STATE OF MICHIGAN

IN THE SUPREME COURT

S. DOUGLAS TOUMA, as Personal Representative of the Estate of GARYLYN S. LANGELL, deceased,

Plaintiff-Appellee/Cross-Appellant,

v.

MCLAREN PORT HURON, f/k/a PORT HURON HOSPITAL,

Defendant-Appellee/Cross-Appellee,

and

PHYSICIAN HEALTHCARE NETWORK, P.C., MICHAEL PAUL, M.D.

Defendants-Appellants/Cross-Appellees,

and

PARTRIDGE FAMILY PHYSICIANS, P.C., and TIMOTHY HORRIGAN, M.D.,

Defendants.

Supreme Court Case No. 161974

Court of Appeals Case No. 347274

St. Clair County Circuit Court
Case No. 15-002567-NH
Hon. Daniel Kelly

AMICI CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY, AMERICAN MEDICAL ASSOCIATION, AND REGENTS OF THE UNIVERSITY OF MICHIGAN

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STATEMENT OF INTEREST OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY, AMERICAN MEDICAL ASSOCIATION, AND REGENTS OF THE UNIVERSITY OF MICHIGAN[1]

Amicus curiae Michigan State Medical Society (MSMS) is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

Amicus curiae American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy-making process. AMA members practice and reside in all states, including Michigan. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes.

MSMS and the AMA join this brief on their own and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

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[1] Pursuant to MCR 7.312(H)(4), amici curiae Michigan State Medical Society, American Medical Association, and the Regents of the University of Michigan state that neither appellant's counsel nor appellee's counsel authored this brief in whole or in part, or contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae have contributed money intended to fund the preparation and submission of this brief. While another lawyer at Kerr Russell represented two defendants in the underlying circuit court action, those defendants received a no cause jury verdict and are not – and have never been parties to this appeal.

The Regents of the University of Michigan have constitutional authority to supervise and control the University, including Michigan Medicine, one of the largest health care systems and the largest academic institution in Michigan. Michigan Medicine includes the University of Michigan Medical School and its faculty group practice with approximately 900 full-time physicians and over 1,200 house officers in 20 clinical departments;[2] the University of Michigan Hospitals and Health Centers, comprising four hospitals, five specialty health centers, and 80 outpatient health centers and clinics; the clinical activities of the University of Michigan School of Nursing; and the Michigan Health Corporation, the legal entity through which Michigan Medicine participates in partnerships, affiliations, joint ventures, and other activities.

Amici curiae have a compelling interest in the state of the law governing medical malpractice actions. In this appeal, Defendants-Appellants challenge the Court of Appeals' affirmance of a jury verdict in *Estate of Garylyn Langell v McLaren Port Huron*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2020 (Docket No. 347274), which included a wrongful death award for loss of future earnings. Defendants-Appellants, Dr. Michael Paul and his medical practice, Physician Healthcare Network, PC, argued that lost earnings were not a permitted category of recovery under the Wrongful Death Act, relying upon this Court's decision in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948). But in allowing the award of such damages, the Court of Appeals in *Langell* did not mention *Baker*, relying instead on *Denney v Kent Cty Rd Comm'n*, 317 Mich App 727, 729–30; 896 NW2d 808 (2016), a case that heavily relied upon *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 651; 896 NW2d 808 (2016). *Baker* was not addressed in either *Denney* or *Thorn*.

[2] House officers are recent medical school graduates who are receiving further training, such as residents and interns.

As the *Langell* court acknowledged, *Denney* recognized that lost earnings were not identified as a category of recovery under the Wrongful Death Act (MCL 600.2922(6)). Nonetheless, *Langell* relied upon *Denney*'s analysis "that the word 'including' as used in this provision indicated 'an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case.'" *Langell*, at *5 (citing *Denney*, 317 Mich App at 731, quoting *Thorn*, 281 Mich App at 651). *Langell* cited to *Denney*'s conclusion that the wrongful-death act "'neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury.'" *Langell* at *5 (citing *Denney*, 317 Mich App at 731, quoting *Thorn*, 281 Mich App at 660). The *Langell* court concluded:

> Accordingly, damages available under MCL 600.2922(6) included " 'any type of damages, economic and noneconomic, deemed justified by the facts of the particular case,' " *Denney*, 317 Mich. App. at 731, quoting *Thorn*, 281 Mich. App. at 651. Economic damages include " 'damages incurred due to the loss of the ability to work and earn money ....'[;] [t]herefore, damages for lost earnings are allowed under the wrongful-death statute." *Denney*, 317 Mich. App. at 732, quoting *Hannay v. Dep't of Transp.*, 497 Mich. 45, 67; 860 N.W.2d 67 (2014). [*Langell* at *5].

This analysis and result are contrary to *Baker*'s holding that wrongful death recovery is limited to damages sustained by persons entitled to support and does not include loss of future earnings. It is also contrary to decades of case law addressing the Wrongful Death Act. Resolving the jurisprudential controversy created by the *Langell*, *Denney*, and *Thorn* trio of cases is an issue of importance to the medical community, particularly given their impact on medical malpractice litigation in this state. Amici curiae appreciate the opportunity to express their views.

STATEMENT OF QUESTION ADDRESSED BY AMICI CURIAE

The question is whether this Court should grant leave to appeal to reaffirm that the binding decisions of this Court cannot be overruled by the Court of Appeals and where a published Court of Appeals decision is contrary to this Court's precedent, the rule announced and applied by this Court must govern. Stated more particularly in the context of this case, amici curiae argue that this Court should grant leave to consider whether *Langell*'s reliance on *Denney v Kent County Road Commission* in applying the damages provision of Michigan's Wrongful Death Act is erroneous because *Denney* is contrary to this Court's higher precedent in *Baker v Slack* and renders nugatory various provisions of the statutory language?

The Trial Court would likely say "no."

The Court of Appeals would say "no."

Plaintiff-Appellee says "no."

Defendants-Appellants say "yes."

Amici Curiae Michigan State Medical Society,
American Medical Association, and
Regents of the University of Michigan say "yes."

INTRODUCTION

Denney has had an outsized impact on the litigation of wrongful death actions in Michigan. With its change in the law governing wrongful death damages, *Denney* has prompted unrealistic expectations of future earnings recovery, making it difficult to resolve these cases in advance of trial and making them likely candidates for appeal thereafter. *Denney* transparently disregards the express language of the Wrongful Death Act and contravenes the ruling of this Court in *Baker*, creating a jurisprudential ruckus that can only be quelled if the unconventional underpinnings of *Denney* and *Thorn* are examined by this Court. Under *Denney*, anything and everything the jury could conceivably deem "fair and equitable" is recoverable. That was not the law before *Denney*. That is not the intent of the statute.

Langell comes before this Court from a jury verdict awarding damages for loss of future earnings without evidence that the decedent had a support obligation and without any deduction for the decedent's own consumption expense. This is because *Denney* allows lost earnings recovery for anyone and everyone, irrespective of whether the survivors received (or could have ever hoped to receive) the decedent's financial support. Indeed, there is little in the *Denney*/*Langell* analysis that would oppose double or triple recovery, potentially permitting the assertion of concurrent claims for loss of services, loss of future wages, and loss of financial support.

