

STATE OF MICHIGAN
IN THE COURT OF APPEALS

BETHANY ZEHEL, Individually
and as Personal Representative
of the ESTATE OF ROWYN VASQUEZ,

Plaintiffs-Appellees,

Court of Appeals
No. 357511

v

CLARK EDWARD NUGENT, MD,
DEBORAH BERMAN, MD,
JUSTIN JUNN, MD, ALICE MAY CHI, MD,
and ANGELA SIMMEN KELLEY, MD

Washtenaw County Circuit Court
No. 19-000388-NH

Defendants-Appellants

BRIEF OF AMICUS CURIAE MICHIGAN SOCIETY
FOR HEALTHCARE RISK MANAGEMENT

RHOADES McKEE PC
James R. Poll (P70191)
Attorneys for Amicus Curiae Michigan
Society for Healthcare Risk Management
55 Campau Avenue NW, Suite 300
Grand Rapids, MI 49503
(616) 235-3500
Email: jrpoll@rhoadesmckee.com

RECEIVED by MCOA 5/2/2022 10:53:27 AM

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... iii

INDEX OF ATTACHMENTS..... vi

QUESTION PRESENTED vii

STATEMENT OF ORDER APPEALED FROMviii

STATEMENT OF INTEREST OF AMICUS CURIAE ix

STATEMENT OF FACTS AND PROCEEDINGS1

LAW & ARGUMENT2

 I. Introduction2

 II. Argument4

 A. Standard of review.....4

 B. The statutory text – WDA.....4

 C. Damages in common law tort actions are limited to
 compensation for losses actually suffered.....5

 D. Relevant history of the WDA, 1939 amendment of the
 WDA and the Michigan Supreme Court’s
 interpretation of the 1939 amendment in *Baker*.7

 E. Development of the “reasonable expectation test” after
 Baker.10

 F. The 1971 and 1985 amendments of the WDA were a
 legislative affirmation of the continuing viability of
 Baker.12

 G. *Denney* does not apply and, if not overruled, should be
 expressly limited to the facts presented in that case.....16

 H. In the alternative, *Denney* was wrongly decided and is
 not binding on this Court.....18

 I. *Shinholster & Thorn* do not apply and neither opinion
 addressed, much less overruled, *Baker*.20

CONCLUSION.....23

RECEIVED by MCOA 5/2/2022 10:53:27 AM

INDEX OF AUTHORITIES

CASES

<i>Baker v Slack</i> , 319 Mich 703 (1948)	7, 8, 9, 10, 12, 14, 15, 16, 19, 20, 22, 23
<i>Breckon v Franklin Fuel Co</i> , 383 Mich 251 (1970)	13
<i>Delahunt v Finton</i> , 244 Mich 226 (1928)	6
<i>Denney v Kent Co Rd Comm</i> , 317 Mich App 727 (2016)	2, 16, 17, 18, 19, 20, 21
<i>Dow v Humbert</i> , 91 US 294 (1875)	6
<i>Eggleston v Bio-Med Applications of Detroit, Inc</i> , 468 Mich 29 (2003)	4
<i>Estate of Vasquez v Nugent</i> , (COA Docket No. 357511)	1
<i>Ford v Maney's Estate</i> , 251 Mich 461 (1930)	7
<i>Hannay v Dep't of Transp</i> , 497 Mich 45 (2014)	17, 18, 19
<i>Hardy v Maxheimer</i> , 429 Mich 422 (1987)	7
<i>In Re Bradley Estate</i> , 494 Mich 367 (2013)	5
<i>In re Medina</i> , 317 Mich App 219 (2016)	15
<i>In Re Olney's Estate</i> , 309 Mich 65 (1944)	7
<i>James v Alberts</i> , 234 Mich App 417 (1999)	19

<i>Kyes v Valley Tel Co,</i> 132 Mich 281 (1903)	7
<i>Maiden v Rozwood,</i> 461 Mich 109 (1999)	4
<i>McAuley v General Motors Corp,</i> 457 Mich 513 (1998)	6, 7
<i>Miller v State Farm Mut Auto Ins Co,</i> 410 Mich 538 (1981)	6
<i>Mooney v Hill,</i> 367 Mich 138 (1962)	12, 19
<i>O'Dess v Grand Trunk WR Co,</i> 218 Mich App 694 (1996)	19
<i>Olivier v Houghton Co Street R Co,</i> 134 Mich 367 (1903)	7
<i>Rafferty v Markovitz,</i> 461 Mich 265 (1999)	3, 6
<i>Settingington v Pontiac Gen Hosp,</i> 223 Mich App 594 (1997)	14
<i>Shinholster v Annapolis Hospital,</i> 471 Mich 540 (2004)	21, 22
<i>State Farm Fire & Cas Co v Old Republic Ins Co,</i> 466 Mich 142 (2002)	15, 20
<i>Stillson v Gibbs,</i> 53 Mich 280 (1884)	6
<i>Swartz v Dow Chem Co,</i> 95 Mich App 328 (1980)	14
<i>Taylor v Michigan Power Co,</i> 45 Mich App 453 (1973)	8
<i>Thompson v Ogema Co Bd of Rd Comm,</i> 357 Mich 482 (1959)	10, 11, 12, 14, 19

<i>Thorn v Mercy Mem Hosp Corp</i> , 281 Mich App 644 (2008)	17, 19, 21, 22
<i>Wavle v Michigan United Rys Co</i> , 170 Mich 81 (1912)	7
<i>Welke v Kuzilla</i> , 144 Mich App 245 (1985)	6
<i>Wesche v Mecosta Co Rd Comm</i> , 480 Mich 75 (2008)	7, 18
<i>White v FCA US, LLC</i> , 350 FSupp3d (ED Mich 2018)	12
<i>Wilson v Bowen</i> , 64 Mich 133 (1887)	3, 5
<i>Wood v Detroit Edison Co</i> , 409 Mich 279 (1980)	13

STATUTES

MCL 600.1402(1).....	17
MCL 600.2921	18
MCL 600.2922	vii, 5
MCL 600.2922(6).....	5, 18
MCL 691.1402(1).....	17

OTHER AUTHORITIES

1846 Rev Stats, ch 101, § 5	7
1848 PA 38	7

RULES

M Civ JI 45.02.....	8, 13
MCR 7.212(H)(3).....	ix

INDEX OF ATTACHMENTS

Exhibit 1, 1971 PA 65

Exhibit 2, 1985 PA 93

QUESTION PRESENTED

The question raised by the Defendants – Appellants is whether the trial court erred by finding that the plaintiff estate may recover the deceased infant’s future earnings under the Wrongful Death Act (WDA), MCL 600.2922 where there is no record evidence that any estate beneficiary had a reasonable expectation receiving financial support from the deceased infant.

