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

Brief on Appeal
Oral Argument Requested

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

Table of Contents

Index of Authorities

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

Joint Appendix Index[1]

Document	*Title*	*Appendix Pages*
1	July 28, 2021 Order Denying Defendants' Motion to Dismiss Future Economic Damages	002-003
2	Register of Actions	005-007
3	Complaint	009-027
4	Affidavit of Nitin Paranjpe (with exhibits)	029-052
5	Defendants' Motion for Summary Disposition of Future Economic Damages (without exhibits)	054-061
6	Plaintiffs' Response Opposing Defendant[s'] Motion for Summary Disposition of Future Economic Damages (without exhibits)	063-083
7	Defendants' Reply to Plaintiff[s'] Response to Motion for Summary Disposition of Future Economic Damages (without exhibits)	085-089
8	July 21, 2021 Motion for Summary Disposition Hearing Transcript	091-112
9	Defendants-Appellants' Corrected Application for Leave to Appeal (Court of Appeals; without exhibits)	114-132
10	Defendants-Appellants' Brief on Appeal (Court of Appeals)	134-166
11	Defendants-Appellants Reply Brief to Plaintiff[s]-Appellees['] Brief on Appeal	168-181

[1] The parties have stipulated to using the joint appendix filed with this brief, though they reserve the ability to file supplemental appendices, if needed. **Attachment 1**, Joint Appendix Stipulation; MCR 7.312(D); MCR 7.212(J)(4).

Jurisdictional Statement

This Court has jurisdiction over appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4; MCR 7.303(B)(1).

On July 28, 2021, the trial court entered an order denying defendants-appellants Prime Healthcare Services—Garden City, LLC, Dr. Kelly Welsh, and Dr. Megan Shady's motion for summary disposition on future economic damages.[2] Under MCL 600.308(2)(c) and MCR 7.203(B)(1), the Court of Appeals has jurisdiction to hear appeals by leave granted from interlocutory orders. An application for leave to appeal is timely if it is filed within 21 days of the entry of the order being appealed. MCR 7.205(A)(1). Defendants-appellants filed an application for leave to appeal on August 18, 2021.

On October 13, 2021, the Court of Appeals entered an order granting leave to appeal. On December 1, 2022, the court issued a published opinion affirming the trial court. *Daher v Prime Healthcare Services-Garden City, LLC*, __ Mich App __; __ NW2d __; 2022 WL 17365635 (2022) (Docket No. 358209).[3]

Under MCR 7.215(I)(1), a motion for reconsideration may be filed within 21 days after the Court of Appeals issues its opinion. On December 21, 2022, defendants-appellants timely moved for reconsideration. The court denied reconsideration on January 13, 2023.

Under MCL 600.215, MCR 7.303(B)(1), and MCR 7.305(H)(1), this Court may grant leave to appeal or order other relief after a decision of the

---

[2] **Appendix 002-003**, July 28, 2021 Order Denying Defendants' Motion to Dismiss Future Economic Damages.

[3] **Appendix 183-189**, *Daher* Court of Appeals Opinion; **Appendix 191-192**, *Daher* Concurrence.

Court of Appeals. An application for leave to appeal is timely when it is filed within 42 days of the Court of Appeals' opinion. MCR 7.305(C)(2). Defendants-appellants timely filed their application for leave to appeal on February 24, 2023.

On September 22, 2023, this Court granted defendants-appellants' application for leave to appeal. This Court directed the parties to "address whether: (1) the estate of a child may recover damages for the child's lost future earnings; and (2) to what specificity future earnings need be shown." *Daher v Prime Healthcare Services – Garden City, LLC*, 994 NW2d 789 (Mich, 2023).

When this Court grants leave to appeal, the appellant's brief is due within 56 days of the order granting leave to appeal. MCR 7.312(E)(1)(a). Defendants-appellants moved for a 28-day extension of the due date for its appeal brief, which this Court granted, stating "[t]he brief will be accepted as timely filed if submitted on or before December 15, 2023." *Daher v Prime Healthcare Services – Garden City, LLC*, unpublished order the Supreme Court, issued November 3, 2023 (Docket No. 165377).

Statement of Questions Presented

I.

> Nearly all jurisdictions allow income-related damages in wrongful-death cases. The vast majority allow damages for the loss of financial support that the decedent would have provided others. Few allow earning-capacity damages. It's always one or the other, never both. Historically, Michigan was among the majority. And its wrongful-death act expressly permits "loss of financial support" damages.
>
> Can the estate of a child recover damages for the child's lost future earnings?

The trial court answered that estates may recover for a child's lost future earnings in the form of postmortem earning-capacity damages.

The Court of Appeals answered that estates may recover postmortem earning-capacity damages.

Plaintiffs-appellees answer that they can recover postmortem earning-capacity damages.

Defendants-appellants answer that estates may recover for a child's lost future earnings in the form of lost financial support, as reflected in the language of Michigan's wrongful-death act.

II.

> Remote, contingent, and speculative damages are not recoverable. So, when estates seek income-related damages in wrongful-death cases, to what specificity do future earnings need to be shown?

The trial court did not expressly address this issue, but it denied defendants' motion, which argued that plaintiff's damages were speculative.

The Court of Appeals answered that postmortem earning capacity must be "proven with reasonable certainty based on the child's unique and known traits and abilities." (Apx. 189, *Daher* Court of Appeals Opinion, p. 7).

Plaintiffs-appellees' answer said that the Court of Appeals ruling is "both supported by Michigan law and logic …" (Answer to Application, p. 34).

Defendants-appellants answer that, because Michigan allows loss-of-financial-support damages, estates must produce evidence that the decedent was providing financial support and show a reasonable expectation of continued support. If this Court deviates from its precedent and the express language of the wrongful-death act to allow postmortem earning-capacity damages, then the evidence must be personalized and account for the decedent's personal consumption and probable taxes.

Michigan's Wrongful-Death Statutes

MCL 600.2921:

> All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

MCL 600.2922:

> (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, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after 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) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to 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 of the deceased's spouse.

(c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

(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 that 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 an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

(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. 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, or an incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated individual.

(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 individual 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). 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 that 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 a civil action for wrongful death is not pending under this section, the procedures prescribed in section 3924 of the estates and protected individuals code, 1998 PA 386, MCL 700.3924, shall be applicable to the distribution of the proceeds.

Introduction

In wrongful-death cases, legislatures have two choices for compensating the loss of the decedent's income. They can allow damages for the loss of financial support that the decedent would have provided others. Or they can allow postmortem earning-capacity damages, which are based on work the decedent could have performed but for the injury. Michigan's wrongful-death act expressly permits "loss of financial support" damages. It doesn't reference earning capacity. And, for 68 years, Michigan followed the majority rule: estates can recover for loss of financial support, not the decedent's postmortem earning capacity. That changed with a Court of Appeals opinion in 2016, *Denney v Kent Co Rd Comm'n*, which the Court of Appeals followed in this case. Now, Michigan is the **only** jurisdiction permitting postmortem earning-capacity damages when its wrongful-death statute references only lost "support." This Court should overrule *Denney* and reaffirm that Michigan is a lost-financial-support jurisdiction.

Legislatures make the policy choice between lost support and earning capacity. Michigan's wrongful-death confirms the Legislature's choice. It's a detailed statute that reflects a carefully struck balance. The statute defines who can recover damages based on a wrongful death—nuclear and extended family members, will devisees, trust beneficiaries, etc. In doing so, it expands far beyond those who can recover damages based on a non-fatal injury. Choosing "loss of financial support" over earning capacity balances that expansion. *Denney* destroys the balance.

The Legislature could not have been more express or direct in its choice between loss-of-financial-support damages or earning-capacity damages. The act expressly allows "loss of financial support," not earning

capacity. *Denney* makes that language surplusage—a grave offense for courts. *Denney*'s myopic focus also ignored the act's specific distribution provisions. The act identifies who receives damages and what they receive. There is no provision for distributing earning-capacity damages. It's implausible that the Legislature intended to permit earning-capacity damages but omitted the distribution of those damages.

Denney made Michigan an outlier and disbalanced Michigan law. This Court should return the balance in the act. It should restore the Legislature's express policy choice of "loss of financial support" over earning capacity. It should reaffirm the importance of statutory language and considering the entirety of an act. It should hold that Michigan is among the majority of jurisdictions in choosing loss-of-financial-support damages. This Court should overrule *Denney* and reverse the lower courts in this case.

Under Michigan's traditional rule, estates must show that survivors reasonably expected the decedent to continue providing financial support. If this Court deviates from the statute and nearly 70 years of precedent to adopt an earning-capacity model for damages, it should affirm the Court of Appeals' holding that proofs must be personalized, adding that those proofs must account for personal consumption and probable taxes.

Statement of Facts

A. The Estate claimed $10 million to $19 million in earning-capacity damages.

The Estate filed this action alleging that the defendants are liable for the death of 13-year-old Jawad Jumaa a/k/a Jawad Jomaa.[4] The Estate claimed that it could recover earning-capacity damages.[5]

During discovery, the Estate produced a report from Dr. Nitin Paranjpe, an economist. Dr. Paranjpe calculated Jawad's earning capacity "based on the average earnings of Caucasian males with a high school degree or a bachelor's degree …"[6] He added 15% for fringe benefits, increased the total by 4% each year, and didn't include any offsets.[7] Dr. Paranjpe opined that Jawad's earning capacity was either $10,585,244 (high school degree) or $19,200,806 (bachelor's degree).[8]

B. The trial court denied partial summary disposition.

Garden City Hospital, Dr. Welsh, and Dr. Shady moved for partial summary disposition. They argued that the Estate could not recover earning-capacity damages. The Estate argued that it could recover earning-capacity damages based on *Denney v Kent Co Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016) and that earning-capacity damages weren't speculative, citing Dr. Parajpe's report.

---

[4] See, generally, **Appendix 009-027**, Complaint.

[5] Apx. 017, 020, 022-023, 025, Complaint, ¶¶38, 47, 56, 65.