This is all relatively new. Before *Denney*, courts consistently interpreted the Wrongful Death Act as permitting only the particular categories of damages expressly identified in the Act, and the parties recognized that under that statute, loss of financial support – not loss of future earnings – could be recovered. Case after case consistently applied the Act's specified categories of recovery *as limitations* in keeping with the language of the statute. But with the result in *Denney*, driven by the Governmental Tort Liability Act's limitation on recovery to only that which the injured person could have recovered, everything changed. *Baker* was disregarded – indeed, not

even mentioned – and recovery became unlimited. Despite repeated requests to address this development in the law, this Court denied leave in *Denney*, 500 Mich 997; 894 NW2d 608 (Mem), *Thorn*, 483 Mich 1122; 767 NW2d 431 (Mem), *Floen v Lewin*, ___ Mich ___; 943 NW2d 126 (Mem), and *Sammut v Batra*, 503 Mich 952; 922 NW2d 370 (Mem).

Langell now comes before this Court from a final judgment on a jury verdict. This Court should seize the opportunity to address it. If *Baker* is no longer good law, the bench and bar need to hear it from this Court in keeping with this Court's many previous pronouncements that the precedent of this Court *remains binding* unless this Court (not the Court of Appeals) says otherwise. Absent clarification, the controversy over "the *Denney* rule" will continue, along with the confusing ramifications confronting Michigan citizens who must wonder whether they can count on the pronouncements of this Court when considering how to arrange their affairs. Litigants have been struggling with this issue for nearly four years. As this Court stated in recognizing its obligation to address a much earlier controversial wrongful death damages issue arising from its decision in *Wycko v Gnodtke*, 361 Mich 331; 105 NW 2d 118 (1960):

> We acknowledge that these questions should be settled with judicial promptness. The right of action for recovery of damages for pecuniary injury (or 'pecuniary loss' as our statute uses the 2 terms interchangeably) is employed steadily in all Michigan circuits. We are not so obtuse as not to know that many wrongful death actions remain pending, the result of which will turn upon our decision to revisit the *Wycko* Case . . . [*Breckon v Franklin Fuel Co*, 383 Mich 251; 174 NW2d 836 (1970) , overruled by *Smith v City of Detroit*, 388 Mich 637; 202 NW2d 300 (1972)].

ARGUMENT

I. Under the Precedent of this Court and the Express Language of the Wrongful Death Act, Recovery for the Decedent's Future Earnings is Not Permitted.

The Wrongful Death Act provides the exclusive right to recover damages for a wrongfully caused death. *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). The question here is whether the Wrongful Death Act permits recovery for loss of the decedent's future earnings.

A. *Baker* Held That Loss of Future Earnings Are Not Recoverable under the Wrongful Death Act.

Prior to 1939, recovery for a wrongfully caused death was permitted under the Survival Act or the Wrongful Death Act. The Survival Act applied when the plaintiff's decedent survived the injury for a time before death ensued. The Wrongful Death Act afforded a cause of action when instantaneous death occurred. There has long been a difference between the decedent's own damages, which could be recovered under the Survival Act, and the recovery allowed to "next of kin" survivors under the Death Act. This Court explained that distinction in *Olivier v Houghton County Street-Railway Co*, 138 Mich 242; 101 NW 530 (1904):

> The cases cited which have arisen under the death act, and have from time to time been considered, have no application, for the reason that in those cases the damages recoverable are those *sustained* by the next of kin. In this case the damages which are recoverable are those sustained by the deceased. [138 Mich at 245].

In 1939, the Survival Act was merged into the Wrongful Death Act, which thereafter governed *all actions* for wrongful death, whether instantaneous or not.[3] This was accomplished by an amendment to the Wrongful Death Act, which also provided "for the repeal of any inconsistent provisions of the 'survival act.'" *See Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 431; 329 NW2d 729 (1982). To the extent damages under the Wrongful Death Act differed from damages previously allowed under the Survival Act, the Survival Act was repealed. As this Court explained in *Hawkins*, "in *Baker v Slack*, 319 Mich. 703; 30 N.W.2d 403 (1948), it was decided that the repeal of inconsistencies [of the Survival Act] went only to the measure of

[3] This remains true today. MCL 600.2921 provides: "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" (emphasis added).

damages." *Hawkins*, 415 Mich at 433, fn 4. In other words, *Hawkins* recognized that the damages provision of the Survival Act was repealed by the Wrongful Death Act.

The 1939 Act allowed recovery for "pecuniary injury."[4] In *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948), this Court rejected the assertion that damages recoverable under the Survival Act (such as lost future earnings) remained available after the Survival Act was merged into the Wrongful Death Act. More specifically, *Baker* rejected a claim for lost earnings and concluded that recovery was only permitted *to the extent a support obligation* could be shown. *Id.* at 709-714. This Court explained:

> Plaintiff's brief and the opinion of the trial court also urge *Grimes v. King*, 311 Mich. 399, as authority for the proposition that under the 1939 act, as under the old survival act, recovery may be had for loss of probable future earnings without diminution for maintenance costs and without a showing that those seeking recovery sustained a pecuniary loss . . .
>
> * * *
>
> *. . . To give the language . . . from that case [Grimes] the meaning contended for by plaintiff and accorded it by the trial court would be to hold that in cases of instantaneous death the elements of damages were extended by the 1939 act, beyond what was recoverable under the previous death act, so as to include, now, probable future earnings, without diminution for cost of maintenance, regardless of whether decedent left a surviving spouse or next of kin to whom decedent was*

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[4] As quoted in *Hawkins*, the Act stated in pertinent part:

> "Sec. 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, *with reference to the pecuniary injury resulting from such death, 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: * * * [*Hawkins*, 415 Mich at 432 (emphasis added)]

legally obligated to contribute support. ***That was not the intent of the 1939 act***. [*Id*. at 711 (emphasis added)][5]

To establish recovery for "pecuniary injury" under the 1939 Act, *Baker* required proof that the decedent financially supported those entitled to recover. This Court explained:

> In the instant case, plaintiff failed to establish conscious pain and suffering by decedent, and inasmuch as the widowed decedent's next of kin, in the language of the *Olney* Case, "had no legally enforceable claim to support or maintenance by decedent" and, consequently, suffered no pecuniary loss, the only element of damages which was recoverable was the expense of decedent's funeral and burial, for which plaintiff claimed and defendant conceded that plaintiff was entitled to have judgment for $190. [*Id*. at 714-715 (emphasis added)]

See also, *Bricker v Green*, 313 Mich 218, 227; 21 NW2d 105 (1946) (under the Wrongful Death Act, "damages must be limited to the pecuniary damage sustained by those legally entitled to

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[5] This Court continued:

> The effect of the 1939 act on the old survival act becomes abundantly clear upon a reading of its provisions. Legislative language could hardly be made more explicit on the subject. Four times the legislative intent on this matter is expressed in the 1939 act:
>
> (1) The title proclaims that for wrongful death or injuries resulting in death the statute is enacted " * * * to prescribe the measure of damages recoverable * * * and to repeal inconsistent acts";
>
> (2) Section 1 reads in part: "all actions for such death, or injuries resulting in death, shall hereafter be brought only under this act";
>
> (3) Section 2 limits damages to (a) what the court or jury shall deem fair and just with reference to pecuniary injuries to the surviving spouse or next of kin, (b) reasonable medical, hospital, funeral and burial expenses, (c) reasonable compensation for conscious pain and suffering;
>
> (4) Section 3 expressly repeals the survival act insofar as its provisions are inconsistent with this act.
>
> *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. [*Baker*, 319 Mich at 713 (emphasis added)]

support"); *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482, 489; 98 NW2d 620 (1959) ("the test is reasonable expectation of support rather than any particular age at time of death"); *Zolton v Rotter*, 321 Mich 1, 10; 32 NW2d 30 (1948) (noting that "[a]lthough, under the death act … recovery is limited to those persons entitled to support from decedent, recovery is not limited to the amount of support actually received.").