The Circuit Court would say “no”

Plaintiffs-Appellees says “no”

Defendants – Appellants says “yes”

Amicus Curiae Michigan Defense Trial Counsel says “yes”

Amicus Curiae Michigan Society of Healthcare Risk Management says “yes”

STATEMENT OF ORDER APPEALED FROM

Defendants – Appellants sought leave to appeal from the trial court’s order dated May 26, 2021, denying their motion for partial summary disposition seeking dismissal of Plaintiffs’ claims for loss of the decedent’s future earnings and earnings capacity. This Court granted Defendants – Appellants’ application for leave on October 8, 2021. This Court granted MSHRM’s motion for leave to file an amicus curiae brief on April 13, 2022.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, Michigan Society of Healthcare Risk Management (MSHRM), draws its membership from many different areas of healthcare including large/small, urban/rural and acute/long-term/specialty care. The bylaws of MSHRM broadly accommodate any individual with an interest in healthcare risk management. MSHRM exists to provide a forum for individuals involved with healthcare risk management to exchange information and ideas. MSHRM appears before the Court as a representative of individuals with an interest in health care risk management throughout the State of Michigan.¹

¹ This brief was not authored by counsel for any party in this case having been drafted entirely by the undersigned counsel. MCR 7.212(H)(3). No party or individual other than the amicus curiae made monetary contributions to the preparation of this brief. *Id.*

STATEMENT OF FACTS AND PROCEEDINGS

Based on the facts outlined by Defendants—Appellants, Plaintiff—Appellee asserts medical malpractice in the delivery of Plaintiff’s premature twins resulting in the death of infant Rowyn Vasquez. Plaintiff asserted a claim for the infant decedent’s future earnings. Plaintiffs’ economist expert Michael Thomson, PhD estimates the decedent’s future “earnings capacity” at between \$10,600,000 and \$16,800.0000.

Defendants moved for partial summary disposition on January 27, 2021 seeking dismissal of Plaintiffs’ claim for the decedent’s future earnings and household services. The trial court entertained oral argument on the motion on May 5, 2021. The trial court entered an order denying the motion on May 26, 2021. This appeal followed.²

² This Court has also granted leave to address the issue raised in this appeal in *Estate of Jawad Jumaa v Garden City Hospital, et al*, (COA Docket No. 358209).

LAW & ARGUMENT

I. INTRODUCTION

This Court released its opinion in *Denney* on November 15, 2016. *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016). Over the ensuing five plus years, plaintiffs in WDA cases have seized on *Denney* as working a dramatic change in the scope of future earnings damages recoverable under the WDA. Despite the lack of meaningful discussion of the history of the WDA or decades of Michigan Supreme Court precedent limiting an estate to recovery of loss of financial support in *Denney*, plaintiffs began citing *Denney* to support claims for decedents' future earning capacity in cases where there was no evidence that any family member had a reasonable expectation of receiving financial support. This spawned the creation of a category of alleged damages in WDA cases that have become commonly known as "*Denney* damages."

"*Denney* damages" are a decedent's future earnings or earnings capacity in a case where no estate beneficiary had a reasonable expectation of receiving financial support in the future. The facts of this case fit the definition. "*Denney* damages" are damages that compensate no loss suffered by the decedent or the family. Rather, "*Denney* damages" represent a windfall recovery to the plaintiffs. As outlined below, "*Denney* damages" are inconsistent with Michigan's common law tort system of compensatory damages, the plain statutory language and historical development of the WDA and binding Michigan Supreme Court precedent limiting an estate to recovery of loss of financial support.

Denney, as interpreted by plaintiffs in WDA cases, has created significant confusion in the trial courts. Some courts have accepted the broad interpretation of the

opinion urged by plaintiffs and permitted claims for the entirety of the decedents' future earnings where there is no evidence that any next of kin had an expectation of financial support. Like this case, claims for such future earnings damages have been permitted in cases involving stillborn babies and infants. This has led to significant motion practice and stalled settlement negotiations where plaintiffs insist they have a viable claim for a decedent's future earnings despite a lack of evidence of an expectation of financial support. This case is a prime example. Plaintiff asserts a claim for the decedent's future earnings their expert values at between \$10,000,000 and \$17,000,000 while Defendants—Appellants correctly contend that there is no viable claim for the decedent's future earnings under the WDA.

Dating back hundreds of years, Michigan has followed a system of compensatory damages in tort cases. *Wilson v Bowen*, 64 Mich 133, 141–42; 31 NW 81 (1887). The purpose of compensatory damages is to make “an injured party whole for *losses actually suffered*.” *Rafferty v Markovitz*, 461 Mich 265, 271; 602 NW2d 367 (1999) (emphasis added). Distilled to its essence, the question this Court must consider is what loss would allowing recovery of the decedent's future earnings compensate? It will not compensate any economic loss of surviving family members. It will not compensate any loss experienced by the decedent as the decedent experiences no financial loss as a result of her inability to work and earn income in the future. If allowing recovery of the decedent's future earnings will not compensate any actual loss, it is not compensatory and not recoverable under a tort system rooted in compensatory damages.

II. ARGUMENT

A. Standard of review.

Both questions of statutory interpretation and a trial court’s grant or denial of summary disposition are reviewed de novo. *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

B. The statutory text – WDA.

The current version of the WDA provides, in pertinent part:

(1) Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, 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.

* * *

(3) . . . [T]he 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.

* * *

(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. . .

MCL 600.2922 (Emphasis added). The plain statutory language therefore limits recovery only to individuals who “suffer damages” as a result of the decedent’s passing. It then enumerates several categories of damages that those individuals may recover, “including reasonable medical, hospital, funeral, and burial expenses[,]” the decedent’s “pain and suffering, while conscious[,]” and “damages *for the loss of financial support and the loss of the society and companionship of the deceased.*” MCL 600.2922(6) (emphasis added).