[6] **Appendix 031**, Paranjpe Affidavit, ¶9; see *id.*, Exhibit C.

[7] *Id.*, ¶12

[8] *Id.*, ¶¶12, 19.

The trial court denied summary disposition, primarily relying on *Denney*.[9]

C. The Court of Appeals affirmed.

The Court of Appeals granted Garden City Hospital, Dr. Welsh, and Dr. Shady's application for leave to appeal and, later, affirmed.

Though *Denney* conflicts with this Court's holding in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948), the panel held that "*Baker* has clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*."[10] The panel said that this Court "implicitly" overruled *Baker* when it repudiated the notion that wrongful-death actions are "new actions," which, it said, was "the fundamental principle underlying the analysis and holding in *Baker*."[11] The panel also held that the Legislature abrogated *Baker* because, "when it was considered by the *Baker* court, … the statute lacked the open-ended inclusiveness of the current statute."[12] The court concluded 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."[13]

The panel turned to the proofs necessary to establish earning-capacity damages. It started with the basics—remote, contingent, and speculative damages aren't recoverable; mathematical precision isn't

---

[9] **Appendix 103-108**, July 21, 2021 Motion for Summary Disposition Hearing Transcript, p. 13-18.

[10] Apx. 186, *Daher* Court of Appeals Opinion, p. 4.

[11] Apx. 186, *Daher* Court of Appeals Opinion, p. 4.

[12] Apx. 186, *Daher* Court of Appeals Opinion, p. 4.

[13] Apx. 186, *Daher* Court of Appeals Opinion, p. 4.

required; and there's a difference between work-loss and earning-capacity damages.[14]

Finding "little clear authority in Michigan," the panel considered Ohio and Pennsylvania cases.[15] In those cases, courts allowed damages tethered to the projected future income of an 11-year-old and teenagers. The plaintiffs in those cases were able to present evidence of the decedent's mental and physical characteristics, activities, educational plans, and career plans.[16]

The Court of Appeals concluded that "a child's expected future earning potential is not **inherently** too speculative."[17] While an "employment history isn't required," a child's earning capacity must be "proven with reasonable certainty based on personal characteristics and influences known at the time …."[18] The panel remanded for litigation on "[w]hether **Jawad's** future earning potential can be proven with reasonable certainty …."[19]

Judge Swartzle wrote a concurrence.[20] He expressed reservations about *Denney*'s holding based on the history and complete text of the wrongful-death act.[21]

---

[14] *Id.*, pp. 4-5.

[15] *Id.*, pp. 5-7, discussing *Howard v Seidler*, 116 Ohio App 3d 800; 689 nw2d 572 (1996) and *Mecca v Lukasik*, 366 Pa Super 149; 530 A2d 1334 (1987).

[16] *Id*.

[17] *Id.*, p. 7 (emphasis in original).

[18] *Id.*, p. 7.

[19] *Id.* (emphasis in original).

[20] **Appendix 191-192**, *Daher* Concurrence.

D. This Court granted leave to appeal.

This Court granted Garden City Hospital, Dr. Welsh, and Dr. Shady's application for leave to appeal. It directed the parties to "address whether: (1) the estate of a child may recover damages for the child's lost future earnings; and (2) to what specificity future earnings need be shown." *Daher*, 994 NW2d at 789.

Standard of Review

Whether the Estate can recover postmortem earning-capacity damages is a question of law, which this Court reviews de novo. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). Likewise, this Court reviews summary-disposition rulings de novo. *Id.*

Issue I: Michigan is still a loss-of-financial-support jurisdiction.

Before *Denney*, it was understood that an estate could recover the lost financial support that the decedent would have provided others, but not the decedent's earning capacity. See Michigan Law of Damages and Other Remedies ch 3, § 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."). The model civil jury instructions express the same understanding. See M Civ JI 45.02, cmt ("[D]amage for loss of earnings after death was superseded by the claim for 'pecuniary injury' suffered by the surviving spouse or next of kin.'"), citing *Baker*. Now, claims for a decedent's earning capacity after death are commonly dubbed "*Denney* damages," reflecting the fact that *Denney* changed Michigan law.

There was no legislative change to the wrongful-death act

[21] *Id.*, pp. 1-2.

immediately before *Denney*. Yet, *Denney* blazed a new trail. The analysis that led *Denney* to deviate from an over-60-year-old rule suffers from two fundamental errors. It interpreted isolated phrases instead of the entire statute. And it conflicts with several of this Court's decisions.

The Legislature didn't write and amend the wrongful-death act in a vacuum. Legislatures have always chosen between allowing earning capacity or allowing lost financial support in wrongful-death cases; estates have never recovered both. Michigan's act refers to "loss of financial support," not income or earnings, and it has no provision for distributing earning-capacity damages.

Based on a sound understanding of the types of wrongful-death acts in the United States, the history of Michigan's wrongful-death act, and the entirety of the statutory text, this Court should hold that loss-of-financial-support damages are recoverable in wrongful-death cases. It should reaffirm Michigan's place among the majority of jurisdictions. And it should expressly overrule *Denney*'s outlier holding that estates can recover postmortem earning-capacity damages.

A. There are four basic statutory models for compensating a wrongful death.

There's no common-law wrongful-death action for anyone—not the decedent, estate, or dependents. See *Hawkins v Reg'l Med Labs, PC*, 415 Mich 420, 428-429; 329 NW2d 729 (1982) ("[C]auses of action …, under the common law, were terminated by the death either of the person injured or the tortfeasor."); *Hyatt v Adams*, 16 Mich 180, 185 (1867) ("[A]t common law, no civil action could be maintained for the death of a human being, caused by the wrongful act or negligence of another …."); 1 CJS Abatement and Revival § 158 ("In absence of a statute providing

otherwise, a cause of action for injuries to the person does not survive on the death of either the person injured or the wrongdoer ….” (footnotes omitted)). Whatever remedies exist for a wrongful death are entirely statutory and contrary to the common law.

American jurisdictions recognize four types of wrongful-death statutes—survival, death, combined, and punitive. See Restatement Torts, 2d, § 925, cmt b. The differences between those approaches show the specific choices that Michigan's Legislature made when enacting and amending Michigan's wrongful-death act.

1. Survival statutes allow recovery of earning capacity.

Survival statutes permit estates to recover losses to the decedents; the estates stand in their shoes. Restatement Torts, 2d, § 925, cmt b; Matheson, Rosenbaum, & Schap, *Wrongful Death: Who Recovers What, Where, and How?* 22 J Legal Econ 25, 27 (2016). Damages typically include medical bills, funeral expenses, estate administration expenses, pain and suffering before death, and (most relevant here) earning capacity. Restatement Torts, 2d, § 925, cmt b; Matheson, 22 J Legal Econ at 28-29; Schap, *The Reduction for Decedent Self-Consumption: Jurisdictional Mandates for Personal Consumption or Personal Maintenance*, 22 J Legal Econ 107, 107 (2016).

Most jurisdictions that follow the survival-statute model reduce earning-capacity damages based on the decedent's personal consumption.[22] Allowing the entirety of the decedent's earning capacity

[22] See *Floyd v Fruit Indus, Inc*, 144 Conn 659; 136 A2d 918 (1957); *Citrus Co v McMillin*, 840 So2d 343, 346 (Fla App, 2003) *Fitzpatrick v Cohen*, 777 F Supp 2d 193, 196 (D Me, 2011); *Youngquist v Western Nat Mut Ins Co*, 716 NW2d 383, 386 (Minn

would be punitive. See *Flannery for Flannery v United States*, 718 F2d 108, 112 (CA 4, 1983) (reducing award based on taxes and estimated living expenses because the Federal Tort Claims Act prohibits punitive damages); *Hartz v United States*, 415 F2d 259, 264 (CA 5, 1969) (recognizing that earning-capacity damages without deduction of personal expenses is punitive); *Felder v United States*, 543 F2d 657, 669-670 (CA 9, 1976) (holding that a failure to deduct income taxes would be punitive); Restatement Torts, 2d, § 925 cmt b (awarding all of the decedent's earning capacity "is more than compensatory"); *Murray*, 359 Pa at 76 n. 8, quoting McCormick: Damages, §96 (1935) ("[I]t is difficult to justify the award of gross earnings as a measure of the loss caused by the death …."); *Fitzpatrick v Cohen*, 777 F Supp 2d 193, 196 (D Me, 2011) ("[A]warding gross earnings would have the perverse effect of placing the decedent's estate in a better position than if he lived to earn the amount sought."); *Sheffield v Sheffield*, 405 So2d 1314, 1318 (Miss, 1981) ("[W]ithout the deduction made the deceased is 'more valuable to his family dead than alive ….'"), quoting *Louisville & N R Co v Garnett*, 93 So 241, 243 (Miss, 1922).

Only Georgia, Kentucky, and West Virginia allow estates to recover all of the decedent's future earning capacity. Georgia and West Virginia

---

App, 2006); *Sheffield v Sheffield*, 405 So2d 1314, 1318 (Miss, 1981); *Pitman v Merriman*, 117 A 18, 20 (NH, 1922); *Rea v Simowitz*, 226 NC 379, 381; 38 SE2d 194 (1946); *Murray v Philadelphia Transp Co*, 359 Pa 69, 76 n. 8; 58 A2d 323 (1948); *Doe v United States*, 737 F Supp 155, 164 (DRI 1990) (applying Rhode Island law); *Hutton v City of Savannah*, 968 SW2d 808, 811-812 (Tenn App, 1997); see also Restatement Torts, 3d (tentative draft No. 2, Apr. 2023), Remedies § 23, cmt m ("Most states following this approach then subtract decedent's personal living expenses, and some subtract income taxes that would have been paid on the earnings.").

have unique statutory provisions. See GA Code 51-4-1 (expressly prohibiting "deducting for any of the necessary or personal expenses of the decedent had he lived"); *Wehner v Weinstein*, 191 W Va 149, 160; 444 SE2d 27 (1994) ("[W]e refuse to construe the phrase 'reasonably expected loss of ... income of the decedent,' in W.Va.Code, 55–7–6(c)(1)(B)(i), to mean 'net income.'"). Kentucky courts have recognized that "[t]he majority rule is … that personal consumption items should be taken into consideration" and that Kentucky is "in the minority, and possibly a minority of one, subscribing to the contrary principle." *Charlton v Jacobs*, 619 SW2d 498, 500 (Ky App, 1981).