Even where the language of earnings was used, it was clearly in the context of the decedent's contribution to the survivors over and above the decedent's own maintenance expenses. *See, e.g., Courtney v Apple*, 345 Mich 228; 76 NW2d 80 (1956) (upholding verdict where jury's failure to award damages for two-year-old's earnings less support could have reflected the jury's conclusion that the cost of maintenance and education of the child would have equaled or exceeded what the child could have earned). There are also cases, however, that reflect this Court's frustration with the need to place a purely pecuniary value on the loss of human life. *See, e.g.*, *Wycko v Gnodtke*, 361 Mich 331, 338-340; 105 NW2d 118 (1960) (rejecting child-labor minus upkeep as the sole measure of pecuniary loss, explaining that "[t]he pecuniary value of a human life is a compound of many elements," including "mutual society and protection, in a word, companionship."). *Wycko* led to a series of divided decisions and this Court ultimately decided to reconsider *Wycko* in *Breckon v Franklin Fuel Co*, 383 Mich 251, 257; 174 NW2d 836 (1970), overruled by *Smith v Detroit*, 388 Mich 637; 202 NW2d 300 (1972).[6]

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[6] *Breckon* explained:

> Upon application of the defendants for bypass of the Court of Appeals, the 6 participating Justices resolved unanimously August 15, 1968 to reconsider *Wycko v. Gnodtke* (1960), 361 Mich. 331, 105 N.W.2d 118, and review in that light the instant cause for wrongful death. The need for such action became crescently apparent as the Court divided equally in *Burns v. Van Laan* (1962), 367 Mich. 485, 497, 116 N.W.2d 873, and thereafter divided when the wrongful death actions shown by *Currie v. Fiting* (1965), 375 Mich. 440, 134 N.W.2d 611; *Heider v. Mich.*

In *Breckon*, a majority of the Court found that the discussion in *Wycko* regarding the value of a life, including society and companionship, was mere dicta, and *Wycko* was not binding precedent for the proposition that loss of companionship was recoverable under the statute. *Id*. at 265-266, 275. The following year, in response to *Breckon*, the Legislature amended the statute, replacing "may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death. . ." with "may award damages as the court or jury shall consider fair and equitable, under all the circumstances ..." and expressly identifying as categories of damages recovery "loss of financial support" and "loss of society and companionship" (in keeping with *Baker* and *Wycko*). Loss of earnings and loss of services were not included as components of recovery under the statute. See 1971 PA 65.

B. *Langell* Should Have Followed *Baker*.

Baker was the authority on the loss of financial support versus loss of future earnings issue until the Court of Appeals concluded in *Denney v Kent Cty Rd Comm'n* that a decedent's future earnings could be recovered under the highway exception to the Governmental Tort Liability Act (GTLA). The *Denney* Court did not mention *Baker*. It instead relied upon the Court of Appeals decision in *Thorn v Mercy Memorial Hosp*, which, in the context of considering whether the loss of a mother's services were recoverable as economic damages, concluded that the Wrongful Death Act did not limit the categories of recovery a jury could award as "fair and equitable" damages. *Denney* allowed its vision of *Thorn* to negate express language in the Wrongful Death Act and deprive it of any purpose or meaning. But *Baker* remains good law; it has never been overruled

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> *Sugar Co*. (1965), 375 Mich. 490, 134 N.W.2d 637; *Reisig v. Klusendorf* (1965), 375 Mich. 519, 134 N.W.2d 634; *Wilson v. Modern Mobile Homes Inc*. (1965), 376 Mich. 342, 137 N.W.2d 144, and *Mosier v. Carney* (1965), 376 Mich. 532, 138 N.W.2d 343, came one after the other to doubtful precedent. [383 Mich at 257]

or explicitly superseded by statute. Nor was it distinguished or found inapplicable. *Baker* was simply ignored.

In *Associated Builders & Contractors v City of Lansing*, 499 Mich 177; 880 NW2d 765 (2016), the Supreme Court vacated a Court of Appeals opinion which disregarded Supreme Court authority because the Court of Appeals majority believed that "subsequent changes to state law had caused [the prior Supreme Court case] to be 'superseded.'" *Id*. at 180. Although the Supreme Court overruled the prior decision in the case before it, the Court held that the prior decision was binding upon the lower courts until it was overruled:

> While it is inarguable that developments over the past century have undercut the foundation upon which *Lennane* stood, its holding was never explicitly superseded by the ratifiers of the 1963 Constitution or by the Legislature, nor was it overruled by this Court. The Court of Appeals is bound to follow decisions by this Court except where those decisions have *clearly* been overruled or superseded and *is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined*. Thus, while we agree with the result of the Court of Appeals' decision, we disapprove of its usurpation of this Court's role under our Constitution.
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> * * *
>
> The Court of Appeals erred … by disregarding precedent from this Court that has not been clearly overruled by the Court or superseded by subsequent legislation or constitutional amendment. "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." Because of this error, we vacate the Court of Appeals' decision but affirm the result, for the reasons stated above. [*Id*. at 191-93 (emphasis in original) (footnotes omitted)][7]

This Court further explained that "[w]hile the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it" (citing *Boyd v W G*

[7] *Boyd* was overruled on other grounds by *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007), itself overruled in part by *Bezeau v Palace Sports & Entertainment, Inc*, 487 Mich 455; 795 NW2d 797 (2010).

Wade Shows, 443 Mich 515, 523; 505 NW2d 544 (1993). *Associated Builders*, 499 Mich at 192, n 33.

This Court's consistent adherence to stare decisis was described in *In re Nestorovski Estate*, 283 Mich App 177, 206; 769 NW2d 720 (2009) (Saad, J., dissenting), where Judge Saad observed that in *People v Mitchell*, 428 Mich 364; 408 NW2d 798 (1987), this Court admonished the Court of Appeals for failing to adhere to its earlier holding that an unsigned search warrant lacked validity. The Court made clear that the impropriety lies not in reaching the incorrect conclusion, but in overruling the Supreme Court as "[a]n elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of this Court is binding upon lower courts" (internal quotations omitted).

Judge Saad also discussed *Boyd*, *supra*, where this Court reversed the Court of Appeals holding that the necessity to abide by the Supreme Court's ruling in a prior case "*was obviated by post-decision amendment of the statute to which [the case] related*" (emphasis added). Judge Saad explained:

> Unequivocally asserting exclusive authority to overrule its decisions, the Michigan Supreme Court again held that "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and *until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority*." [*In re Nestorovski Estate*, 283 Mich App at 207 (emphasis in original)]

See also, *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000) ("this Court is bound by Michigan Supreme Court precedent, even if such precedent has become obsolete."); *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009) ("this Court remains bound by our Supreme Court's decision … until such time as our Supreme Court instructs otherwise…").