C. Damages in common law tort actions are limited to compensation for losses actually suffered.

Michigan common law, which is rooted in English common law, recognizes torts and contracts as the two types of civil wrongs. *In Re Bradley Estate*, 494 Mich 367, 382; 835 NW2d 545 (2013). English common law recognized that a tort “is remedied through an award of compensatory damages.” *Bradley Estate*, 494 Mich at 382-383. Dating back to the 19th century, Michigan common law also recognized that the purpose of tort damages is compensatory:

It is not necessary to repeat the discussion. It is summed up by saying that the purpose of an action of tort is to recover the damages which the plaintiff has sustained from an injury done him by the defendant; that compensation to the plaintiff is the purpose in view; and, when that is accorded, *anything beyond, by whatever name called, is unauthorized.* It is not the province of the jury, after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff, as a punishment for the wrong he has done to the plaintiff.

Wilson, 64 Mich at 141-142 (emphasis added). Compensatory damages are firmly entrenched in Michigan tort cases for the purpose of making “an injured party whole for

losses actually suffered.” *Rafferty*, 461 Mich at 271 (emphasis added). Put simply, the amount of recovery for such damages is “inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery.” *McAuley v General Motors Corp*, 457 Mich 513, 520; 578 NW2d 282 (1998) (internal citation and quotations omitted).

In an opinion published in 1875, the United States Supreme Court explained that a plaintiff receives compensatory damages “as a compensation, recompense, or satisfaction to the plaintiff for any injury *actually received* by him from the defendant.” *Dow v Humbert*, 91 US 294, 299 (1875) (emphasis added). Thus, compensatory damages “should be precisely commensurate with the injury, neither more nor less, whether the injury be to his person or estate.” *Dow*, 91 US at 299. See also *Stillson v Gibbs*, 53 Mich 280, 285; 18 NW 815 (1884) (holding that a court should “endeavor fairly to compensate the plaintiff for the wrong he has suffered ... [not] punish the defendant”). The Michigan Supreme has recognized that the damages provided by the WDA are compensatory: “wrongful death act damages focus upon the financial loss *actually incurred by the survivors* as a result of their decedent’s death. *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 560-561; 302 NW2d 537 (1981) (emphasis added).

The legal claim underlying Plaintiff’s cause of action is common law medical malpractice. See *Delahunt v Finton*, 244 Mich 226, 230; 221 NW 168 (1928) (defining common law medical malpractice); *Welke v Kuzilla*, 144 Mich App 245, 252-253; 375 NW2d 403 (1985) (recognizing that a medical malpractice claim “is in essence a tort claim in negligence.”). The WDA is essentially a filter through which the underlying claim may

proceed. *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 88; 746 NW2d 847 (2008). As a result, any statutory or common law limitations on the underlying claim apply to a wrongful death action. *Wesche*, 480 Mich at 89. In tort actions, damages are limited to those necessary to compensate losses actually suffered. *McAuley*, 457 Mich at 520.

D. Relevant history of the WDA, 1939 amendment of the WDA and the Michigan Supreme Court's interpretation of the 1939 amendment in *Baker*.

At common law, death abated a cause of action. *Ford v Maney's Estate*, 251 Mich 461, 463; 232 NW 461 (1930). During the mid-19th century, the Michigan Legislature abrogated this common law rule by enacting a survival act (1846 Rev Stats, ch 101, § 5) and a death act (1848 PA 38). See *Hardy v Maxheimer*, 429 Mich 422, 436; 416 NW2d 299 (1987); *In Re Olney's Estate*, 309 Mich 65, 73; 14 NW2d 574 (1944). Prior to amendment of the WDA in 1939, an estate was required to rely on the survival act to file suit in cases where death was not instantaneous. *Kyes v Valley Tel Co*, 132 Mich 281, 284; 93 NW 623 (1903). The survival act permitted the estate to recover the decedent's future earnings. *Olivier v Houghton Co Street R Co*, 134 Mich 367, 369-370; 96 NW 434 (1903). The WDA limited the estate's recovery to the loss of financial support experienced by the estate's beneficiaries. *Wavle v Michigan United Rys Co*, 170 Mich 81, 94-95; 135 NW 914 (1912).

Following its enactment in 1848, the WDA remained unchanged until amended by the Legislature in 1939. *In Re Olney's Estate*, 309 Mich at 73. The 1939 amendment required that claims for injuries resulting in death be brought under the WDA irrespective of whether the death was instantaneous. *Hardy*, 429 Mich at 437. The 1939 amendment also superseded damage claims for loss of earnings of the decedent by

providing for recovery of “pecuniary injury” suffered by the next of kin. See Comment to M Civ JI 45.02.³ In sum, the 1939 amendment constituted a partial repeal of the survival act and merger of the survival act and death act.

The Michigan Supreme Court addressed the significance of the 1939 amendment to an estate’s claim for the decedent’s future earnings in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948). *Baker* was a case brought under the WDA based on the death of Julia A. Baker in an automobile accident with the defendant. *Baker*, 319 Mich at 705. At the time of her death, Ms. Baker was a widow and lived with her son. *Id.* at 706. Ms. Baker had three adult children none of whom were dependent on her for financial support. *Id.* Ms. Baker assisted her son with household chores in exchange for room and board and “money from time to time as her needs required.” *Id.* At the conclusion of plaintiff’s proofs, the defendant moved for a directed verdict in the amount of only the burial expenses (\$190). *Id.* at 707. The trial court denied the motion and allowed the jury to consider whether the plaintiff had presented sufficient evidence establishing “decedent’s probable future earnings had she not been injured or killed.” *Baker*, 319 Mich at 707. The jury returned a verdict totaling \$1,690.00 which included damages for loss of the decedent’s probable future earnings. *Id.*

On appeal, the Supreme Court framed the issue as:

³ Jury instructions constitute the work of a committee created by the Supreme Court and are entitled to some level of deference. *Taylor v Michigan Power Co*, 45 Mich App 453, 457; 206 NW2d 815 (1973).

whether recovery may be had under Act 297, Pub. Acts 1939 [the WDA], for loss of probable future earnings, without diminution for cost of maintenance, when the widowed decedent had an established earning capacity but no surviving spouse or next of kin to who she was under a legal or moral obligation to contribute support.