Notably, Georgia, Kentucky, and West Virginia also permit punitive damages. *Jones v Bebee*, 353 Ga App 689, 692; 839 SE2d 189 (2020); *Commonwealth Dep of Agriculture v Vinson*, 30 SW3d 162, 166 (Ky, 2000); *Constellium Rolled Prod Ravenswood, LLC v Griffith*, 235 W Va 538, 546-547; 775 SE2d 90 (2015).

2. Death statutes allow recovery of lost financial support.

Death statutes allow the decedent's dependents to recover their losses from the death. Restatement Torts, 2d, § 925, cmt b; Matheson, 22 J Legal Econ at 26. Damages typically include lost household services, society and companionship, and (most relevant) financial support. Restatement Torts, 2d, § 925, cmt b; Ireland, *Damage Standards for Wrongful Death/survival Actions: Loss to Survivors, Loss to the Estate, Loss of Accumulations to an Estate, and Investment Accumulations*, 22 J Legal Econ 5, 7 (2016).

Most states follow the death-statute model and only allow lost-financial-support damages. See Restatement Torts, 2d, § 925, cmt b ("In the majority of states, the English model has been followed, and damages

are determined by the present worth of the contributions and aid that the deceased probably would have made to the survivors had he lived."); Schap, 22 J Legal Econ at 107; see also Restatement Torts, 3d (tentative draft No. 2, Apr. 2023), Remedies § 23, cmt c (providing for "lost financial support" instead of "lost earnings or earning capacity" because "[a] large majority of wrongful-death statutes provide, or have been interpreted to provide, for the loss-to-survivors approach").

3. Combined statutes typically follow the survival-statute model for pre-death losses and the death-statute model for post-death losses.

Combined statutes meld elements of survival statutes and death statutes. Restatement Torts, 2d, § 925, cmt b. Typically, the survival portion concerns the decedent's losses from injury to death, and the death portion concerns the dependent's losses after death. Matheson, 22 J Legal Econ at 30 ("[M]ost states have paired wrongful death and survival actions, in which case the **survival action is focused** on the losses occurring to the decedent and/or decedent's estate in **the period from injury to death**, and the **wrongful death action is focused** on loss to the decedent's estate or, more commonly, the loss to specifically designated beneficiaries, **postmortem**.") (emphasis added). So most combined statutes allow lost-financial-support damages, not postmortem earning-capacity damages. *Id.*

4. Punitive statutes only compensate based on the defendant's fault.

Punitive statutes measure damages by the defendant's degree of fault. Restatement Torts, 2d, § 925, cmt b. Only Alabama does this. See *Cain v Mortgage Realty Co*, 723 So2d 631, 633 (Ala, 1998); Ireland, 22 J Legal

Econ at 6; see also Restatement Torts, 3d (tentative draft No. 2, Apr. 2023), Remedies §23, cmt p.

B. Michigan's wrongful-death act has evolved from separate survival and death acts to a combined act that expressly adopts loss of financial support as the measure for postmortem income-related damages.

Michigan's wrongful-death legislation has embraced each type of wrongful-death statute (except punitive). The evolution of Michigan's wrongful-death act is critical to understanding the current legislation.

1. Starting in the mid-1800s, Michigan had mutually exclusive survival and death acts.

In 1846, Michigan enacted a survival act. 1846 Rev Stats, ch 101, § 5; see *Hardy v Maxheimer*, 429 Mich 422, 436 n.11; 416 NW2d 299 (1987). The survival act provided that actions "for negligent injuries to persons" (among others) would survive the plaintiff's or defendant's death. *Id.*, quoting 1846 Rev Stats, ch 101, § 5. The Legislature amended the survival act in 1885 and 1897 only to add to the list of actions that it preserved. *Id.*

In 1848, Michigan enacted a death act, which, on the issue of damages, 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), quoting 1848 PA 38.]

The Legislature amended the death act in 1873 to change who would receive distributions from a recovery; it didn't change the damages provision. *Lincoln*, 179 Mich at 199; see also *MacDonald v Quimby*, 350 Mich 21, 26; 85 NW2d 157 (1957), quoting 1848 PA 38, as amended by 1873 PA 94.[23]

Under the survival act, an estate could recover the decedent's future earning capacity. See *Walker v McGraw*, 279 Mich 97; 271 NW 570 (1937); *Olivier v Houghton Cty St R Co*, 138 Mich 242, 243; 101 NW 530 (1904); *Kyes v Valley Tel Co*, 132 Mich 281, 284; 93 NW 623 (1903). Under the death act, the estate could recover the dependents' lost financial support, but not the decedent's earning capacity. *Lincoln*, 179 Mich 195-196; *Rouse v Detroit Elec Ry*, 128 Mich 149, 155; 87 NW 68 (1901); *Van Brunt v Cincinnati, J & M R Co*, 78 Mich 530, 538-539; 44 NW 321 (1889).

A claim was under one act or the other, never both. *Hardy*, 429 Mich at 433 ("'[T]he claims were mutually exclusive …'"), quoting *Hawkins*, 415 Mich at 430. The applicable act depended on whether the death was instantaneous, which led to a lot of confusion. *Hardy*, 429 Mich at 432 n. 10; *Hawkins*, 415 Mich at 430-431.

2. In the early 1900s, Michigan enacted a combined statute, which this Court interpreted to allow lost financial support, not earning-capacity damages.

In 1939, the Legislature amended the death act. The amendments effectively "wipe[d] out the fiction of instantaneous death and create[d] one cause of action where death results." *In re Olney Estate*, 309 Mich 65, 76; 14 NW2d 574 (1944). In other words, the Legislature created a

[23] The amendment removed reference to "the widow and next of kin," leaving those "left by persons dying intestate."

combined statute. *Hawkins*, 415 Mich at 431 (stating that the amendment "combined the two acts").

The amended act stated, "[A]ll actions for such death or injuries resulting in death, shall hereafter be brought only under this act." 1939 PA 297; see *Hawkins*, 415 Mich at 433. It repealed any inconsistent provisions of the survival act, which effectively "incorporated [the survival act] into the new death act to form a single ground of recovery in cases where tortious conduct caused death." *Hawkins*, 415 Mich at 432.

The 1939 amendment changed the damages provision to reflect a combined statute, too. It added that estates could recover survival-statute damages like medical expenses, burial expenses, and damages for the decedent's pain and suffering before death:

> [I]n every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. [*MacDonald*, 350 Mich at 25, quoting 1939 PA 297.]

Parties disputed whether the post-1939 wrongful-death act followed the survival-statute model (earning-capacity damages) or the death-statute model (financial-support damages). In *Baker v Slack,* 319 Mich 703; 30 NW2d 403 (1948), this Court held that estates can recover lost-financial-support damages, not earning-capacity damages. *Id.* at 712, 715.

Baker explained 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. *Id.* at 711. In fact, this Court concluded that the 1939 amendment was intended to limit damages in the cases that would have previously fallen under the survival act. *Id.* at 715 ("The conclusion is inescapable that it was precisely in the field of damages, in those cases in which decedent survived his injuries, that the legislature attempted to effectuate a change, not only as to the distribution but, particularly, as to what shall constitute the elements thereof."). This Court also rejected a different approach to recovering the decedent's lost earning capacity—potential inheritance. *Id.* at 714.

In 1960, this Court reiterated that "the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death." *Wycko v Gnodtke*, 361 Mich 331 at 334; 105 NW2d 118 (1960), quoting Tiffany, Death by Wrongful Act (2d ed) §153, 323. And in 1961, the statute was moved to MCL 600.2922 "without any change." *Currie v Fiting*, 375 Mich 440, 460; 134 NW2d 611 (1965).[24] So the Legislature adopted *Baker*'s interpretation. See *Jeruzal v Herrick*, 350 Mich 527, 534; 87

[24] As discussed more below, this Court overruled *Currie* in *Breckon* which was superseded by statutory amendment. Both of those cases (among others) and the statutory amendment concerned whether noneconomic damages for loss of society and companionship were recoverable.

NW2d 122 (1957) ("[W]hen a statute, clause or provision thereof, has been construed by the court of last resort of this State and the same is substantially re-enacted[,] the legislature adopts such construction, unless the contrary is clearly shown by the language of the act.").

3. A 1971 amendment allowed estates to recover noneconomic damages—loss of society and companionship.

In 1971, the Legislature amended the damages provision of the wrongful-death act to add express reference to loss-of-society-and-companionship damages:

> [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 (emphasis added).[25]]

The 1971 amendment settled a long-disputed issue. For decades, this Court vacillated on whether loss-of-society-and-companionship damages were recoverable under the wrongful-death act. See *Breckon v Franklin Fuel Co*, 383 Mich 251; 174 NW2d 836 (1970), overruled by *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972). So, finally, the Legislature settled the point by adding an express reference to loss-of-society-and-companionship damages, abrogating *Breckon*.

Notably, the 1971 amendment is narrower than the original proposal, which stated, "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."[26] By rejecting the bolded language, the Legislature demonstrated its intent to retain limitations. See *In re Certified Question (Kenneth Henes v Continental Biomass Ind, Inc*), 468 Mich 109, 115 n. 5; 659 NW2d 597 (2003) ("[B]y comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.").

The 1971 amendment also removed "with reference to the pecuniary injury resulting from such death" and replaced it with "under all of the circumstances." 1971 PA 65. That change was necessary to open the door to **non**-pecuniary damages, like lost society and companionship. It hasn't been given effect beyond that narrow aim.