Baker has never been clearly overruled or explicitly superseded by the Legislature. To the contrary, in amending the Wrongful Death Act to expressly allow recovery for loss of financial support, the Legislature was consistent with *Baker*'s interpretation of the phrase "pecuniary injury"

as requiring proof of a support obligation. The Court of Appeals in *Denney*, *Thorn*, and *Langell* had no choice but to follow *Baker*. Certainly, even published Court of Appeals decisions should not be elevated over the decisions of this Court. *See, e.g.*, *In re Mardigian Estate*, 312 Mich App 553, 560; 879 NW2d 313 (2015) (noting that the Court of Appeals lacks the authority to overrule Supreme Court precedent). But that has been the effect of *Denney*.[8]

C. *Thorn* and *Denney* Deviated from Established Case Law and the Plain Meaning of the Statutory Language.

Whether survivors can recover loss of earnings or loss of support under the Wrongful Death Act is answered by the language of the statute. Consistent with this Court's decision in *Baker*, MCL 600.2922 expressly provides recovery for loss of financial support; it does not allow damages for loss of earnings. The statute states 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.
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> * * *
>
> (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,

[8] The ongoing vitality of *Baker* is not undermined by the deletion of the term "pecuniary injury" from the present statute. Both the rejected category of recovery in *Baker* (loss of future earnings) and the permitted category of recovery (loss of financial support) were "pecuniary." The issue boiled down to whether the act compensated the decedent's injury or the survivors' injury. *Baker*'s holding that recovery required proof that the decedent financially supported those entitled to recover shows that the wrongful death act is designed to compensate the survivors' injury, as is evident in today's version of the statute (other than the conscious pain and suffering of the decedent). *See infra* at 25-27. Nor can *Denney* rest on statutory language that permits the jury to award damages that are fair and equitable. The prior statute likewise allowed the court or jury to give damages deemed fair and just. The amendments do not warrant a departure from *Baker*.

> 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.

Prior to *Thorn* and *Denney*, it was well-established that wrongful death recovery was limited to the categories of damage specified in the Act. But *Thorn* disregarded this precedent. In *Thorn*, the Court of Appeals held that the value of the decedent mother's services was a recoverable category of economic loss under the Wrongful Death Act. Deeming the statutory categories illustrative only, *Thorn* broadly permitted the jury to award *any* damages found to be "fair and equitable," rendering nugatory the statutory language that particularly specified the categories of recovery. Purporting to give effect to the word "including," *Thorn* first held that the statute does not limit the categories of damage recoverable for wrongful death. The Court explained:

> The word "including" is directly preceded in the statutory subsection by the following language: "In every action under this section, the court or jury *may award damages* as the court or jury *shall consider fair and equitable, under all circumstances* . . . ." When viewed in context, rather than as a solitary term, the word "including" indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case. As such, the term "including" should be construed as merely providing specific examples of the types of damages available and not an exhaustive list. To view the term in the limiting manner urged by defendants would result in an internal contradiction. Interpreted in the manner suggested by defendants, the statutory language would mandate both the award of damages "consider[ed] fair and equitable, under all the circumstances" while simultaneously limiting a plaintiff's recovery only to those items specified in the list following the term "including." We find that such an interpretation conflicts with our rules of statutory interpretation which preclude construing terms beyond their "plain and ordinary meaning" and would render the expansive language preceding use of the term either "surplusage" or "nugatory." *Ammex, Inc v Dep't of Treasury,* 273 Mich App 623, 648-649; 732 NW2d 116 (2007). [*Thorn,* slip op at 4 (emphasis in original)].

In holding that the Wrongful Death Act did not limit the categories of recovery that a jury could award as "fair and equitable" damages, *Thorn* improperly disregarded prior case law as dicta. But in fact, the Wrongful Death Act was instrumental to the holdings of those cases. "Obiter dictum" is "[a] judicial comment made while delivering a judicial opinion, but one that is

unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary (8th ed). The analyses disregarded by *Thorn* in evaluating the status of those cases do not satisfy this meaning of dicta.

For example, in *Tobin v Providence Hosp*, 244 Mich App 626; 624 NW2d 548 (2001), the decedent died after receiving a transfusion of infected blood during surgery. The Court ruled that evidence regarding the decedent's wishes not to receive blood from a stranger was not relevant to the determination of damages because MCL 600.2922(6) limits recovery to the categories enumerated in the statute:

> In a wrongful death action, MCL 600.2922; MSA 27A.2922 limits damages to
>
> > 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.
>
> There was no showing that the decedent was aware, between the time of his injury and death, that his suffering was due to the administration of allogeneic blood. *Furthermore, the decedent's desire not to receive allogeneic blood had no effect on the family's loss of the decedent's financial support, companionship, and society. Therefore, this Court concludes that the trial court abused its discretion by permitting plaintiff to introduce evidence regarding the decedent's desire not to receive "a stranger's blood*." [*Id*. at 638-639 (emphasis added)]

The Court's statement that the statute limits recovery to the types of damages specified in the statute was the premise for the Court's decision relating to the relevance of the proposed testimony. Had other types of damages been recoverable, the decedent's wishes may have been relevant. Thus, the statement is not dicta.

The same is true of *Fellows v Superior Products Co*, 201 Mich App 155; 506 NW2d 534 (1993). In *Fellows*, the primary issue was whether certain evidence was admissible to support the

plaintiff's wrongful death claim for exemplary damages. The Court stated that exemplary damages are not recoverable in a wrongful death action, explaining:

> This act has been construed by the Michigan Supreme Court as the statute which provides the exclusive remedies for those injuries which result in death, see *Endykiewicz v State Highway Commission*, 414 Mich 377, 387-88; 324 NW2d 755 (1982); *Courtney v Apple*, 345 Mich 223, 228; 76 NW2d 80, 83 (1956), and that statute does not provide for punitive or exemplary damages. See *Bernier v Board of County Road Commissioners*, 581 F Supp 71, 80 (WD Mich, 1983); *cf. Currie*, 375 Mich 440; 134 NW2d 611. [*Id.* at 158.]

This statement was obviously necessary to the disposition of the case. Had exemplary damages been recoverable, the Court would have then addressed whether the evidence was admissible with respect to those damages. Thus, it is not dicta.

Other cases have similarly concluded that wrongful death recovery is limited by the statute. In *Courtney*, 345 Mich at 228, this Court stated as to an earlier version of the statute which also permitted the jury to assess damages it deemed "fair and just", that "[t]he remedy under the death act . . . is exclusive, and the recovery of damages *is necessarily limited to those specified by the legislature* and sustained by proofs" (emphasis added). Similarly, in *Porter v Northeast Guidance Center*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2001 (Docket No. 213190), modified in part on other grounds, 467 Mich 901 (2002), plaintiff sought to recover for the pain and suffering of the decedent's family members due to the decedent's death. The Court of Appeals relied upon the language of the statute in denying such recovery, stating, "[B]ecause the Legislature added elements of damages, had they also intended to add the surviving family members' own pain and suffering, it would have said so and added that to the statute as well." *Id.* at 4.[9]

[9] This case, attached as Exhibit 1, is cited to demonstrate the pre-*Thorn* adherence to the categories of damages specified in the statute.