Baker, 319 Mich at 708. The plaintiff contended on appeal that such recovery should be permitted under the WDA as it had been permitted under the survival act prior to the 1939 amendment. *Id.* at 711. The *Baker* Court rejected this argument holding that the estate's "right to recover extends . . . to the pecuniary injury to decedent's surviving spouse and next of kin, which shall be found to exist only, as under the old death act, when and to the extent that it is established that the decedent owed a legal duty to contribute to the support of such persons or any of them." *Id.* at 712. The *Baker* Court further wrote as follows:

The remaining question is, what is meant in the 1939 act by 'pecuniary injury' to decedent's surviving spouse or next of kin. Does this include things so speculative and nebulous as the fondly nurtured hope of an inheritance, enhanced by redress for decedent's wrongful death, but suspended by the tenuous cord of decedent's possible intestacy? Assuredly not. In the *Olney* case we recognized that, beyond compensation to a husband for loss of his wife's services, the right to recover for pecuniary loss must be predicated upon the existence of some next of kin having a legally enforceable claim to support or maintenance by the deceased.

Id. at 714. Since the decedent's next of kin "had no legally enforceable claim to support or maintenance by [the] deceased," the Supreme Court reversed and remanded the case for entry of judgment in the amount of \$190.

As held by the Supreme Court in *Baker*, the 1939 amendment of the WDA limited an estate's recovery of the decedent's future earnings to the financial support the decedent would have been legally obligated to provide. As outlined below, the only

change to this test since *Baker* is the development of a “reasonable expectation” standard for financial support. What neither the Supreme Court nor the Legislature have changed since *Baker*, is the limitation on damages for the decedent’s future earnings to only financial support.

E. Development of the “reasonable expectation test” after *Baker*.

With respect to minor decedents, the Supreme Court ruled consistently with *Baker* in cases involving a parent’s claim for damages for loss of earnings of a deceased minor or adult child under the WDA in the years following *Baker*. These cases found that a minor or adult child’s parents were only entitled to recover for the child’s alleged loss of future earnings to the extent they had a reasonable expectation of receiving financial support from the minor or adult child. The only modification to the rule applied in *Baker* by these subsequent cases was the development of a “reasonable expectation of support” test in place of the “legally obligated to support” test applied in *Baker*.

In an opinion published in 1959, the Michigan Supreme Court considered whether the parents of a deceased 15-year-old minor could recover economic damages for the support the parents expected from the child beyond the child’s twenty first birthday. *Thompson v Ogema Co Bd of Rd Comm*, 357 Mich 482; 98 NW2d 620 (1959). In *Thompson*, the plaintiff’s decedent minor daughter died in a motor vehicle accident allegedly caused by the defendant’s failure to appropriately maintain the road where the accident occurred. *Thompson*, 357 Mich at 484. The plaintiff presented evidence that the child contributed earnings from a babysitting job to payment of the household expenses and that she planned to replace her mother as the primary wage earner in the family after

graduating from high school. At trial, the jury returned a verdict in favor of the estate in the amount of \$12,072. *Id.*

On appeal, the Supreme Court considered whether it was appropriate for the jury “to consider and award damages for ‘pecuniary injuries’ suffered by the surviving parents after the period of the child’s minority.” *Id.* at 485. The Supreme Court took note of testimony provided by the father (who was unable to work) that the plan for his daughter after her graduation from high school was to assume her mother’s job at a restaurant “and let mother come home.” *Id.* at 486. In analyzing what economic damages the minor’s parents were entitled to recover, the Supreme Court noted that the wrongful death act “and Michigan case law interpreting it allow consideration of loss of services of a minor in determining pecuniary injury of a parent.” *Id.* at 488. The Supreme Court noted that a “large majority of state courts hold that recovery may be had for the loss of benefits *reasonably to be expected* after the majority of the deceased.” *Thompson*, 357 Mich at 489 (emphasis added). After taking note of the testimony and caselaw outlined above, the *Thompson* Court held as follows:

We do not believe the age of the child at death (whether before or after majority) is decisive as to consideration of loss of possible future support after the 21st birthday. Nothing in the Michigan statute pertaining to wrongful death suggests such a distinction. The language of the *Judis* and *McDonald* cases suggest that *the test is reasonable expectation of support* rather than any particular age at the time of death.

Id. at 489 (emphasis added). The Supreme Court found that there was sufficient evidence that the child contributed financially to her parents’ support and that there was an

expectation that the child would support the parents financially in the future by working in place of the mother to support a claim for loss of financial support. *Id.* at 491-492.

In a case published three years after *Thompson*, the Supreme Court again considered the question of whether a child's parents could recover damages for loss of financial support for a child. *Mooney v Hill*, 367 Mich 138; 116 NW2d 231 (1962). In *Mooney*, the Supreme Court again held that the parents were entitled to recover for the *loss of financial support* they experienced due to the death of their adult son. *Mooney*, 367 Mich at 140.

As established in the *Thompson* and *Mooney*, while parents may recover damages for a child's future earnings under the WDA, they are held to the same standard as any other next of kin seeking damages for a decedent's future earnings: the reasonable expectation of financial support. The only distinction between the holdings of *Thompson* and *Mooney* and the holding of *Baker* was the adoption of a "reasonable expectation" standard in place of the "legal obligation" standard.

F. The 1971 and 1985 amendments of the WDA were a legislative affirmation of the continuing viability of Baker.

A common argument by plaintiffs attempting to explain *Baker*, is that the Legislature's amendment of the WDA in 1971 to remove the phrase "pecuniary injury" superseded or limited the *Baker* holding. **Exhibit 1, 1971 PA 65.** The federal district court adopted this argument in conclusory fashion in *White v FCA US, LLC*, 350 FSupp3d 640 (ED Mich 2018) while making no effort to examine the purpose and legislative intent underlying the 1971 amendment. An examination of the history and purpose behind the

1971 amendment reveals that it intended to address only questions surrounding whether the WDA permitted recovery of noneconomic damages for loss of society and companionship.