---

[25] Quoted in *O'Dowd v Gen Motors Corp*, 419 Mich 597, 600; 358 NW2d 553 (1984).

[26] **Appendix 194-197**, 1971 HB 4504 (emphasis added).

In *Wood v Detroit Edison Co*, 409 Mich 279; 294 NW 571 (1980), for example, this Court agreed with an argument that the 1971 amendments were "directed solely to address this Court's ruling in *Breckon*." *Id.* at 286; accord *id.*, 294-295 (Moody, J., concurring) ("The complete focus of 1971 PA 65 was this court's *Breckon* decision. … 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."). Before the 1971 amendment, this Court held that evidence of a spouse's remarriage isn't relevant to damages. *Bunda v Hardwick*, 376 Mich 640, 656; 138 NW2d 305 (1965). *Wood* rejected the argument that that the insertion of "under all the circumstances" abrogated that pre-amendment holding. *Wood* "h[e]ld that evidence of a plaintiff surviving spouse's remarriage may not be used to determine damages." *Id.* at 288. The 1971 amendment only abrogated *Breckon*.

Swartz v Dow Chem Co, 95 Mich App 328; 290 NW2d 135 (1980), overruled on other grounds, 414 Mich 433; 326 NW2d 804 (1982)[27] confirmed the understanding of the post-1971 wrongful-death act. The court affirmed the exclusion of testimony on "the loss of future earning capacity of decedent." *Swartz*, 95 Mich App at 334. There was no testimony that the decedent's parents reasonably expected that he would financially support them. So the trial court didn't err in excluding the testimony. *Id.* at 335. In other words, the estate could only seek lost-financial-support damages under the post-1971 amended act and, in *Swartz*, there were none.

[27] This Court reversed the Court of Appeals' holding that evidence that the decedent's employer violated safety and health standards was admissible.

In *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538; 302 NW2d 537 (1981), this Court analogized survivor-loss benefits under the no-fault act to economic damages under the wrongful-death act. *Id.* at 560-561 & n. 9. It observed that "it is important to keep in mind that wrongful death act damages focus upon the financial loss actually incurred by the survivors as a result of their decedent's death." *Id.* at 561.

4. A 1985 amendment added express reference to lost-support damages and distribution provisions that don't address earning-capacity damages.

In 1985, the Legislature reorganized the wrongful-death act by dividing it into multiple subsections. See 1985 PA 93. The aim was to clarify who could recover damages in a wrongful-death action.[28]

Before 1985, the act stated that the trial court and probate 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.[29]

The 1985 amendment was more specific. It added a detailed subsection that defined "the persons who may be entitled to damages under this section …." MCL 600.2922(3); 1985 PA 93.[30] It also specified what damages were distributed to the estate and the people identified in the new subsection:

---

[28] See **Appendix 199-201**, House Legislative Analysis for House Bills 4486 and 4487.

[29] See **Appendix 203-209**, 1985 HB 4487.

[30] *Id*.

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.

[omitted provisions concerning notice and appointment of fiduciaries]

(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. [1985 PA 93; MCL 600.2922(6)(a)-(d).]

There is no provision for distributing any "remainder" or earning-capacity damages.

In the damages provision, the 1985 legislation made minor revisions (e.g., replacing "give such" with "award" and replacing "deem" with "consider"). It removed reference to "those persons who may be entitled to such damages when recovered," though, again, it added subsections defining those people and stating who would receive what. 1985 PA 93; see MCL 600.2922(3) (stating "the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages"); MCL 600.2922(6)(d).

The 1985 amendment also added express reference to "loss of financial support." In *Setterington v Pontiac Gen Hosp*, 233 Mich App 594; 568 NW2d 93 (1997), the Court of Appeals observed that the former "'pecuniary injury' language of the statute … is analogous to the clearer 'loss of financial support' language of the current statute." *Setterington*, 223 Mich App at 607. *Setterington* held that the decedent's children could recover for lost financial support beyond their 18th birthday, which was consistent with this Court's prior interpretation of the act. *Id*.

So, like it does today, the amended damages provision 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. [1985 PA 93; MCL 600.2922(6).]

5. The 2000 and 2005 amendments made no substantive changes to the damages and distribution provisions.

Amendments in 2000 and 2005 didn't make 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").[31]

6. With no substantive statutory amendment since 1985, *Denney* departed from nearly 70 years of precedent.

For 68 years, Michigan followed the majority rule—it allowed lost-financial-support damages instead of earning-capacity damages in wrongful-death actions. Confusion arose in 2016.

---

[31] The 2000 amendment was "largely technical in nature" and implemented the Estates and Protected Individuals Code. See House Legislative Analysis for House Bills 5485-5498, **apx. 211-213**. The 2005 amendment allowed plaintiffs to pursue wrongful-death claims on behalf of an embryo or fetus. See **Appendix 215-217**, First Analysis for House Bill 4777.

In *Denney v Kent Co Rd Com'n*, 317 Mich App 727; 896 NW2d 808 (2016), the decedent's motorcycle struck two potholes, causing him to crash and sustain fatal injuries. His estate sued the governmental agency responsible for maintaining the road where the accident occurred, relying on the highway-defect exception to governmental immunity. See MCL 691.1402(1). The defendant argued that the highway-defect exception did not allow lost-financial-support damages.[32] The trial court granted partial summary disposition, but the Court of Appeals granted leave to appeal and, later, reversed.

The Court of Appeals reframed the issue. Instead of the highway-defect exception, the panel started with the wrongful-death act. It quoted a prior case that said the wrongful-death act "'permit[s] the award of any type of damages, **economic** and noneconomic, deemed justified by the facts of the particular case.'" *Denney*, 317 Mich App at 731 (emphasis added), quoting *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 761 NW2d 414 (2008). The panel then turned to *Hannay v Dep't of Transp*, 497 Mich 45; 860 NW2d 67 (2014) to define economic damages: "[E]conomic damages include 'damages incurred due to the loss of the ability to work and earn money ….'" *Denney*, 317 Mich App at 731, quoting *Hannay*, 497 Mich at 67.

So, using a non-statutory term—"economic"—and a case (*Hannay*) that didn't involve the wrongful-death act, *Denney* concluded that "damages for lost earnings are allowed under the wrongful-death statute." *Denney*, 317 Mich App at 732. The panel rejected the defendant's

[32] The argument was based on *Wesche v Mecosta Co Rd Comm'n*, 480 Mich 75; 746 NW2d 847 (2008), which held that the bodily-injury limitation precluded a family member's loss-of-consortium claim. *Id.* at 87.

argument that the Estate was really seeking lost financial support. *Id.* at 736-737. It stated that "this claim was the **decedent's** claim for lost earnings," not for lost financial support. *Id.* at 736.

Denney didn't mention *Baker* (or *Swartz*). *Baker* was controlling unless it had been "clearly overruled or superseded." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016). So *Denney* silently created conflicting precedent.

While *Denney*'s conflict with *Baker* is most stark, *Denney* conflicts with more of this Court's precedent. This Court has held that when a deceased child was a wage earner, the estate can recover lost support for the time that a parent reasonably expected financial support from the child. *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482, 488-489; 98 NW2d 620 (1959); *Rytkonen v City of Wakefield*, 364 Mich 86; 111 NW2d 63 (1961) (upholding damages because the decedent had provided his mother financial support for 12 years before his death); *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962) (upholding damages because the decedent had a history of sending his parents money); see also *Setterington*, 223 Mich App at 607 (allowing children to recover support they reasonably expected beyond their 18th birthdays). *Denney*'s holding allows estates to recover their decedents' entire earning capacity regardless whether survivors reasonably expected financial support. So *Denney* conflicts with *Thompson* and its progeny too.

In this case, the Court of Appeals resolved the *Baker*/*Denney* conflict in favor of *Denney*. Though lower courts cannot "anticipatorily ignore [this Court's] decisions" and this Court has said that "one can determine with relative ease" whether it overruled its precedent, *Associated Builders*, 499 Mich at 191-192 & n. 32, the panel in this case held

that this Court implicitly overruled *Baker*.[33] The panel's reliance on an implicit overruling appears to be a first for the "clearly overruled" standard.

The panel thought this Court implicitly overruled *Baker* because it has rejected the concept that a wrongful-death claim is a new action.[34] But *Baker* didn't rely on a "new action" rationale. And, as the panel admitted, none of the cases rejecting the "new action" rationale cite *Baker*.

The panel also held that *Baker* has been clearly superseded by statutory amendments. Its analysis of that issue was curt—"when it was considered by the *Baker* court … the statute lacked the open-ended inclusiveness of the current statute."[35]

Shucking aside this Court's precedent requires more attention than the panel gave it. Review of what led to *Baker*, what followed it, and the language of the entire wrongful-death act confirm that Michigan still aligns with the majority rule—estates can recover lost-financial-support damages, not earning-capacity damages.

C. Michigan's wrongful-death act follows the death-statute model for lost postmortem income.

Of course, *Denney* isn't binding on this Court. So, while the conflict between *Baker* and *Denney* and whether the lower courts correctly followed *Denney* is academically interesting, the real issue is whether *Denney*'s interpretation of the current wrongful-death act is correct.

---

[33] Apx. 186, *Daher*, slip op, p. 4.

[34] Apx. 186, *Daher*, slip op, p. 4; see *Wesche*, 480 Mich at 91.

[35] Apx. 186, *Daher*, slip op, p. 4.

Denney is wrong. Michigan's wrongful-death act fits firmly within the majority rule. None of the amendments repudiate *Baker*. The addition of "loss of financial support" cements Michigan's death-statute model for income-related damages. And the distribution provisions in the act leave no place for earning-capacity damages.

Based on the complete statutory text of Michigan's wrongful-death act, its history, and the legal background for wrongful-death statutes, this Court should hold that loss-of-financial-support damages are recoverable in wrongful-death cases and postmortem earning-capacity damages are not.

1. The Legislature has not abrogated *Baker*.

After *Baker* was decided in 1948, the Legislature moved the wrongful-death act without change in 1961 and amended it in 1971, 1985, 2000, and 2005. None of the amendments abrogated *Baker*.