Thorn also disregarded the rules of statutory construction. When reviewing statutory matters, a Court's primary purpose "is to discern and give effect to the Legislature's intent." *Robertson v DaimlerChrysler*, 465 Mich 732, 748; 641 NW2d 567 (2002). In the first instance, the legislative intent is to be derived from the specific language of the statute inasmuch as the Legislature "is presumed to have intended the meaning it has plainly expressed." *Id.* The words used are "not to be ignored, treated as surplusage, or rendered nugatory." *Id.* When the language is clear and unambiguous, judicial construction is not permitted and the statute must be enforced as written. *Id.; see also Omelenchuck v City of Warren*, 461 Mich 567, 575; 609 NW2d 177 (2000) (refusing to add words to the tolling statute). A court may not speculate about the Legislature's intent beyond the words expressed, *Rheaume v Vandenberg*, 232 Mich App 417, 422; 591 NW2d 331 (1998), but must enforce the law as written. Nor may the court second-guess the wisdom of the statute and use rules of construction as a means of imposing its own policy preferences. As this Court explained in *Robertson, supra*, "Our judicial role precludes imposing different policy choices than those selected by the Legislature." 465 Mich at 751 (quoting *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001).

Thorn did not faithfully apply these rules. It relied instead upon "implications" it derived from other rulings, the historical recovery of "loss of services," and its view that "the various amendments to the statute have served to expand rather than limit the damages available to litigants." *Id*. at 4-9. *Thorn* also gave credence to its own policy notions of what is just. The Court rationalized that if a wrongful death action is saddled with the statutory and common law limitations on the underlying claim, it should likewise recognize the full panoply of damages recoverable for the underlying claim. *See, e.g., id*. at 9 ("[T]he Court has ruled, 'any statutory or common-law limitations on the underlying claim apply to the wrongful-death action'… For

symmetry and continuity, if 'the limitation on damages . . . must apply in [a] wrongful-death action,' so too must the damages which are available in the underlying claim be recognized … *Consequently, the damages listed in MCL 600.2922(6) cannot be construed as exhaustive*.") *Id.* at 9 (emphasis added).

In another policy pronouncement, the Court in *Thorn* found it "inconceivable" that loss of services could be recovered by a parent who survives an injury, but not by a child who survives the irreversible loss of the parent-child relationship. *Id.* at 10. The Court insisted that "[c]ommon sense would dictate . . . [that] the more egregious the injury, the greater the damages. Any other result would be contrary to the history of litigation in this area of the law, which sought to assure that wrongdoers would be held accountable to their victims." *Id.* at 9.

These statements do not aid in divining the Legislative intent. To the contrary, they shroud the plain language of the statute in the Court's own view of what is just and evidence a propensity to substitute the Court's judgment for that of the Legislature. Further, *Thorn*'s reasoning is faulty. If the Legislature intended wrongful death damages to include everything that could have been recovered by the decedent had he or she lived, a simple tweak to subsection (1) would have so stated and all but the beginning of the first sentence of subsection (6) would have been unnecessary. As it is, *Thorn*'s application reads words into subsection (1) and renders much of subsection (6) surplusage and nugatory. The bold, italicized, and underlined additions and deletions illustrate how the statute would read if *Thorn*'s interpretation was correct:

> (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 ***the same*** damages ***that could have been recovered by the decedent***, ***plus funeral and burial expenses and the loss of the society and companionship of the deceased***, 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.

* * *

(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.***

There is no utility in specifying the categories of damages that can be recovered under the statute if recovery is not in fact limited to the specified categories. Stated another way, there is no point in specifying that damages for loss of support, pain and suffering, and medical and funeral expenses can be recovered, if all other forms of damage can also be obtained.[10] This is particularly so with respect to damages for loss of support, which is a subset of total earnings. If all future earnings were intended to be recoverable under the statute, there would have been no reason to specifically mention loss of support.

At the very least, *Thorn*'s interpretation adds words of expansion to the statute that the Legislature did not see fit to insert. *Thorn* reads "including" as if it said "including but not limited

[10] *Thorn* also relied upon M Civ JI 45.02, which does not accurately state the law relative to wrongful death recovery. A model jury instruction may only be given if it accurately states the applicable law. MCR 2.516(D)(2). Here, M Civ JI 45.02 goes far beyond the delineation of damages recoverable under the Wrongful Death Act. For example, in addition to specifying "loss of service" as a category of damage, M Civ JI 45.02 includes categories for "loss of gifts or other valuable gratuities," "loss of parental training and guidance" and "[other]." None of these categories of damages are specified in the statute. Further, the overlap among the categories is troublesome. For example, "loss of parental training and guidance" is clearly subsumed within "loss of society and companionship" but is nonetheless separately set forth in the jury instruction. "Loss of gifts or other valuable gratuities" unquestionably falls within the category of "loss of financial support" but again, both are separately stated. Further, the statute does not allow recovery for "other" categories. *Thorn* should not have relied upon a standard jury instruction that deviates so substantially from the statute. The Court's focus should have been limited to the language of the statute itself.

to." The phrase "including but not limited to" appears countless times in Michigan statutes. If the Legislature intended to make the specified damage categories mere examples of wrongful death recovery, it was well versed in the ways of expressing that concept, as is clear in the following examples:

- MCL 691.1610(1) "A person other than an individual abuser who is entitled to a recovery under this act may recover economic, noneconomic, and exemplary damages and reasonable attorney fees and costs, *including, but not limited to*, reasonable expenses for expert testimony. . ."

- MCL 752.983(1) "A person who violates chapter LXVIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h, is liable to the victim of the violation for economic and noneconomic damages that result from the violation, *including, but not limited to*, all of the following:

  (a) Physical pain and suffering.
  (b) Mental anguish.
  (c) Fright and shock.
  (d) Denial of social pleasure and enjoyments.
  (e) Embarrassment, humiliation, or mortification.
  (f) Disability.
  (g) Disfigurement.
  (h) Aggravation of a preexisting ailment or condition.
  (i) Reasonable expenses of necessary medical or psychological care, treatment, and services.
  (j) Loss of earnings or earning capacity.
  (k) Damage to property.
  (l) Any other necessary and reasonable expense incurred as a result of the violation.

- MCL 286.260(5) "A person who violates a quarantine rule promulgated or quarantine order issued under this act is liable for any damages to plants, natural resources, or agricultural, silvicultural, or horticultural products or resources resulting from the violation, *including, but not limited to*, costs incurred to investigate, monitor, prevent, or minimize such damages."

- MCL 691.1416(f) "'Noneconomic damages' *includes, but is not limited to*, pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damages."

Thorn's assumption that the 1971 amendment sought to expand recovery under the Wrongful Death Act beyond the express language of the statute is simply unfounded.

Thorn's expansive reading of the Wrongful Death Act is not compelled by the jury's obligation to award "fair and equitable" damages. A jury need not be accorded unfettered discretion to conjure up categories of damage in order to make an award that is fair and equitable. A jury might think that exemplary damages are necessary to fairly compensate an injured party but they cannot, for that reason alone, be awarded. Punitive damages might be "equitable" in the eyes of an angry jury, but there is no license to award them. Juries must always operate within the confines of the law. They are frequently instructed to render a verdict that will fairly compensate the plaintiff, but what is fair must be determined within the boundaries of discretely defined categories of recovery. For example, M Civ JI 52.01, instructs the jury to "determine the amount of money which will reasonably, fairly and adequately compensate" the plaintiff for damage suffered as a result of injury to a plaintiff's spouse. However, the jury is limited to three categories of damages: medical expenses, value of the services of the spouse, and value of the loss of "society, companionship, and sexual relationship." While the jury may find it reasonable and fair to compensate the plaintiff for other types of damages, it is limited to the three enumerated categories.