The elimination of the phrase “pecuniary injury” from the WDA in 1971 represented a legislative response to the Supreme Court’s opinion in *Breckon v Franklin Fuel Co*, 383 Mich 251; 174 NW2d 836 (1970). In *Breckon*, the Supreme Court found that prior opinions had erred by allowing recovery for loss of society and companionship because such damages are “incapable of being defined by any recognized measure of value.” *Breckon*, 383 Mich at 265. The *Breckon* court found that allowing recovery for noneconomic damages for loss of society and companionship was inconsistent with the “pecuniary injury” language in the WDA. The comment to M Civ JI 45.02 explains:

The legislature responded to *Breckon* with the enactment of 1971 PA 65, which amended the statute by deleting the phrase ‘pecuniary injury’ and by directing the jury to give such damages as it ‘shall deem fair and just, under all of the circumstances, . . . [including] recovery for the loss of the society and companionship of the deceased.’ *In context it seems clear enough that this was not intended to eliminate any of the elements of ‘pecuniary injury’ previously allowed, but rather to settle the troublesome question as to the inclusion of damages for loss of society and companionship.*

Comment, M Civ JI 45.02 (emphasis added); see also *Wood v Detroit Edison Co*, 409 Mich 279, 295-296; 294 NW2d 571 (1980) (MOODY, J. opinion) (observing that “[t]he complete focus of 1971 PA 65 was this court’s *Breckon* decision . . .”).

As explained above, the deletion of the phrase “pecuniary injury” did not expand or reduce the type of pecuniary damages previously allowed under the WDA. Rather, it

merely settled the question of whether the WDA permitted recovery for loss of society and companionship.

This Court continued to apply the *Baker* rule following the 1971 amendment. *Swartz v Dow Chem Co*, 95 Mich App 328, 335; 290 NW2d 135 (1980), rev'd on other grounds, 414 Mich 433 (1982). In *Swartz*, this Court ruled that the 19-year-old decedent's estate could not recover damages for his lost future income because there was no evidence that his parents reasonably expected him to financially support them. The plaintiff estate proffered expert testimony to prove the value of the decedent's lost earning capacity and contended that it was entitled to recover such lost earnings under the WDA. The trial court, applying the reasonable expectation of support rule, excluded the testimony. This Court affirmed explaining:

Our review of decedent's father's testimony indicates that decedent had never contributed to the support of his parents, but instead, his parents continued to support him while he was working and that, barring a catastrophe, his father did not ever expect to be dependent on decedent. Taking this testimony along with the fact that decedent's father had a pension plan, *the trial court properly found that there was no reasonable expectation that decedent would contribute to the support of his parents from future earnings. We, therefore, find no error in the exclusion of this testimony.*

Swartz, 95 Mich App at 335 (emphasis added).

Significantly, the Legislature next amended the WDA in 1985 to specifically added the phrase "loss of financial support" to subsection 6. **Exhibit 2, 1985 PA 93**. This Court has found that "the 'pecuniary injury' language of the statute construed in *Thompson* is analogous to the clearer 'loss of financial support' language of the current statute." *Settingington v Pontiac Gen Hosp*, 223 Mich App 594, 607; 568 NW2d 93 (1997). Moreover,

the Legislature's addition of the language "loss of financial support" in the 1985 amendment demonstrates the Legislature's affirmation of the prior holdings of the Supreme Court limiting recovery to loss of financial support experienced by the next of kin. *In re Medina*, 317 Mich App 219, 227; 894 NW2d 653 (2016) (the Legislature is presumed to be fully aware of existing law when enacting legislation).

The 1985 amendment of the WDA removed any doubt regarding the Legislature's intent to limit an estate's recovery of the decedent's future earnings to the loss of financial support experienced by the next of kin. An interpretation of the WDA that permits recovery of the entirety of the decedent's future earnings without regard to financial support renders the "loss of financial support" language in the statute mere surplusage. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) (a court must avoid an interpretation that would render any part of the statute surplusage or nugatory). It is well established that courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part the statute surplusage or nugatory." *State Farm*, 466 Mich at 146. If the Legislature had intended to expand the scope of damages available relative to the decedent's earnings, it would have added language allowing recovery for "loss of the decedent's future earnings." Instead, it chose to add the more limiting phrase "loss of financial support." Therefore, the 1985 amendment was a legislative affirmation of the soundness and continuing viability of the *Baker* holding.

In the years following the 1971 and 1985 amendments of the WDA no court questioned the continuing viability of the *Baker* rule that damages for a decedent's future

earnings under the WDA are limited to the loss of financial support experienced by the next of kin. Plaintiffs in WDA cases did not question the rule either. Following the 1985 amendment which confirmed the *Baker* rule, plaintiff and defense attorneys continued analyzing future earnings damages in WDA cases in the same manner they had for decades: did any family member have a reasonable expectation of future financial support from the decedent? This changed suddenly after the publication of *Denney* in November of 2016.

G. *Denney* does not apply and, if not overruled, should be expressly limited to the facts presented in that case.

Denney arose out of a motorcycle accident resulting in the death of the plaintiff's decedent Matthew Denney. *Denney*, 317 Mich App at 729. The trial court granted partial summary disposition in favor of the Kent County Road Commission (KCRC) finding that the KCRC was immune from liability for damages beyond bodily injuries suffered by the decedent, including damages for loss financial support, under the Government Tort Liability Act (GTLA). *Id.* at 729-730.

This Court granted leave to consider the question of whether the highway exception to the GTLA allowed the decedent's surviving family members to recover the decedent's loss of future earnings. On appeal, the defendant contended that the surviving family members had only a claim for loss of financial support under the WDA and therefore did not have a claim for "a person who sustains bodily injury" within the meaning of the highway exception to the GTLA. *Id.* at 736. The *Denney* panel agreed with the defendant that a claim for loss of financial support is not allowed under the

GTLA highway exception. *Id.* However, without conducting any detailed analysis or review of the history of the WDA, the *Denney* panel characterized the plaintiff's claim as one for recovery of the decedent's loss of earnings. *Id.* at 737. The only case cited by the *Denney* panel to support its finding that "damages for lost earnings are allowable under the wrongful death act" was a 2008 opinion of this Court addressing whether economic damages for loss of the decedent's services were available under the WDA. *Denney*, 317 Mich App at 731-732 (citing *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644; 761 NW2d 414 (2008)). On this basis, the *Denney* panel reversed the trial court's opinion and remanded the case for further proceedings.

