Rinner, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, NM, for Defendants.

MEMORANDUM OPINION AND ORDER

KENNETH J. GONZALES, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court upon Defendant Volvo Cars of North America LLC's *Daubert* Motion to Exclude Plaintiff's Expert Witness Robert Johnson's Testimony on Hedonic Damages and Wage Loss Scenarios (Motion to Exclude), filed on April 1, 2015. (Doc. 245). Plaintiff filed a response on April 20, 2015, and Defendant Volvo Cars of North America, LLC (Volvo) filed a reply on May 7, 2015. (Docs. 264 and 286). Having reviewed the Motion to Exclude, the accompanying briefs, and exhibits, the Court grants the Motion to Exclude.

Volvo moves to exclude certain opinion evidence in the May 15, 2014, expert report prepared by Plaintiff's economic losses expert Robert Johnson. First, Volvo asks that the Court exclude any evidence from Johnson that quantifies the value of enjoyment of life, i.e., hedonic damages. Second, Volvo asks that the Court exclude any evidence Johnson may present on wage loss scenarios.

As a gatekeeper under Fed. R. Evid. 702, the Court must ensure the reliability and relevance of all proffered expert testimony. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). Generally, to be considered reliable, an expert's proposed testimony must be based on more than a subjective belief or unsupported speculation. *Daubert*, 509 U.S. at 590. The proponent of expert testimony has the burden of demonstrating that its expert fulfills the Rule 702 requirements of reliability and relevance. *Heer v. Costco Wholesale Corp.*, 589 Fed. Appx. 854, 861 (10th Cir. 2014).

A. Johnson's Opinion on Hedonic Damages

Johnson sets forth a five-step method for calculating hedonic damages. (Doc. 245-4) at 4-5. Johnson takes into account the value of an average life ($8,900,000 in 1997 dollars) and "the Human Capital component" to calculate that the value of a human life ranges from $3,5000,000 to $12,900,00 in 2013 dollars. *Id.* at 4. Johnson's computation method then requires a trier of fact to "determine the percentage (how much in percent) of the loss of the enjoyment of life that the plaintiff has suffered due to their [sic] injuries" and to pick a number between $3,5000,000 and $12,900,00, which "represents the 100% loss of the enjoyment of life." *Id.* at 5. Finally, to determine the amount of hedonic damages, the trier of fact multiplies the percentage of the loss of enjoyment of life by the chosen number representing the 100% loss of enjoyment of life. *Id.*

Although an economics expert can give "generalized testimony about the *concept* of hedonic damages," the majority rule in federal court is that placing a dollar amount on hedonic damages, including the use of benchmarks and range of values, does not meet the reliability and relevance factors required to admit expert testimony. *See e.g., BNSF Railway Co. v. La Farge SW., Inc.*, 2009 WL 4279849 *1-2 (D.N.M.). This district court has, likewise, has rejected expert testimony on the value of a statistical life as not reliable or relevant. *See Chavez v. Marten Transport., Ltd.*, 2012 WL 988008 *2 (D.N.M.) (citing *Cruz v. Bridgestone/Firestone North Am. Tire, LLC*, 2008 WL 5598439 *4 (D.N.M. 2008)). Because Johnson's five-step method incorporates a monetary range for the value of a human life based, in part, on the value of an average or statistical life, the Court will exclude

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Johnson's five-step method for calculating hedonic damages as unreliable.

B. Johnson's Wage Loss Scenarios

***2** Johnson, at Plaintiff's attorney's request,[1] calculated expected income for A.R. under three scenarios: (1) as a high school graduate, (2) as having completed 1-3 years of college, and (3) as a college graduate. (Doc. 245-2) at 2-3. Johnson acknowledges in his report that he made his wage loss calculations for the three scenarios based on a nurse's life care plan, various statistical reports, the First Amended Complaint, and Plaintiff's deposition testimony. (Doc. 245-1) at 1-2. Johnson, however, admitted at his deposition that all he knew of A.R.'s injuries came from the life care plan; Johnson did not review any medical records. (Doc. 245-3) at 4; depo. at 30.

Volvo cites to *Virginian Ry. Co. v. Armentrout* to support its position that the speculative nature of determining loss of earning capacity for a child makes expert testimony on that subject inadmissible under Rule 702. 166 F.2d 400, 407 (4th Cir. 1948). The Fourth Circuit in *Virginian Ry. Co.* stated:

> The problem of assessing damages in a case of this sort is one which must be approached with common sense. The little child has been terribly injured; but there is nothing from which loss of earning capacity can be estimated with any degree of accuracy. The jury must do the best it can to estimate this, taking into account, of course, such matters as average earnings. They can consider, also, that the child is bright and intelligent and with proper education may be able to develop high earning capacity in intellectual pursuits.

Virginian Ry. Co.,166 F.2d at 407. The Fourth Circuit in that case, however, did not address the issue of admissibility of expert testimony on a child's loss of earning capacity. Rather the issue before the Fourth Circuit was whether the district court erred in not setting aside the verdict as excessive and in not granting a new trial. *Id.* Moreover, the Fourth Circuit actually stated that a jury should consider average earnings, information which an expert would provide. *Id.*

Plaintiff cites to *Hull by Hull v. United States* to support its position that the Court should allow Johnson to present the three wage loss scenarios to establish loss of A.R.'s earning capacity. 971 F.2d 1499 (10th Cir. 1992). In *Hull by Hull*, the Tenth Circuit affirmed the district court's acceptance of an expert's "present value calculation" of a child's lost future earnings. *Id.* at 1511. The issue in *Hull by Hull* was limited, however, to whether the district court properly adjusted the award for lost future earnings to reflect present value. *Id.* at 1510-11. Like *Virginia Ry. Co.*, the Court in *Hull by Hull* did not squarely address the question of admissibility of expert testimony on a child's loss of earning capacity.