Likewise, the "fair and equitable" damages that can be awarded under the Wrongful Death Act are qualified by the categories of damages that follow the word "including" - the damages to be awarded for the listed categories must be fair and equitable. Broadly defined, "damages" means "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary (8th ed). By electing to qualify the word "damages" with a very specific list, and no language suggesting an absence of limitation, the statute evinces an intent to allow the jury to award *an amount that is fair and equitable* for the specified categories of injury. There is support for this view in this Court's own opinions. For example, in deciding whether the

noneconomic damages cap applied to a wrongful death action in *Jenkins v Patel*, 471 Mich 158, 172; 684 NW2d 346 (2004), this Court recognized that "fair and equitable" is a modifier of the amount of damages to be awarded, stating, "Although § 1483 reduces the damages awarded by the trier of fact, it does nothing to impinge upon the trier of fact's ability to determine *an amount that is 'fair and equitable*.' That is, § 1483 does not diminish the ability of the trier of fact to render a fair and equitable award of damages; it merely limits the plaintiff's ability to recover *the full amount awarded* in cases where the cause of action is based upon medical malpractice and the amount exceeds the cap" (emphasis added).

D. *Denney*'s Reliance Upon and Expansion of *Thorn*, and *Langell*'s Adoption of Their Combined Analysis, is Error That Should be Corrected by This Court.

As explained above, in affirming the jury's award for loss of future earnings, *Langell* adopted the analysis set forth in *Denney*, which expanded upon *Thorn*. See *supra* at 4-6. *Thorn* did not decide whether survivors could recover loss of earnings in addition to, or instead of, loss of financial support, but *Denney* relied upon *Thorn*'s expansive reading of the Wrongful Death Act to reach that conclusion. In so doing, *Denney* went well beyond *Thorn*. Given *Denney*, no plaintiff will be incentivized to seek damages for loss of financial support when future earnings are available in a much greater amount - undiminished by the decedent's own consumption expenses and unhindered by the need to show an expectation of financial support.

Further, *Thorn* did not allow recovery of the decedent's *own* damages but contrary to MCL 600.2922(2) and (3), the decedent's loss is the predicate for *Denney*. *See, e.g.*, *Denney*, 317 Mich App at 734-735 ("tort damages recoverable for bodily injury under the GTLA's motor-vehicle exception and, by extension, its highway exception, are *only* those damages that the injured person suffered") (emphasis added). This is contrary to the Wrongful Death Act. MCL 600.2922(2), (3), and (6) make it clear that other than damages for the decedent's own pain and suffering before

death, which go to the estate, only survivors can recover wrongful death damages. Per subsection (2), the person or persons entitled to damages are specified in subsection (3), which states that "*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."* MCL 600.2922(2) and (3) negate an interpretation of the statute that would allow as damages what the decedent might have recovered. Damages are only allowed to those who survive and can show that they have suffered damages. The relevant sections state:

> (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 [*Id*. (emphasis added)].

See also MCL 600.2922(6)(b) ("Unless waived, notice of the hearing shall be served upon all *persons who may be entitled to damages under subsection (3)*") (emphasis added); MCL 600.2922(6)(d) ("The court shall then enter an order distributing the proceeds to *those persons designated in subsection (3) who suffered damages* and to the estate of the deceased for

compensation for conscious pain and suffering, if any, 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.…") (emphasis added).

These provisions show that other than damages for the pain and suffering of the deceased, only the survivors' damages are recoverable under the Wrongful Death Act. Thus, it is their measure of damages in the form of loss of support – not the decedent's lost earnings – that are recoverable.[11]

CONCLUSION

The transparently faulty analysis in *Langell*, *Denney*, and *Thorn* has disrupted the previously settled law governing wrongful death damages. Allowing survivors to recover loss of future earnings as the measure of their own damages is a windfall, over and beyond what they could ever have hoped to recover had the decedent lived. Had the decedent lived, any demonstrated expectation of support would have been reduced by the consumption expenses of the decedent. This is what the Legislature intended in specifying recovery for loss of financial support and omitting any reference to loss of future earnings.

The result reached in the *Langell, Denney, and Thorn* trio of cases undermines stare decisis and contravenes *Baker* and its progeny. It also disregards the plain meaning of sections (1) and

[11] This statutory language was raised in *Denney* but disregarded. 317 Mich App at 737. *Denney* was a highway defect case brought against the county under an exception to the Governmental Tort Liability Act. Under GTLA, future earnings are recoverable because they are damages sustained *by* the injured person. Damages for loss of financial support cannot be recovered under GTLA because they are not damages suffered by the person who sustains bodily injury. *Denney*, 317 Mich App at 736-737. This distinction, not the Wrongful Death Act, explains *Denney*. As the *Denney* court stated, "Finally, defendant argues that MCL 600.2922(6)(d) indicates that plaintiff's claim was not one for damages suffered by the decedent because MCL 600.2922(6)(d) provides that damages are distributed directly to the beneficiaries rather than to the estate. We fail to see how the distribution of damages affects our analysis—the decedent's lost earnings resulted from the bodily injury he sustained, and therefore, damages for the decedent's lost earnings were allowed under MCL 691.1402(1)." 317 Mich App at 737.

(6) of the Wrongful Death Act, and the *survivor* recovery language of sections (2) and (3). For the reasons explained above, amici curiae respectfully urge this Court to address these important issues, reverse *Langell*, and overrule *Denney*.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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Dated: January 5, 2021

CERTIFICATE OF SERVICE

Joanne Geha Swanson, being first duly sworn deposes and says that on January 5, 2021 she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/Joanne Geha Swanson
Joanne Geha Swanson (P33594)

Exhibit 1

2001 WL 1179672
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Sabrina E. PORTER, Personal Representative of the Estate of Richard Smith, III, Plaintiff-Appellee,
v.
NORTHEAST GUIDANCE CENTER, INC., and Mary Ellen Guido, Defendants-Appellants.
Sabrina E. PORTER, Personal Representative of the Estate of Richard I.Smith, Plaintiff-Appellee,
v.
NORTHEAST GUIDANCE CENTER, INC., and Mary Ellen Guido, Defendants-Appellants.
Sabrina E. PORTER, Personal Representative of the Estate of Richard Irvinsmith, III, Plaintiff-Appellee,
v.
NORTHEAST GUIDANCE CENTER, INC., and Mary Ellen Guido, Defendants-Appellants.

No. 213190, 217974, 223647, 223648.
|
Oct. 5, 2001.

Before: SAWYER, P.J., and MURPHY and SAAD, JJ.

Opinion

PER CURIAM.

***1** In this consolidated appeal, defendants appeal from a judgment of the circuit court entered on a jury verdict in favor of plaintiff in the amount of $5,505,000 on plaintiff's wrongful death claim and from orders of the circuit court regarding sanctions under the offer-of-judgment rule, MCR 2.405. We affirm in part, reverse in part and remand.

This case arises out of a traffic accident which occurred in the City of Detroit on December 27, 1995. Defendant Guido (defendant) was driving a vehicle owned by her employer, defendant Northeast Guidance Center. She struck plaintiff's decedent, nine-year-old Richard Smith III, while he was crossing the street in the crosswalk. Plaintiff maintains that defendant failed to yield the right-of-way to the victim, who was properly in the crosswalk. Defendants maintain that defendant's view of the victim was obscured by an oncoming vehicle, that she applied the brakes as soon as possible after initially seeing the victim, and that the victim was responsible for the accident because he entered the intersection in front oncoming traffic when it was unsafe to do so, in violation of city ordinance. The jury found defendants to be 100 percent responsible for the accident.