The sticking point in *Denney* was the statutory language of the highway exception to the GTLA limiting recovery to a "person who sustains bodily injury . . ." MCL 600.1402(1). The Michigan Supreme Court had previously interpreted the phrase "bodily injury" in the GTLA to include damages for the consequences of "bodily injury" including loss of the ability to work and earn money. *Denney*, 317 Mich App at 733 (citing *Hannay v Dep't of Transp*, 497 Mich 45, 64-65; 860 NW2d 67 (2014)). As noted above, the *Denney* panel found that MCL 691.1402(1) did not permit a claim for loss of financial support because such damages would not be damages suffered by a person who sustains bodily injury as provided in the language of the statute.

In sum, *Denney* involved an underlying statutory scheme unique to claims of governmental immunity under the GTLA and how those claims should be interpreted through the filter of the WDA. If *Denney* is permitted to stand, it should be limited to the

facts of *Denney* and analogous claims under the motor vehicle and highway exception to the GTLA.

H. **In the alternative, *Denney* was wrongly decided and is not binding on this Court.**

Respectfully, it appears that the *Denney* panel may have made the analysis more complicated than necessary. Under MCL 600.2921, the decedent’s claim arising from his “bodily injury” that satisfied the highway exception to GTLA liability survived his death. Further, MCL 600.2921 required that the decedent’s claim that survived death be prosecuted under the WDA. Under the WDA, the estate was entitled to assert a claim for loss of financial support experienced by the next of kin under the plain language of MCL 600.2922(6). Indeed, for all the reasons outlined above, the estate’s claim for the decedent’s future earnings was expressly limited to the loss of financial support experienced by the next of kin. The damages for the decedent’s future earnings would still have been damages that naturally flowed from the decedent’s “bodily injury” as recognized in *Hannay*, but merely limited to loss of financial support consistent with the plain language of the WDA. It seems possible that *Denney* could have been resolved with a much simpler analysis that would have avoided significant confusion, motion practice and stalled settlement negotiations relating to “*Denney* damages” over the last five plus years.⁴

⁴ In *Wesche*, the Supreme Court held that a loss of consortium claim is not a “bodily injury” for which governmental immunity is waived under the highway exception to the GTLA and therefore not a claim that could be brought under the WDA. The Supreme Court reasoned, in part, that loss of consortium is a completely separate claim— not merely a separate category or item of damages. *Wesche*, 480 Mich at 85. Since loss of

However, to the extent that *Denney* is interpreted broadly enough to permit, as in this case, recovery of a decedent's future earnings in a medical malpractice action where no family member had a reasonable expectation of financial support, it was wrongly decided. *Denney*, if interpreted so broadly, conflicts with numerous prior opinions of the Michigan Supreme Court including *Baker*, *Thompson* and *Mooney*. A decision of the Supreme Court is binding until the Supreme Court overturns it. See *James v Alberts*, 234 Mich App 417, 419, fn 1; 594 NW2d 848 (1999); *O'Dess v Grand Trunk WR Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996). While *Denney* fails to even recognize *Baker*, it certainly could not overrule the binding Michigan Supreme Court opinion. As a result, this Court must follow *Baker's* holding that an estate is limited to recovery of loss of financial support irrespective of anything in *Denney* to the contrary.

Interpretation of the WDA to allow an estate to recover the decedent's loss of future earnings as separate and distinct from damages for loss of financial support also violates rules of statutory interpretation. Specifically, such an interpretation of the WDA renders the specific language of the WDA allowing recovery for "damages for the loss of

consortium is a separate claim that does not arise out of bodily injury and would not have been permitted in an action under the GTLA if death had not ensued, it could not be asserted under the WDA. *Id.* However, a claim for damages for loss of financial support is not a completely separate claim akin to a claim for loss of consortium. See *Thorn*, 281 Mich App at 658 (recognizing that the "WDA does not comprise an independent cause of action."). The WDA merely acts as a filter through the underlying claim may be asserted. *Wesche*, 480 Mich at 88. It is an element of damages and a subset of the economic damages for the decedent's future earnings that would have been permitted in *Denney* if the decedent had survived. Therefore, the alternate analysis proposed here does not appear to directly conflict with the holdings of *Wesche* or *Hannay*.

financial support” mere surplusage. It is well established that courts “must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part the statute surplusage or nugatory. *State Farm*, 466 Mich at 146. It is axiomatic that “loss of financial support” is a subset or portion of the decedent’s total future earnings. Interpreting the WDA to allow an estate to recover damages for the entirety of the decedent’s loss of future earnings in every case, renders the phrase “loss of financial support” mere surplusage and nugatory as it would manifestly be an amount less than the decedent’s total future earnings.

In other words, the Legislature’s addition of the phrase “loss of financial support” to the WDA in 1985 demonstrates the Legislature’s intent to exclude the decedent’s lost future earnings as damages as there would be no reason to include the language “loss of financial support” if the Legislature intended to allow recovery for all the decedent’s future earnings in every case. The fact that the Legislature explicitly provided for recovery of “loss of financial support” in the WDA in 1985 demonstrates it only intended to allow recovery of damages consistent with the purpose of compensatory damages in tort actions rooted in the common law, the 1939 amendment of the WDA and the Michigan Supreme Court’s decision in *Baker*.

I. ***Shinholster & Thorn do not apply and neither opinion addressed, much less overruled, Baker.***

The natural question following *Denney* is what changed in Michigan law between the 1985 amendment of the WDA and November of 2016 that allowed the *Denney* panel to recognize a claim for the decedent’s future earnings without regard to financial

support under the WDA for the first time? *Denney* relied primarily on this Court's decision in *Thorn*. Plaintiffs advocating an expansive interpretation of *Denney* primarily cite *Thorn* and the Michigan Supreme Court's opinion in *Shinholster v Annapolis Hospital*, 471 Mich 540; 685 NW2d 275 (2004). However, neither *Shinholster* nor *Thorn* addressed the issue presented in *Denney* or in this appeal.

In *Shinholster*, the Michigan Supreme Court addressed three unrelated issues one of which was whether the higher non-economic damage cap applicable to medical malpractice cases can apply in an action brought under the WDA. *Shinholster*, 471 Mich at 560. In analyzing that issue, the Court observed, in *dicta*, that "we believe the Legislature made a quite contrary decision in §2922(1), (2) and (6) by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived." *Id.* at 564. Plaintiffs asserting claims for "*Denney* damages" frequently cite this statement as support for their interpretation of *Denney*.