Other courts, albeit state courts, have more directly addressed the question of whether to admit expert testimony on a child's loss of earning capacity. One group of cases allows expert testimony on a child's loss of earning capacity if the expert bases that testimony both on statistics and facts specific to the child. *See, e.g., Bulala v. Boyd*, 239 Va. 218, 233, 389 S.E.2d 670, 677 (1990). Otherwise, "[e]stimates of damages based entirely upon statistics and assumptions are too remote and speculative...." *Id.* For example, an expert should consider facts personal to the child such as academic reports, medical records, the family's educational and vocational background, and impressions from interviews with the child and the child's family. *See Musick v. Dorel Juvenile Group, Inc.*, 818 F.Supp. 2d 960, 963-64 (W.D. Va. 2011). *See also Altman v. Alpha Obstetrics & Gynecology, P.C.*, 255 A.D.2d 276, 278, 679 N.Y.S.2d 642, 644 (1998) (expert considered father's vocation and educational level as well as brother's college attendance and academic achievements); *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis.2d 231, 240, 201 N.W.2d 745, 750 (1972) (expert must take into account child's handicaps which are supported by medical evidence). In *Andrews v. Reynolds Memorial Hosp., Inc.*, the West Virginia Supreme Court of Appeals allowed expert testimony setting forth three wage loss scenarios, like the ones Johnson proposes, noting that the expert considered the educational background of the child's parents. 201 W.Va. 624, 630-33, 499 S.E.2d 846, 852-55 (1997). On the other hand, the New Jersey Supreme Court held that it,

> ***3** will not require expert testimony, as a general rule, to establish the *quantum* of earning-capacity loss for a minor. Again, the subject matter of the proof is not so beyond common experience or the store of knowledge or ordinary people that jurors cannot arrive at a reasonable figure on their own. Moreover, we do not perceive much difference between expert prognostication and jury speculation when the question goes to loss of future earning capacity of a child. There are just too many variables to permit the kind of close calculation that would call for expert testimony. Although we are mindful of the fact that the assessment of an infant's lost income-earning capacity is burdened with the element of speculation, we nevertheless conclude that the question is not so beyond the common knowledge and

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> common experience of jurors as to warrant our making expert testimony mandatory in such cases.

Lesniak v. Cnty. of Bergen, 117 N.J. 12, 32-33, 563 A.2d 795, 806 (1989).

As a gatekeeper under Rule 702, the Court is charged with excluding speculative, i.e., unreliable, expert opinion. Although it is tempting to conclude, as the New Jersey Supreme Court did, that any attempt by an expert to determine a child's loss of earning capacity is speculative, the Court agrees with those courts which have held that expert testimony based on statistical averages in conjunction with facts specific to the child is admissible as sufficiently reliable. Such testimony would be helpful to a jury in making its damages findings.

Although Johnson states that he based his wage loss scenarios, in part, on a nurse's life plan, the First Amended Complaint, and Plaintiff's deposition testimony, Johnson concedes that all he knows about A.R. comes from a nurse's life care plan. Johnson admits that he did not review any medical records to determine what A.R.'s physicians believe are A.R.'s physical and mental limitations or any prognoses for these limitations. There also is no indication that Johnson relied on the vocational and educational background of A.R.'s family or any of A.R.'s academic records.[2] Furthermore, there is no indication that Johnson conducted a personal interview with A.R. or her parents to gain any useful impressions. Under these circumstances, Johnson did not consider sufficient facts specifically related to A.R. to make Johnson's wage loss scenarios reliable. The Court, therefore, determines that the wage loss scenarios are inadmissible under Rule 702.

IT IS ORDERED that

1. Defendant Volvo Cars of North America LLC's *Daubert* Motion to Exclude Plaintiff's Expert Witness Robert Johnson's Testimony on Hedonic Damages and Wage Loss Scenarios (Doc. 245) is granted;

2. Johnson's five-step method for determining hedonic damages is inadmissible and is excluded from trial; and

3. Johnson's three wage loss scenarios are inadmissible and are excluded from trial.

All Citations

Not Reported in Fed. Supp., 2015 WL 11118067

Footnotes

1 Volvo is concerned that the wage loss scenarios somehow represent the opinion of Plaintiff's counsel. *See In re Tri State Outdoor Media Group, Inc.*, 283 B.R. 358, 365 (Bankr. M.D. Ga. 2002) (“Courts must be careful to not allow the testifying expert's opinion to be a conduit for the attorney's opinion or allow the testifying expert to be influenced by the attorney....”). Simply requesting three different wage loss scenarios, however, does not constitute improper influence by Plaintiff's counsel.

2 The Court notes that at the time Johnson completed his report in May 2014, A.R. was five years old and could have been enrolled in preschool or kindergarten which may have kept academic records on A.R.

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