We turn first to defendants' appeal from the judgment itself. They first argue that they are entitled to a new trial because plaintiff's counsel deliberately misrepresented the record on a number of occasions. We disagree. This Court reviewed the standards relating to attorney misconduct in *Hunt v. Freeman,* 217 Mich.App 92, 95; 550 NW2d 817 (1996):

> When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. *Wilson v. General Motors Corp,* 183 Mich.App 21, 26; 454 NW2d 405 (1990). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required only whether the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Hammack v. Lutheran Social Services,* 211 Mich.App 1, 9; 535 NW2d 215 (1995).

See also *Reetz v. Kinsman Marine Transit Co,* 416 Mich. 97, 103; 330 NW2d 638 (1982).

This presents a close call. Of the instances cited by defendants, at least two represent examples of clear misrepresentations of the record for which it is difficult to conclude were anything other than intentional. First, there was a rather strenuous objection by plaintiff's counsel to a question by defense counsel about whether the victim was

running. In the objection, plaintiff's counsel stated that there was no evidence whatsoever that the victim had been running. In fact, a number of witnesses had so testified. Plaintiff even concedes on appeal that the objection was "flawed." Second, in framing a question to defendants' expert during cross-examination, plaintiff's counsel stated "So no witness puts [defendant] on her own side [of the road]." In fact, many witnesses, including those called by plaintiff, had already testified that defendant was on her own side of the road at the time of the accident.[1]

***2** The question becomes, then, whether counsel's conduct requires reversal. While we are deeply troubled by counsel's conduct, we are not persuaded that the incidents rise to the level of establishing "a deliberate course of conduct aimed at preventing a fair and impartial trial" and that "the prejudicial statements of [the] attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunt, supra*. With some reservation, we accept the proposition that these incidences represent counsel endeavoring to be zealous advocates and pressing their theory of the case at each opportunity rather than a deliberate course of conduct designed to deprive defendants of a fair trial.

Next, defendants argue that the trial court erred in admitting into evidence a pamphlet published by the Secretary of State entitled "What Every Driver Should Know." We agree that the trial court erred in admitting the pamphlet. The pamphlet was not relevant and should not have been admitted. However, we are persuaded that the error was harmless. The material from the pamphlet was consistent with the instructions given to the jury regarding the duties of defendant and the decedent. Accordingly, any error was harmless. See, e.g., *Thorin v. Bloomfield Hills Bd of Ed*, 203 Mich.App 692, 704; 513 NW2d 230 (1994) (testimony by expert as to legal standard harmless where the expert's opinion is consistent with the applicable law).[2]

Next, defendants argue that the trial court erred in admitting testimony from the decedent's mother, sister and grandmother regarding the fact that the decedent's organs were donated to give different people. We agree. The fact that the decedent's organs were donated was in no way relevant to any issue before the jury.

The Wrongful Death Act, M.C.L. § 600.2922(6); MSA 27A.2922(6), provides in pertinent part as follows:

> 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.

Thus, the statute establishes the following elements of damages:

> (1) Reasonable medical, hospital, funeral and burial expenses of the deceased;
>
> (2) Pain and suffering of the deceased prior to death;
>
> (3) The surviving family members' loss of financial support and loss of society and companionship of the deceased.

No where in the statute is mentioned the family members' pain and suffering as a result of the decedent's death. In fact, under a previous version of the statute, the Supreme Court, in *Wycko v. Gnodtke*, 361 Mich. 331, 340; 105 NW2d 118 (1960), noted that such damages are not allowed:

> ***3** We are, it will be noted, restricting the losses to pecuniary losses, the actual money value of the life of the child, not the sorrow and anguish caused by its death. This is not because these are not suffered and not because they are unreal. The genius of the common law is capable, were it left alone, of ascertaining such damages, but the legislative act creating the remedy forbids.

Plaintiff contends that changes to the Wrongful Death Act since the *Wycko* decision suggests a broader range of damages. Specifically, plaintiff points to the fact that the 1971 and 1985 amendments deleted the term "pecuniary" and specifically authorized the elements of damages for loss of financial support and for loss of society and companionship. However, plaintiff's arguments prove too much. That is, because the Legislature added elements of damages, had they also intended to add the surviving family members' own pain and suffering, it would have said so and added that to the statute as well.

Further, the verdict form utilized by the jury did not provide for an award for the pain and suffering of the family members. The following questions were submitted to the jury on damages:

> QUESTION NO. 3: What is the total amount of Plaintiff's damages to the present date for funeral and burial expenses?

> QUESTION NO. 4: What is the total amount of Plaintiff's damages to the present date for conscious pain and suffering of Richard Irvin Smith, III?
>
> QUESTION NO. 5: What is the total amount of Plaintiff's damages to the present date for loss of services and the loss of the love, society and companionship of Richard Irvin Smith, III as a result of his death?
>
> QUESTION NO. 6: What is the total amount of Plaintiff's future damages for loss of services and the loss of love, society and companionship of Richard Irvin Smith, III, as a result of his death?

Thus, the issue of the amount of damages for the family members' own pain and suffering was not before the jury.

Therefore, it must be inquired whether the testimony of organ donation is relevant to any issue of damages before the jury. The answer to that question is clearly "no." There is no indication that the organ donation affected the cost of the funeral and burial expenses (and, even if it did, those costs could be proven without reference to the organ donation). Further, organ donation obviously did not affect the decedent's conscious pain and suffering, the donation occurring after his death. Finally, it does not affect the family members' loss of services, society or companionship of the decedent. Those were lost because of the death, not because of the organ donations. Therefore, the organ donations were not relevant to any issue before the jury.

Plaintiff does argue that the evidence was relevant to the measure of the loss of the decedent's society and companionship because it impacted the grief suffered by the family. That, however, is a non sequitur. That would be true only if the definition of society and companionship is the absence of grief. In our view, "society and companionship" is a positive attribute, not merely the absence of a negative. That is, "society and companionship" is what the family would enjoy if the victim were still with them.

***4** Plaintiff also argues that, at worst, the admission of the evidence was harmless. We disagree. How can such a discussion not be prejudicial? What purpose does it serve but to inflame the passions of the jury? In any event, any argument that a discussion of organ donations was not for the purpose of inflaming the passions of the jury is laid to rest by the following portion of plaintiff's closing argument:

> Today when my body will lay upon a white sheet, neatly tucked under four corners of a mattress, located in a hospital, busily occupied with living and the dying. In a certain moment a doctor will determine that my brain had deceased [sic] to function. And for all practical purposes, my life has stopped. When that happens, do not attempt any artificial life into my body by the use of a machine. And don't call this my death bed, let it be called the bed of life.
>
> Whatever was usable let it be taken from it to help others to lead a full life. Give my sight to a man who has never seen a sunrise. A baby's face and the love in a woman's eyes.
>
> Give my heart to a person whose own heart has caused nothing but endless days of pain.
>
> Give my blood to a teenager who is pulled from the wreckage of a car so he might live to see his grandchildren play.
>
> Give my kidneys who depend on to one depend upon machines to exist [sic].
>
> And take my bones and every nerve and muscle in my body and find a way to make a crippled child walk.
>
> Explore every corner of my brain, take my cells if necessary, let them grow so that someday a speechless boy will shout at the crack of a bat. And a deaf girl will hear the sound of rain against a window. Burn what's left and scatter my ashes in the wind to help the flowers grow.
>
> And if you must bury something, let it be my faults, my weaknesses, and all my prejudices against my fellow man. Give my sins to the devil and give my soul to God. And if by chance you wish to remember me, do so with a kind deed or word to somebody that needs you. And if you do all that I have asked, I will live forever.