However, this argument only exposes the fallacy of Plaintiff's position. Specifically, if the decedent had survived and recovered, she would have no claim for loss of future earnings. Consider an analogy to a claim for future pain and suffering: if an estate is entitled to recover all damages the decedent would have been entitled to recover "had she lived", may the estate also assert a claim for the decedent's future pain and suffering as if she had survived? Clearly not. The rationale against that argument is no different from the rationale against permitting recovery of the decedent's future earnings without regard to loss of financial support: the decedent experiences no

damages relating to his/her inability to work and earn income in the future and such an award of damages would compensate no loss actually suffered.

Like *Shinholster*, this Court did not address future earnings damages under the WDA in *Thorn*. The issue in *Thorn* was whether the WDA permitted an estate to recover economic damages for the loss of household services being provided by the decedent mother at the time of her death. *Thorn*, 281 Mich App at 646. The *Thorn* panel held that damages for loss of household services were recoverable under the WDA and that such damages were economic in nature. *Id.* at 666-667. In concluding that the WDA permitted damages for loss of the decedent's services, the *Thorn* panel made several statements regarding the expansive nature of damages permitted under the WDA. Among the cases cited was the statement from *Shinholster* that an estate is entitled to recover everything the decedent could have "had he/she lived." *Id.* at 654-655. However, none of the broad statements regarding the scope of damages available under the WDA in *Thorn* addressed the scope of damages for the decedent's future earnings or the *Baker* holding limiting recovery of future earnings to the loss of financial support experienced by the estate's beneficiaries.

CONCLUSION

“*Denney* damages” are inconsistent with Michigan’s common law tort system of compensatory damages, the plain statutory language and historical development of the WDA and binding Michigan Supreme Court precedent. The 1985 amendment of the WDA removed any doubt regarding the Legislature’s intent to limit an estate’s recovery of the decedent’s future earnings to the loss of financial support experienced by the next of kin. The fact that the Legislature explicitly provided for recovery of “loss of financial support” in the WDA in 1985 demonstrates it only intended to allow recovery of damages consistent with the purpose of compensatory damages in tort actions rooted in the common law, the 1939 amendment of the WDA and the Michigan Supreme Court’s decision in *Baker. Denney*, which contains no meaningful analysis of the history of the WDA could not change the law established in the 1939 amendment of the WDA as confirmed in *Baker*.

Respectfully submitted,

RHOADES McKEE PC
Attorneys for Amicus Curiae Michigan
Society for Healthcare Risk Management

Dated: May 2, 2022

By: /s/James R. Poll
James R. Poll (P70191)
Business Address:
55 Campau Avenue NW
Suite 300
Grand Rapids, MI 49503
(616) 235-3500

EXHIBIT1

HEINONLINE

Citation:

1971 ,

Provided by:

Library of Michigan

Content downloaded/printed from *HeinOnline*

Mon Oct 2 11:58:53 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.



Use QR Code reader to send PDF to your smartphone or tablet device

to any one person. Notwithstanding any law of this state to the contrary, the Warren firemen's benevolent association may pay death and sick benefits in an amount not to exceed \$7,000.00 to any one person. Notwithstanding any law of this state to the contrary, the Lansing firemen's benefit association may pay death and sick benefits in an amount not to exceed \$2,000.00 to any one person. Notwithstanding any law of this state to the contrary, the Sanilac county police and firemen's fund may pay death and sick benefits in an amount not to exceed \$3,000.00 to any one person.

This act is ordered to take immediate effect.

Approved July 28, 1971.

[No. 65.]

AN ACT to amend section 2922 of Act No. 236 of the Public Acts of 1961, entitled "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," as amended by Act No. 146 of the Public Acts of 1965, being section 600.2922 of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section amended.

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

600.2922 Wrongful death; liability of tortfeasor. [M.S.A. 27A.2922]

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

Persons entitled to sue; damages, distribution.

(2) Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem

fair and just, 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. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action shall be distributed to the surviving spouse and next of kin who suffered injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the probate court by written opinion as to the amount thereof representing the loss suffered by the surviving spouse and all of the next of kin, and the proportion of such total loss suffered by the surviving spouse and each of the next of kin of such deceased person, as shown by the evidence. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total loss suffered by the surviving spouse and next of kin shall be distributed, and the proportionate share thereof to be distributed to the surviving spouse and the next of kin. The remainder of the proceeds of such judgment shall be distributed according to the intestate laws.

Approved July 28, 1971.

[No. 66.]

AN ACT to amend Act No. 116 of the Public Acts of 1954, entitled "An act to reorganize, consolidate and add to the election laws; to provide for election officials and prescribe their powers and duties; to provide for the nomination and election of candidates for public office; to provide for the resignation, removal and recall of certain public officers; to provide for the filling of vacancies in public office; to provide for and regulate primaries and elections; to provide for the purity of elections; to guard against the abuse of the elective franchise; to define violations of this act; to prescribe the penalties therefor; and to repeal certain acts and all other acts inconsistent herewith," as amended, being sections 168.1 to 168.992 of the Compiled Laws of 1948, by adding section 624a.

The People of the State of Michigan enact:

Section added.

Section 1. Act No. 116 of the Public Acts of 1954, as amended, being sections 168.1 to 168.992 of the Compiled Laws of 1948, is amended by adding section 624a to read as follows:

EXHIBIT 2

HEINONLINE

Citation:

1985 ,

Provided by:

Library of Michigan

Content downloaded/printed from *HeinOnline*

Mon Oct 2 11:57:16 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.



Use QR Code reader to send PDF to your smartphone or tablet device

- (m) Section 638.
- (n) Section 643.
- (o) Section 644.
- (p) Section 646.
- (q) Section 647.
- (r) Section 653.
- (s) Section 665.
- (t) Section 667.
- (u) Section 671.
- (v) Section 701(4).

(4) Independent probate, as provided for in this article, shall not be subject to the following sections requiring a bond of a personal representative:

- (a) Section 507.
- (b) Section 645.
- (c) Section 648.