The most significant change 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." 1971 PA 65. Several reasons weigh against interpreting that change to abrogate *Baker*.

First, "'[i]t is presumed that the Legislature knows of and intends to legislate in harmony with existing law.'" *Henderson v Dep't of Treasury*, 307 Mich App 1, 14; 858 NW2d 733 (2014), quoting *State Bar of Mich v Galloway*, 124 Mich App 271, 277; 335 NW2d 475 (1983). When the Legislature moved the wrongful-death act to MCL 600.2922 "without any change," *Currie*, 375 Mich at 460, it adopted *Baker*'s holding. See *Jeruzal*, 350 Mich at 534.

So the Legislature was aware of *Baker*, just like it was aware of *Breckon* (the case denying lost-society-and-companionship damages). The Legislature wasn't subtle about abrogating *Breckon*. The 1971 amendment inserted a separate sentence allowing loss-of-society-and-companionship damages. 1971 PA 65. It's illogical to assume that the Legislature decided to be coy about overruling *Baker*. See *Wood*, 409 Mich at 295 (Moody, J., concurring) ("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."). This leads to the next point.

Because there is no common-law claim for wrongful death, recovering any item of damages is in derogation of the common law. To abrogate the common law, the Legislature "should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006); see *Rusinek v Schultz, Snyder & Steele Lumber Co,* 411 Mich 502, 507–508; 309 NW2d 163 (1981) ("[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."). The Legislature hasn't directly stated that estates can recover earning-capacity damages. "Under all the circumstances" isn't shorthand for earning capacity. And the only two courts that touched on that amendment concluded that it only affected *Breckon*. See *Setterington*, 223 Mich App at 607; *Wood*, 409 Mich at 286.

The Legislature also rejected language in the proposed 1971 amendment that damages "shall not be limited**,**"[36] indicating that it intended to retain limitations, like *Baker*. See *In re Certified Question*, 468

[36] 1971 HB 4504 apx. 194-197.

Mich at 115 n 5. This Court cannot assume that the Legislature abrogated the common law to allow estates to recover a decedent's lost earning capacity, particularly in light of *Baker*.

A federal district court judge suggested that removing "pecuniary injury" abrogated *Baker*. *White v FCA US, LLC*, 350 F Supp 3d 640, 646 (ED Mich, 2018).[37] That rationale doesn't hold up to scrutiny.

Earning-capacity damages are pecuniary. See Black's Law Dictionary (11th ed 2019) (defining "pecuniary" as "Of, relating to, or consisting of money; monetary."); see also Restatement Torts, 3d (tentative draft No. 2, Apr. 2023), Remedies § 23, cmt e (explaining that "pecuniary" loss is "equivalent to 'economic' damages"). Removing a provision limiting estates to "pecuniary injury" thereby allows recovery of **non**-pecuniary (noneconomic) losses, like lost-society-and-companionship damages. That was the purpose of the 1971 amendment. *Wood*, 409 Mich at 286; *id.* at 294-295 (Moody, J., concurring).

Removing the "pecuniary injury" limitation doesn't change the type of pecuniary losses, like loss of financial support versus earning capacity, that are recoverable. In other words, removing "pecuniary injury" doesn't open the door to a new type of pecuniary injury.

The 1971 amendment did not abrogate *Baker*. But, even if this Court assumed, for argument's sake, that the 1971 amendment did abrogate *Baker*, the addition of "loss of financial support" in 1985 restored it. *Setterington* observed that "loss of financial support" is a "clearer"

[37] Notably, the court said it would be "absurd" to deny earning-capacity damages. *Id.* at 647. The court was doubtless unaware that most jurisdictions allow lost-financial-support damages, not earning-capacity damages.

expression of the "'pecuniary injury' language." *Setterington*, 223 Mich App at 607. Indeed, as discussed below, the insertion of "loss of financial support" is the most direct expression of legislative intent possible on the issue in this case.

2. The wrongful-death act's damages provision is neither exclusive nor limitless.

Denney's interpretation works if you only consider 15 words in the wrongful-death act—"damages as the court or jury shall consider fair and equitable, under all the circumstances." MCL 600.2922(6). But the act doesn't end there.

A court's "task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). So statutory analysis "begin[s] by examining the most reliable evidence of that intent, the language of the statute itself." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013).

When interpreting a statute, courts must read the statute as a whole. See *S Dearborn Envtl Improvement Ass'n, Inc v Dep't of Envtl Quality*, 502 Mich 349, 368; 917 NW2d 603 (2018) ("[T]he whole-text canon … 'calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.'"); *City of Grand Rapids v Crocker*, 219 Mich 178, 182–83; 189 NW 221 (1922). "[E]ffect should be given to every phrase, clause, and word in the statute." *Sun Valley*, 460 Mich at 237. "[C]ourts 'must … avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012), quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

The Court of Appeals has held that the term "including" makes the damages provision, MCL 600.2922(6), nonexclusive. *Thorn*, 281 Mich App at 651. That doesn't mean that the available damages are unbounded. The Court of Appeals has recognized that, too. No matter how fair and equitable a jury might think punitive damages are, they can't award them. *Fellows v Superior Prod Co*, 201 Mich App 155, 157; 506 NW2d 534 (1993) (holding that the act "'does not provide for punitive or exemplary damages'"), quoting *In re Disaster at Detroit Metro Airport*, 750 F Supp 793, 805 (ED Mich, 1989); *Tobin v Providence Hosp*, 244 Mich App 626, 638-639; 624 NW2d 548 (2001).

The rejection of punitive damages is rooted in sound statutory interpretation. "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 Dept of Nat Res*, 464 Mich 711, 718-719; 629 NW2d 915 (2001); see *Belanger v Warren Bd of Ed*, 432 Mich 575, 583-584; 443 NW2d 372 (1989).

The damages provision starts with a general term—"fair and equitable" damages. It then lists specific examples included within that general term. The listed items fall into three categories: (1) damages the decedent incurred before death—medical and hospital expenses and pain and suffering, (2) liabilities that the estate incurs after death—funeral and burial expenses, and (3) damages that the decedent's survivors incur after death—loss of financial support and loss of society and companionship. MCL 600.2922(6).

Damages aren't limited to those specifically listed. But they must fall into one of the three general categories. *Hugett*, 464 Mich at 718-719.

Lost-household-service damages are a good example. They aren't listed, but they're permitted because they fall in the third category—survivors incur them after the decedent's death. See *Thorn*, 281 Mich App at 651.

The decedent's postmortem earning capacity doesn't fall into the three categories. It follows that the postmortem earning-capacity damages aren't the type of damages authorized by the broader term. *Hugett*, 464 Mich at 718-719; see also *Rusinek,* 411 Mich at 507–508 ("[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.").

3. There is no provision for the distribution of earning-capacity damages.

Another aspect of the statutory language strongly favors the conclusion that the Legislature did not intend to allow earning-capacity damages in wrongful-death cases: The wrongful-death act has no provision for the distribution of earning-capacity damages.

MCL 600.2922(6)(d) details how a court should distribute proceeds from an action under the wrongful-death act:

> 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. [*Id.*]

The act states that damages for medical and funeral expenses are used to pay those expenses. *Id.* Damages are distributed to the people designated in subsection (3) who suffered them. *Id.*; see MCL 600.2922(3) (persons who may be entitled to damages under this section shall be limited to any of the following **who suffer damages** …" (emphasis added)). And only one category of damages is distributed to the deceased's estate—damages for pain and suffering, if any. *Id.* There is no provision for distributing any "remainder" or earning-capacity damages.

The absence of a provision for distributing earning-capacity damages raises two points. First, what is a trial court to do with the damages for earning capacity? The statute doesn't give trial courts authority to distribute those damages to anyone, including the estate, which leads to the next point.

The wrongful-death act is a detailed statute. It's hard to believe that the Legislature intended to follow a survival-statute method, allowing allow earning-capacity damages, but overlooked the distribution of those damages, which can easily reach millions of dollars. Yet that's where

Denney's holding leads. It's wrong.

4. The Legislature's inclusion of "loss of financial support" is the most direct expression of legislative intent possible.

The Legislature's express inclusion of loss-of-financial-support damages refutes *Denney*'s holding. Throughout the United States, legislatures have chosen between one or the other—earning capacity or loss of financial support. It isn't a new debate. See *Baker*, 319 Mich at 715 *Id.* at 715; Restatement Torts, 2d, § 925, cmt b. So, when the Michigan Legislature added "loss of financial support" it made a decisive choice: Michigan allows lost-financial-support damages, not earning-capacity damages.

Again, there are four types of wrongful-death statutes—survival, death, combined, and punitive. See Restatement Torts, 2d, § 925, cmt b. From 1848 to 1939, Michigan had mutually exclusive survival and death statutes. *Hardy*, 429 Mich at 433. Financial-support damages versus earning-capacity damages was a critical distinction between those statutes.

Now, Michigan has a combined statute. When legislatures enact combined statutes, they make a choice—earning capacity or financial support. They usually choose lost support. Matheson, 22 J Legal Econ at 29; Restatement Torts, 2d, § 925, cmt b. Michigan's act references "loss of financial support." It does not reference "earning capacity." The Legislature could not have been more express that it chose a death-statute model for income-related damages.

The express reference to "loss of financial support" damages in the act serves no purpose beyond confirming the Legislature's choice.

Earning-capacity damages and lost-financial-support damages don't coexist. Lost-financial-support damages are a subset of earning-capacity damages. Allowing both would be a double recovery and "Michigan law proscribes double recovery for the same injury." *Chicilo v Marshall,* 185 Mich App 68, 70; 460 NW2d 231 (1990), citing *Great Northern Packaging, Inc v General Tire & Rubber Co,* 154 Mich App 777, 781; 399 NW2d 408 (1986); see also *Rusinek,* 411 Mich at 507–508 (common-law rules cannot be abrogated by implication). Alternatively, allowing earning-capacity damages instead of lost financial support would make the inclusion of "loss of financial support" in the wrongful-death act surplusage, which also isn't permitted. *Johnson*, 492 Mich at 177 ("[C]ourts 'must … avoid an interpretation that would render any part of the statute surplusage or nugatory.'"), quoting *State Farm*, 466 Mich at 146.