(5) Independent probate, as provided for in this article, shall not be subject to the following sections which are inconsistent with the powers of an independent personal representative:

- (a) Section 116.
- (b) Section 147.
- (c) Section 152.
- (d) Section 165.
- (e) Section 605.
- (f) Section 641.

(6) This section shall not prevent the independent personal representative from utilizing any provision of law which can assist the personal representative in the efficient and proper administration of an estate. ~

Applicability.

Section 2. This amendatory act applies to cases and matters pending on or filed after the effective date of this amendatory act.

Conditional effective date.

Section 3. This amendatory act shall not take effect unless House Bill No. 4487 of the 83rd Legislature is enacted into law.

This act is ordered to take immediate effect.

Approved July 10, 1985.

Filed with Secretary of State July 10, 1985.

Compiler's note: House Bill No. 4487, referred to in Section 3, was filed with the Secretary of State on July 10, 1985, and became P.A. 1985, No. 93, Imd. Eff. July 10, 1985.

[No. 93]

(HB 4487)

AN ACT to amend section 2922 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization

and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," being section 600.2922 of the Michigan Compiled Laws.

The People of the State of Michigan enact:

Section amended; revised Judicature act of 1961.

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

600.2922 Death by wrongful act, neglect, or fault of another; liability; action by personal representative; limitation; notice; approval or rejection of proposed settlement; award and distribution of damages; presentation of claim for damages; advising attorney for personal representative of material facts; applicability of §§700.221 and 700.222 to distribution of proceeds. [M.S.A. 27A.2922]

Sec. 2922. (1) Whenever the death of a person or injuries resulting in death 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 which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death 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 person. Within 30 days of the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) Subject to section 251 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.251 of the Michigan Compiled Laws, 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 which may constitute evidence of any claim for damages and that failure to do so may adversely affect his or her recovery of damages and could bar his or her right to any claim at a hearing to distribute proceeds.

(c) A statement that he or she will be notified of a hearing to determine the distribution of the proceeds after the adjudication or settlement of the claim for damages.

(d) A statement that to recover damages under this section the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6) and that failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(5) If, for the purpose of settling a claim for damages for wrongful death where 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 person 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 as defined in section 4 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.4 of the Michigan Compiled Laws, or a legally incapacitated person for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated person.

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(e) If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated person and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the

proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

(7) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(8) A person who may be entitled to damages under this section shall advise the attorney for the personal representative within 60 days after service of the complaint and notice as provided for under subsection (2) of any material fact of which the person has knowledge and which may constitute evidence of any claim for damages. The person's right to claim at a hearing any proceeds may be barred by the court if the person fails to advise the personal representative as prescribed in this subsection.

(9) If a claim under this section is to be settled and a civil action for wrongful death is not pending under this section, the procedures prescribed in sections 221 and 222 of the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.221 and 700.222 of the Michigan Compiled Laws, shall be applicable to the distribution of the proceeds.

Applicability of amendatory act.

Section 2. This amendatory act applies to cases and matters pending on or filed after the effective date of this amendatory act.

Conditional effective date.

Section 3. This amendatory act shall not take effect unless House Bill No. 4486 of the 83rd Legislature is enacted into law.

This act is ordered to take immediate effect.

Approved July 10, 1985.

Filed with Secretary of State July 10, 1985.

Compiler's note: House Bill No. 4486, referred to in Section 3, was filed with the Secretary of State on July 10, 1985, and became P.A. 1985, No. 92, Imd. Eff. July 10, 1985.

[No. 94]

(HB 4464)

AN ACT to amend section 3 of Act No. 164 of the Public Acts of 1955, entitled "An act to provide for the establishment and maintenance of district libraries; to provide for boards of trustees to have control of such libraries; to define the powers and duties of such boards; and to provide for the support of such libraries," being section 397.273 of the Michigan Compiled Laws.

The People of the State of Michigan enact:

Section amended; district libraries.

Section 1. Section 3 of Act No. 164 of the Public Acts of 1955, being section 397.273 of the Michigan Compiled Laws, is amended to read as follows:

STATE OF MICHIGAN

MI Court of Appeals

Proof of Service

Case Title: ESTATE OF ROWYN VASQUEZ V CLARK EDWARD NUGENT MD	Case Number: 357511
--	-------------------------------

1. Title(s) of the document(s) served:

Filing Type	Document Title
Brief	Brief of Amicus Curiae MSHRM

2. On 05-02-2022, I served the document(s) described above on:

Recipient	Address	Type
Laurie Bowen Collins Einhorn Farrell & Ulanoff P.C.	Laurie.Bowen@CEFLawyers.com	e-Serve
John Malone McKeen & Associates, P.C. 81838	jmalone@mckeenassociates.com	e-Serve
Karen Beach Tanoury, Nauts, McKinney, Garbarino & Dwaihy, PLLC 75172	karen.beach@tnmglaw.com	e-Serve
Michael Cook Collins Einhorn Farrell & Ulanoff P.C. P71511	michael.cook@ceflawyers.com	e-Serve
Michelle Trevathan McKeen & Associates, PC	mdtrevathan@mckeenassociates.com	e-Serve
Mary Nightingale Tanoury Nauts McKinney & Garbarino, PLLC	mary.nightingale@tnmglaw.com	e-Serve
Angela Kennedy Tanoury Nauts McKinney & Garbarino, PLLC	angela.kennedy@tnmglaw.com	e-Serve
Lee Ann Allen McKeen & Associates, PC	lallen@mckeenassociates.com	e-Serve
Sara Bos RMPC	smbos@rhoadesmckee.com	e-Serve
Jesse DePauw Tanoury Nauts McKinney & Dwaihy P81358	jesse.depauw@tnmglaw.com	e-Serve
James Poll RMPC 70191	jrpoll@rhoadesmckee.com	e-Serve
Andrew Kay McKeen & Associates, P.C. P73707	akay@mckeenassociates.com	e-Serve
David Nauts Tanoury Nauts McKinney & Garbarino, PLLC 42989	david.nauts@tnmglaw.com	e-Serve

RECEIVED by MCOA 5/2/2022 10:53:27 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with MiFILE and its contents are true to the best of my information, knowledge, and belief.

05-02-2022

Date

/s/ Sara Bos

Signature

RMPC

RECEIVED by MCOA 5/2/2022 10:53:27 AM