Michigan's wrongful-death act and the express reference to lost support tracks the majority approach: "[M]ost states have paired wrongful death and survival actions, in which case the **survival action is focused** on the losses occurring to the decedent and/or decedent's estate in **the period from injury to death**, and the **wrongful death action is focused on loss** to the decedent's estate or, more commonly, the loss to specifically designated beneficiaries, **postmortem**." Matheson, 22 J Legal Econ at 29 (emphasis added). Those pre-death, post-death divisions are reflected in Michigan's wrongful-death act.

The act references medical expenses and the decedent's pain and suffering "during the period intervening between the time of the injury and death." MCL 600.2922(6). Those are survival-statute damages; the decedent incurred them before death. The act also references "loss of financial support and the loss of the society and companionship of the deceased." *Id.* Those are death-statute damages; the dependents incur

them after death.

Denney made Michigan a lone outlier. States that permit postmortem earning-capacity damages typically have statutes that expressly reference "income" or "earnings." See, e.g., Fla Stat Ann 768.21; NH Rev Stat Ann 556:12; NC Gen Stat Ann 28A-18-2; 10 RI Gen Laws Ann 10-7-1.1; W Va Code 55-7-6(c)(1)(B)(i). Others states permit future earning-capacity damages when the statute doesn't use any decisive term, like support, income, or earnings. See, e.g., Conn Gen Stat Ann 52-555; GA Code 51-4-1; Me Rev Stat tit 18-C, § 2-807; Miss Code Ann 11-7-13; Minn Stat Ann 573.02; Tenn Code Ann 20-5-113. *Denney* is the only case interpreting a statute that only references "support" to allow postmortem earning-capacity damages.

There's also no tension between the "loss of financial support" language in the wrongful-death act and MCL 600.6305, which the Estate has cited before. Under MCL 600.6305(1)(b)(ii), personal-injury verdicts must specify future damages for "[l]ost wages or earnings or lost earning capacity and other economic loss." Lost-financial-support damages are "other economic loss." *Id.* So, again, there's no tension between the statutes; section 6305 doesn't require earning-capacity damages for wrongful-death claims.

Section 6305 also provides that, "[i]n 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." In other words, the damages are based on the decedent's pre-injury life expectancy. See *Lamson v Martin*, 182 Mich App 233, 236; 451 NW2d 601 (1990). That undisputed principle lends no support to the argument for earning-capacity damages in wrongful-death

cases. Section 6305 works with a lost-support model; estates can recover lost-support damages based on the decedent's pre-injury life expectancy.

The Legislature's choice of lost support over earning capacity isn't irrational. Wrongful-death damages involve complicated policy choices. And Michigan's act demonstrates a carefully struck balance between those choices. Dependents can't recover lost financial support when the tort plaintiff lives, even if he or she is permanently debilitated. They can in wrongful-death cases. MCL 600.2922(6). Parents, grandparents, siblings, stepchildren, and devisees can't recover for loss of the society and companionship of a living plaintiff. See *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988). They can in wrongful-death cases. MCL 600.2922(3), (6). And though less than the eye-popping $10 million to $19 million that the Estate seeks, lost-support damages provide ample compensation. See, e.g., *Tobin v Providence Hosp*, 244 Mich App 626, 635; 624 NW2d 548 (2001) (lost-support award over $850,000); *Mason v Cass Co Bd of Co Rd Comm'rs*, 221 Mich App 1, 3; 561 NW2d 402 (1997) ($250,000 award for lost support). It isn't absurd for a legislature to choose lost support over earning capacity, particularly when it also chooses to allow additional elements of damages.

The issue for this Court, of course, is legislative intent (not policy). *Sun Valley*, 460 Mich at 236. And the plain terms of the statute establish the Legislature's intent to adopt a death-statute model for postmortem income-related damages. See *id.* ("If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written."). The wrongful-death act doesn't mention earning capacity or wages. The Legislature amend it in 1985 to specifically reference "loss of financial support." 1985 PA 93. So, in the battle between earning capacity and financial support,

the Legislature picked a winner. It could not have been more express or direct on that subject.

5. Attempts to explain away the express inclusion of "loss of financial support" don't work.

After *Denney*, some estates have argued that earning-capacity damages can coexist with lost-financial-support damages. They usually give the example of a retiree with no income providing support for a grandchild (e.g., paying college tuition). They argue that a decedent with no earning capacity who was providing financial support gives meaning to "loss of financial support" without creating a double recovery. They're wrong.

The fund that the hypothetical grandparent was using to pay the tuition would be distributed through a will or intestacy laws. So one of two things would happen: (1) the fund goes to the grandchild, meaning there's no loss of support to compensate, or (2) the fund went to others in which case awarding the grandchild lost-financial-support damages would increase the estate beyond what the grandparent could have ever provided—it's still a double recovery.

There's no indication that the Legislature intended to create a truly unique scheme that **increases** the value of an estate. Such a scheme would be at odds with Michigan's fidelity to compensatory damages. *McAuley v Gen Motors Corp*, 457 Mich 513, 519-520; 578 NW2d 282 (1998) ("It is well established that generally only compensatory damages are available in Michigan and that punitive sanctions may not be imposed."); see also *Rusinek,* 411 Mich at 507–508 ("[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.").

6. The Estate implicitly concedes that the premise of its argument has undefinable limits.

The Estate has said that it "can receive any damages that the decedent had against his tortfeasor, had the decedent survived."[38] Likewise, the Court of Appeals said, "plaintiffs may recover damages for Jawad's lost future earnings to the same extent Jawad could have recovered those damages had he survived."[39] Even the Estate doesn't believe that's true.

The principle that the Estate and Court of Appeals relied on—that the estate stands in the shoes of the decedent—is reflected in subsection (1) of the wrongful-death act. It says that if the decedent would have had a claim "if death had not ensued," then "the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages …." MCL 600.2922(1). It doesn't say the defendant is liable for the "same" damages or "those" damages. It just says, "an action for damages." *Id.* Then, the act describes the damages in subsection (6).

The Estate isn't seeking future medical expenses that would have been incurred had Jawad survived. Likewise, the Estate isn't seeking future pain and suffering as though Jawad had survived. Maybe that's because the wrongful-death act expressly references "the pain and suffering … between the time of the injury and death." MCL 600.2922(6). But, if that's the reason, the reference to "loss of financial support" is just as limiting.

The Estate's implicit admission is that the fiction of "as if they had

---

[38] Estate Answer to Application, p. 18.

[39] Apx. 186, *Daher* Court of Appeals Opinion, p. 4.

lived" isn't literal. We don't speculate about the decedent's physical and mental capability if they had lived—what medical treatment they would need, what pain they would be in, what work they could do.

The Estate's and Court of Appeals' attempt to extend the "stands in the shoes" concept isn't supported by the statutory text. It's also fanciful, which the Estate's decision not to seek future medical or noneconomic damages confirms. The hospital and doctors' argument in this case harmonizes the language of the act with the Estate's implicit admission. There are no unspoken, unexplainable distinctions between damages for postmortem earing capacity and postmortem medical expenses. The Estate can recover damages the decedent suffered between injury and death, and it can recover damages that the decedent's beneficiaries suffered after death. It's a common structure. See Matheson, 22 J Legal Econ at 29.

7. *Denney* raises several questions that no one can answer.

Much of the analysis above can be distilled into a series of questions that no one has answered and should lead this Court to overrule *Denney*.

The 1971 amendment removed reference to "pecuniary injury." 1971 PA 65. How could removing "pecuniary injury" change the **type** of pecuniary losses that are recoverable? Neither the Estate, *Denney*, *White*, nor the Court of Appeals panel in this case answers that question.

The 1971 amendment added an entire sentence to abrogate *Breckon*. Why wouldn't the Legislature address *Baker* in similar fashion if it intended to abrogate it? Neither the Estate, *Denney*, *White* nor the panel in this case answers that question.

If it intended to abrogate *Baker*'s limitation on damages, why would the Legislature reject language that wrongful-death damages "shall not be limited"? The Estate, *Denney*, *White*, and the panel in this case don't answer that question.

Move to the 1985 amendment. The Legislature added detail on who recovers and what they recover. 1985 PA 93; MCL 600.2922(3), (6)(d). How could the Legislature intend to allow a potentially multi-million-dollar category like earning-capacity damages but not provide for its distribution? The Estate, *Denney*, *White*, and the panel in this case don't say.

With no provision on how to distribute earning-capacity damages, what is a trial court supposed to do when distributing those damages? The Estate, *Denney*, *White*, and the panel in this case don't say.

And, not to belabor the point, but why would the Legislature add "loss of financial support" (a subset of earning capacity) if the decedent's postmortem earning capacity was already recoverable? The Estate, *Denney*, *White*, and the panel in this case offer no answer.

D. Conclusion

Whether Michigan allows lost-financial-support or earning-capacity damages is an issue of legislative intent. Michigan has a combined statute. So, did the Legislature choose the survival-statute (earnings) or death-statute (support) model for its combined scheme? The Legislature's express inclusion of "loss of financial support" provides a definitive answer.

An understanding of the models for wrongful-death damages in the United States is against the Estate and *Denney*. The history of

Michigan's wrongful-death act is against the Estate and *Denney*. And an analysis that considers the entirety of the act is against the Estate and *Denney*. This Court should hold that loss-of-financial-support damages are recoverable in wrongful-death cases and postmortem earning-capacity damages are not.

Issue II: The specificity required for income-related damages.

This Court asked what specificity estates must show to recover for a child's future earnings. It has already answered that question for lost-financial-support damages—estates must show a history of support and, if they do, they can recover based on a reasonable expectation of continued support.

If this Court deviates from nearly 70 years of its precedent and the Legislature's express adoption of a "loss of financial support" model to hold that Michigan allows earning-capacity damages in wrongful-death cases, the Court of Appeals provided a correct, though incomplete, answer. Estates mush establish future earning capacity "with reasonable certainty based on the child's unique and known traits and abilities."[40] The pertinent omission is that estates must also account for personal consumption and probable taxes because, if they don't, the award is punitive.

A. Lost support requires a "reasonable expectation of continued support."

If this Court reaffirms that Michigan is a lost-financial-support state, estates must only show that survivors (individuals listed in MCL

[40] Apx. 189, *Daher* Court of Appeals Opinion, p. 7.

600.2922(3)) reasonably expected the decedent to continue providing support.

Thompson v Ogemaw Co Bd of Rd Comm'rs, 357 Mich 482; 98 NW2d 620 (1959) involved a 15-year-old decedent. Before her death, the decedent earned money babysitting and gave her parents about $5 per week. The jury awarded damages for lost support beyond the decedent's 21st birthday. This Court held that lost financial support includes voluntary support. *Id.* at 488. And lost-support damages don't depend on whether the decedent was a minor or when they would reach the age of majority. *Id.* at 489. *Thompson* concluded that, when a deceased child was a wage earner, parents can recover lost support for the time that the parents reasonably expected continued financial support from their children. *Id.* at 488-489 ("[T]he test is reasonable expectation of support rather than any particular age at the time of death.").

Thompson also considered "how definite must the evidence bearing upon pecuniary injury be to support a jury award?" *Id.* at 489-490. The Court observed that direct evidence of the decedent's intent was impossible. *Id.* at 490. But the estate's evidence in *Thompson*—the father was unemployable and the daughter had a history of providing financial support—was sufficient to forecast a reasonable expectation of support into the future. *Id.* at 491-492.

Rytkonen v City of Wakefiled, 364 Mich 86; 111 NW2d 63 (1961) involved a decedent who wasn't a minor. His mother testified that he provided her with financial support for 12 years before his death. *Id.* at 95. This Court reaffirmed that lost financial support includes voluntary support and upheld the jury's award. *Id.*

Likewise, *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962) involved a 24-year-old decedent who had a history of voluntarily providing his parents and siblings with financial support. *Id.* at 139-140. This Court reversed an order granting remittitur and reinstated the jury's verdict based on testimony about the amount of support the decedent provided in the past. *Id.* at 140.

The Court of Appeals applied *Thompson*'s "reasonable expectation of continued support" rule in *Setterington*—notably after the 1971 and 1985 amendments of the wrongful-death act. In *Setterington*, the jury awarded lost-support damages to the decedent's children beyond their 18th birthdays. 223 Mich App at 607. The court affirmed the award. The decedent's age and whether the lost support was to or from a child were inconsequential. *Id.* The test remained the same—whether there is reasonable expectation of continued support. *Id.* at 606-607.

In each case (*Thompson* through *Setterington*), the decedent had a history of providing support. There was also testimony that survivors reasonably expected the support to continue for some period. Whether the support was voluntary didn't matter. And lost support didn't necessarily end based on when the decedents or their survivors would have reached the age of majority. So, in short, the specificity required for future earnings under a lost-support model is evidence showing a "reasonable expectation of continued support." *Thompson*, 357 Mich at 489.

B. When allowed, earning-capacity damages require personalized proofs that account for personal consumption and taxes.

If Michigan allows postmortem earning-capacity damages in wrongful-death actions, the Court of Appeals expressed the right standard

for proofs but omitted an important component. The proofs must be personalized. The panel got that part right. The proofs must also account for personal consumption and taxes. The panel left that part out.

1. Personalized evidence of earning capacity is required.

The Court of Appeals held that a child's earning capacity must be "based on personal characteristics and influences known at the time."[41] The panel is correct--earning capacity is individualized.

The Court of Appeals set out basic, undisputable principles. "'[R]emote, contingent, and speculative damages'" are not recoverable.[42] "'[P]recise proof'" or "'mathematical precision'" isn't required, "'particularly in circumstances in which the defendant's actions created the uncertainty.'"[43] "[W]ork-loss damages" and "loss of earning capacity damages" are different, "the former being for income a person would have earned, and the latter being for income a person could have earned."[44] "[L]oss of earning capacity permits much greater latitude," but "the calculation must still be reasonably based on some evidence."[45]

"Loss of wage earning capacity is a complex fact issue dependent upon the nature of work performed …." *Mitchell v Gen Motors Corp*, 89

---

[41] Apx. 189, *Daher* Court of Appeals Opinion, p. 7.

[42] *Id.*, p. 4, quoting *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005).

[43] Apx. 186, *Daher* Court of Appeals Opinion, p. 4, quoting *Hannay v Dept of Transp*, 497 Mich 45, 79; 860 NW2d 67 (2014).

[44] Apx. 187, *Daher* Court of Appeals Opinion, p. 5, citing *Hannay*, 497 Mich at 80-82.

[45] Apx. 187, *Daher* Court of Appeals Opinion, p. 5, citing *Health Call of Detroit* 268 Mich App at 104 and *May v Wm Beaumont Hosp*, 180 Mich App 728, 756; 448 NW2d 497 (1989).

Mich App 552, 555; 280 NW2d 594 (1979). Earning-capacity damages often consider the injured party's usual employment, physical condition, subsequent earnings, and changes in labor conditions. *Norris v Elmdale Elevator Co*, 216 Mich 548, 554; 185 NW 696 (1921); *Mitchell*, 89 Mich App at 555. Though not determinative, lost wages are often the starting point for earning-capacity damages because they set the minimum. *Rohm v Stroud*, 386 Mich 693, 696; 194 NW2d 307 (1972); *Norris*, 216 Mich at 554 (earning-capacity damagers "should be measured by his impairment of earning capacity in his usual employment").

The panel in this case found no specific Michigan guidance on earning-capacity damages for minors in wrongful-death actions. It referenced a death-act case, *Lincoln v Detroit & M Ry Co*, 179 Mich 189, 199; 146 NW 405 (1914), but found it unhelpful because it involved lost support. The panel briefly discussed *Thompson*, which has some instructive value. As discussed above, *Thompson* involved individualized proofs about the decedent's capabilities. But *Thompson* also involved lost support, not earning capacity.

The panel didn't address *Love v Detroit, J & C R Co*, 170 Mich 1; 135 NW 963 (1912), which was decided under the now repealed survival act. Because it was decided under the former survival act, *Love* involved earning-capacity damages in a wrongful-death case. It also involved a five-year-old decedent. While *Love* hasn't been relevant authority in Michigan for nearly 70 years, its discussion of earning-capacity evidence supports the panel's conclusion that individualized evidence is required.

In *Love*, the estate produced testimony on the father's salary, his financial ability to educate his child, and wages for common laborers and carpenters. *Id.* at 7. This Court held that the testimony about "the child's

status and future prospects and vocations and their remuneration which might reasonably be expected to be open to him" supported the award for lost-earning-capacity damages. *Id*. at 8. So, as the panel suggested in this case, the earning-capacity damages in *Love* were "based on the child's unique and known traits and abilities."[46]

Looking beyond Michigan, the panel discussed Ohio and Pennsylvania cases. Support for the panel's conclusion doesn't end with those states. There's ample support for the principle that evidence of earning-capacity damages for children must be personalized. See, e.g., *Bulala v Boyd*, 239 Va 218, 233; 389 SE2d 670 (1990) (earning-capacity damages "evidence must relate to facts and circumstances personal to the plaintiff as an individual, not merely to his membership in a statistical class");[47] *DiDonato v Wortman*, 320 NC 423, 431; 358 SE2d 489 (1987) (holding that loss of income damages for a child in a wrongful-death action require information about their "intelligence, abilities, interests and other factors"); *Musick v Dorel Juvenile Group, Inc*, 818 F Supp 2d 960 (WD Va, 2011) (experts evaluated the plaintiff's characteristics and family background through interviews and reviewing academic and medical records); *Rivera v Volvo Cars of N Am, LLC*, unpublished memorandum

---

[46] Apx. 189, *Daher* Court of Appeals Opinion, p. 7.

[47] Dr. Paranjpe's calculations alone aren't sufficient. They're not personalized. They're limited to statistics based on Jawad's race and sex, exclusively. It's a dubious way to calculate damages. See McCarthy, *The Lost Futures of Lead-Poisoned Children: Race-Based Damage Awards and the Limits of Constitutionality*, 14 Geo Mason U Civ Rts LJ 75, 77 (2004) ("Experts are often asked to predict how much a child is likely to earn in the child's lifetime, but they offend our most widely accepted common-sense notions of human potential when they claim that a black child is less likely to earn as much as a similarly-situated white child.").

opinion and order of the United States District Court for the District of New Mexico, issued June 8, 2015 (Docket No 13-397); 2015 WL 11118067, *2 (**Attachment 2**) (an expert opining on lost earning capacity "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"); *Sugarman v Liles*, 460 Md 396, 445; 190 A3d 344 (2018) ("Unlike the plaintiffs in cases where the evidence has been deemed insufficient to prove damages, Liles set forth an individualized analysis of his likely outcome coupled with statistical data to assist the jury in quantifying his damages."); see also Purver, *Damages for Wrongful Death of or Injury to Child*, 65 Am Jur Trials 261, § 21 (listing individualized considerations).

Whether based on the general principles for establishing earning capacity, the guidance in *Love*, or foreign authority, the Court of Appeals was correct—earning-capacity damages require personalized evidence.

2. Personal consumption and taxes must be subtracted to prevent a punitive award.

The Court of Appeals panel left Jawad's future earning potential to be litigated on remand.[48] But, if this Court allows earning-capacity damages in wrongful-death actions, it should clarify that the specificity required for those damages includes reductions for personal consumption and probable taxes.

[48] Apx. 189, *Daher* Court of Appeals Opinion, p. 7 ("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.") (emphasis omitted).

a. Michigan law, which only allows compensatory damages, does not align with the few jurisdictions that allow gross earning-capacity damages, which are punitive.

Michigan's wrongful-death act states that if the decedent would have been entitled to "maintain an action and recover damages," the person who caused the death "shall be liable to an action for damages." MCL 600.2922(1). It doesn't say the defendant is liable for the "same" damages or "those" damages. It just says, "damages." And the act's damages provision allows damages that "the court or jury shall consider fair and equitable, under all the circumstances …" MCL 600.2922(6). If earning-capacity damages are allowed, "all the circumstances" must include personal consumption and probable taxes. It certainly doesn't prohibit it. And, without considering those reductions, juries will award impermissible punitive damages.

Commentators, treatises, and courts agree that awarding gross earning-capacity damages in wrongful-death actions is punitive. *Felder*, 543 F2d at 669-670; Restatement Torts, 2d, § 925 cmt b; *Murray*, 359 Pa at 76 n. 8, quoting McCormick: Damages, §96 (1935); *Fitzpatrick*, 777 F Supp 2d at 196; *Sheffield*, 405 So2d at 1318; 22A Am Jur 2d Death § 233. So it's no surprise that most survival-statute jurisdictions allow **net** earning capacity, not gross earning capacity.

Net earning-capacity damages place claimants in the same position they would have been in had they lived. *Doe*, 737 F Supp at 164 ("The claimant ends up with the difference between what the victim could have earned and the amount that the victim was likely to expend in the process."). And it avoids the perverse effects of "placing the decedent's

estate in a better position than if he lived" and making the deceased more valuable dead than alive. *Fitzpatrick*, 777 F Supp 2d at 196; *Sheffield*, 405 So2d at 1318. In other words, it provides a compensatory remedy that makes "the injured party whole for the losses actually suffered …." *McAuley*, 457 Mich at 520.

The three survival-statute jurisdictions that allow gross earning-capacity damages—Georgia, Kentucky, and West Virginia—also allow punitive damages. *Jones*, 353 Ga App at 692; *Vinson*, 30 SW3d at 166; *Constellium Rolled Prod*, 235 W Va at 546-547. Michigan, of course, doesn't. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 765; 685 NW2d 391 (2004); *McAuley*, 457 Mich at 519-520. With few express statutory exceptions, Michigan only allows compensatory damages. *Gilbert*, 470 Mich at 765; *McAuley*, 457 Mich at 519-520. And Michigan's wrongful-death act doesn't have the unique statutory language seen in Georgia's and West Virginia's statutes. See GA Code 51-4-1 (expressly prohibiting "deducting for any of the necessary or personal expenses of the decedent had he lived."); *Wehner*, 191 W Va at 160 (refusing to interpret "income" in the statute "to mean 'net income.'"); see also *Tobin*, 244 Mich App at 638-639 ("It is well settled that exemplary damages are not recoverable in a wrongful death action."); *Fellows*, 201 Mich App at 157 (holding that the wrongful-death act "'does not provide for punitive or exemplary damages'"), quoting *Disaster at Detroit Metro Airport*, 750 F Supp at 805.

b. A personal-consumption reduction is necessary to avoid a punitive award.

Decedents don't incur living expenses after their death. Accounting for that economic reality is necessary to provide a compensatory remedy.

Michigan law on damages for lost services in wrongful-death cases illustrates the point.

Estates may recover damages for the value of services decedents would have provided their survivors. See *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 658; 761 NW2d 414 (2008). But damages for those services are reduced by the cost of the decedent's maintenance. See *Olney's Estate*, 309 Mich at 84 (lost-services damages are "the value thereof less reasonable cost of her maintenance"); *Morris v Radley*, 306 Mich 689, 697; 11 NW2d 291 (1943) (affirming instruction that allowed value of "contributions to her parents until her twenty-first birthday, deducting the reasonable expense that would have been incurred by the parents for the child's maintenance during that period"). In other words, compensatory damages for lost services under the wrongful-death act subtract the value of expenses that were not incurred due to the death, producing a net value. See *Rohm v Stroud*, 386 Mich 693, 697; 194 NW2d 307 (1972) (holding that, though never a net loss, estates must show "that future services will exceed in value both past and future costs of the child's maintenance, support and education").

If Michigan allows postmortem earning-capacity damages, it should follow the majority rule and required reduction based on personal consumption. Doing so would align with Michigan law on lost services and produce a compensatory award instead of a punitive one.

c. A probable-taxes reduction is necessary to avoid a punitive award.

In addition to accounting for personal consumption, it's also necessary to subtract probable income taxes to prevent a punitive award. See *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 258; 533

NW2d 356 (1995) (applying federal law); *Kirchgessner v United States*, 958 F2d 158, 161 (CA 6, 1992) (Federal Tort Claims Act claim involving Michigan law); *Norfolk & Western Ry Co v Liepelt*, 444 US 490; 100 S Ct 755 (1980) (Federal Employee's Liability Act claim); *Tesler v Johnson*, 23 Conn App 536, 541; 583 A2d 133 (1990); *Tenore v Nu Car Carriers, Inc,* 67 NJ 466; 341 A2d 613, 628 (1975) (adopting the "modern and reasonable rule" to "hold that under our wrongful death act … plaintiff's recovery must be calculated on the basis of the deceased's net income after taxes"), abrogated on other grounds by *DeHanes v Rothman,* 158 NJ 90; 727 A2d 8 (1999); *Turcotte v Ford Motor Co*, 494 F2d 173, 184-185 (CA 1, 1974) (applying Rhode Island law); *Adams v Deur,* 173 NW2d 100, 105 (Iowa 1969) ("It is to us self-evident future probable taxes are no more speculative than any other element a trier of the facts is permitted, if not required, to consider in the determination of wrongful death damages."); *Felder*, 543 F2d 657, 669-670.

Estates don't pay taxes on personal injury settlements and judgments. See 28 USC 104(a)(2); MCL 206.30. So awarding earning-capacity damages without reduction for taxes gives estates something neither the decedents nor their beneficiaries would have had without the tortious injury. A reduction based on probable taxes is required for a compensatory award.

d. This Court's precedent allowing gross earning-capacity damages under the survival act is bad law and a distinctly minority view.

In *Olivier v Houghton Cty St R Co*, 138 Mich 242; 101 NW 530 (1904), this Court allowed gross earning-capacity damages under the now repealed survival act. *Id.* at 243. *Olivier*'s holding was abrogated in 1939,

when the Legislature enacted Michigan's wrongful-death act. 1939 PA 297; see *Hardy*, 429 Mich at 433, 437; *Hawkins*, 415 Mich at 431-432. *Olivier* also represents a distinctly minority view. The modern trend has been toward net earning-capacity damages. And *Olivier*'s holding is squarely at odds with the current statute, which requires consideration of "all the circumstances." MCL 600.2922(6).

Olivier's primary rationale was that a net earning-capacity award would be less than a permanently incapacitated plaintiff might recover. It saw net earning-capacity as a reward for the wrongdoer and sought to take away the reward. That's a punishment, which is the flaw in *Olivier*'s reasoning. Michigan allows compensatory damages, not punitive damages. *Gilbert*, 470 Mich at 765. The wrongful-death act is no exception. *Tobin*, 244 Mich App at 638-639; *Fellows*, 201 Mich App at 157; *Disaster at Detroit Metro Airport*, 750 F Supp at 805.

e. Conclusion: If this Court allows postmortem earning-capacity damages in wrongful-death cases, those damages must be reduced based on personal consumption and probable taxes.

Because estates can only recover compensatory damages, the specificity required for future earning-capacity damages must include reduction for personal consumption and taxes. That is, if Michigan allows earning-capacity damages in wrongful-death cases, they must be **net** earning-capacity damages. Dr. Paranjpe's calculations, which include no offsets, are insufficient.[49] At a minimum, wrongful-death defendants should be allowed to present evidence of personal consumption and taxes.

[49] Apx. 032, Paranjpe Affidavit, ¶12.

Conclusion and Relief Requested

This Court should reverse the lower courts and return Michigan law to the rule reflected in the act: estates can recover lost financial support, not postmortem earning capacity. Because Michigan's wrongful-death act makes no distinction between children and adults, estates may recover damages for a child's lost future earnings. But those damages must come in the form of lost financial support, not earning capacity. The specificity required for lost-support damages is well established—estates only need to produce evidence showing a "reasonable expectation of continued support." *Thompson*, 357 Mich at 489.

This Court should overrule *Denney*. *Denney* didn't consider this Court's precedent. It didn't consider the recognized models for wrongful-death acts. It didn't consider the history of Michigan's wrongful-death act. It didn't consider the express inclusion of "loss of financial support." And it didn't consider the distribution provisions of the act. In short, *Denney* dramatically changed Michigan law without any basis for the change.

If this Court upholds *Denney*, it should affirm the Court of Appeals holding requiring personalized evidence. This Court should also clarify that only net earning-capacity damages are allowed because Michigan doesn't permit punitive damages.

Collins Einhorn Farrell PC

BY: */s/ Michael J. Cook*

Michael J. Cook (P71511)
Attorney for Defendant-Appellant
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Michael.Cook@ceflawyers.com

Corbet, Shaw, Essad
& Bonasso, PLLC

BY: */s/ Daniel R. Corbet*
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

Dated: December 15, 2023

Certificate of Compliance

I certify that the Defendant—Appellant's Brief complies with the type-volume limitation set forth in MCR 7.212(B). I am relying on the word count of the word-processing system used to produce this document. This brief uses a 12-point proportional font (Book Antiqua), and the word count for this brief is 14,952.

Collins Einhorn Farrell PC

BY: */s/ Michael J. Cook*
Michael J. Cook (P71511)
Attorney for Defendant-Appellant
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Michael.Cook@ceflawyers.com

Corbet, Shaw, Essad
& Bonasso, PLLC

BY: */s/ Daniel R. Corbet*
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

Dated: December 15, 2023