The issue of organ donation was an emotional one. It was not relevant to any measure of damages. It was utilized to invoke the sympathies of the jury. Therefore, the error in its admission was not harmless.

Accordingly, defendants are entitled to a new trial. However, because the organ donation issue is related to the issue of damages, not liability, we limit the new trial to the issue of damages only.

Our resolution of the above issue renders it unnecessary to consider defendants' remittitur issue, but we do need to consider defendants' argument that the jury's conclusion

that the decedent was not comparatively negligent was not against the great weight of the evidence. While there certainly was evidence of the decedent's negligence, the jury was not compelled to accept it. Accordingly, we are not persuaded that the trial court erred in denying the motion for new trial on this issue.

***5** As for the numerous issues relating to sanctions under MCR 2.405, all are also rendered moot. Because we set aside the damage award, all of the orders granting sanctions must also be aside because it remains to be seen whether defendants will improve their position following retrial. Following that retrial, the trial court may revisit the sanctions issue if the result of the new trial deems its appropriate.

For the above reasons, we affirm the judgment of the trial court finding defendant liable and the decedent not comparatively negligent. However, we reverse the damage award and the orders regarding sanctions and remand the matter for a retrial on the issue of damages. We do not retain jurisdiction. No costs, neither party having prevailed in full.

MURPHY, J. (concurring in part, dissenting in part).

I respectfully write separately because while in agreement with the majority opinion that there exists no basis on which to reverse the jury's liability determination, I additionally see no reason to question the jury's damage award.

Initially, I note agreement with the majority opinion that the alleged improper conduct of plaintiff's counsel in misrepresenting the record did not rise to a level establishing "a deliberate course of conduct aimed at preventing a fair and impartial trial." *Hunt v. Freeman,* 217 Mich.App 92, 95; 550 NW2d 817 (1996). I would also find, however, that the trial court did not abuse its discretion in admitting the Secretary of State pamphlet entitled "What Every Driver Should Know." See *Chmielewski v. Xermac, Inc,* 457 Mich. 593, 614; 580 NW2d 817 (1998). The pamphlet was not introduced during plaintiff's case-in-chief, but rather during cross-examination of the defense expert witness. Further, the highlighted information in the pamphlet, referred to by plaintiff's counsel as illustrative of common sense guidelines to which all drivers should adhere, was consistent with the jury instructions regarding duty and standards of care. Accordingly, I find no basis on which to hold the pamphlet irrelevant. Of course, in the event my conclusion is mistaken and admission of the pamphlet was erroneous, for the same reasons I would nevertheless agree with the majority opinion that this error was harmless and does not merit reversal. MCR 2.613(A); MCL 769.26; MSA 28.1096. Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Chmielewski v. Xermac, Inc,* 216 Mich.App 707, 710-711; 550 NW2d 797 (1996), aff'd. 457 Mich. 593; 580 NW2d 817 (1998).

Where I dispositively diverge from the majority opinion is in consideration of the impact of the limited testimony concerning donation of the decedent's organs. Though I agree that the issue was irrelevant to the question of damages under the Wrongful Death Act, I find harmless the trial court's error in allowing the contested testimony. I would not reverse for a new trial on damages.

***6** The contested testimony was elicited during examination of the decedent's grandmother, his sister and plaintiff, his mother. In response to defendants' objection to the initial mention of organ donation, on the basis that such evidence was irrelevant to damages under the statute, plaintiff's counsel stated that the testimony went to the witness grandmother's "state of mind," and suggested that it was "paramount to the issues of loss, society and companionship." Plaintiff's counsel further explained that the testimony was relevant to the decedent's grandmother's loss and "the way she copes with it and whatever effect it would have on her ." Defendants' objection was overruled and the decedent's grandmother went on to testify that the donation of her grandson's organs made her "feel better" to "know a part of him would be living on." When the issue next arose, during examination of the decedent's sister, basic testimony concerning the organ donation went unchallenged, but defendants objected to a question regarding whether the witness was present when the organs were harvested. Plaintiff's counsel responded to the objection by stating "It's for what she went through, loss of love, care and affection. It shows what she experienced ...." This time the court sustained the objection and plaintiff's counsel moved on. Finally, when the issue was raised for the last time during plaintiff-mother's testimony, defendants made no objection to the general testimony and the decedent's mother went on to testify that the loss she felt was not lessened by the knowledge that a part of her son lived on. These three brief instances of testimony constitute the only mention of the issue of organ donation, aside from the unobjected-to references to the circumstance during plaintiff's opening statement and closing argument.[1]

Under the Wrongful Death Act, M.C.L. § 600.2922(6); MSA 27A.2922(6), damages the jury considers fair and

equitable, under all the circumstances, may be awarded for, amongst other things, "the loss of financial support and the loss of the society and companionship of the deceased." The compensation provided under this element of the statute is "for the destruction of family relationships that result when one family member dies." *McTaggart v. Lindsey*, 202 Mich.App 612, 616; 509 NW2d 881 (1993), citing *Crystal v. Hubbard*, 414 Mich. 297, 326; 324 NW2d 869 (1982). Although specific factors to be accounted for are not identified, this Court has stated that "the only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship." *McTaggart*, *supra*, citing *In re Claim of Carr*, 189 Mich.App 234, 239; 471 NW2d 637 (1991).

Pursuant to these principles, the grief and mental anguish of surviving family members is not to be compensated. Rather, the idea is to compensate survivors for the absence of those positive elements of the relationship that can no longer be enjoyed because of the decedent's death. Accordingly, because the reasons supporting admission of this evidence, proffered by plaintiff's counsel in response to the initial defense objection, are explicitly rejected by our case law, the trial court erred in allowing the contested testimony.[2] Nevertheless, contrary to the majority opinion, I conclude that the references to organ donation were harmless and do not justify reversal of the damage award.

***7** The majority opinion concludes that the evidence of organ donation was inherently prejudicial, noting that the issue was an emotional one that served no purpose but to inflame the passions of the jury and invoke the sympathies of the individual jurors. Though I agree that the issue of organ donation is emotional in nature, I am not convinced that the potential for an emotional reaction on the part of jurors prejudiced defendants in the form of an unjustly high damage award attributable to undue sympathy. It is equally plausible that individual jurors reacted in either of two alternative ways. Jurors could have limited an award believing that loss of society was tempered by the fact of the survivors' knowledge that parts of the decedent lived on in others (as the decedent's grandmother testified, she felt better knowing this). Jurors could also have attributed no effect to the limited testimony and argument, recognizing its lack of relevance to the issue of damages.

Moreover, the passage from plaintiff's closing argument cited by the majority opinion, which appears to be an unattributed poem or self-proclaimed eulogy, was presented during a rambling and unfocused introduction and was followed by reference to a credo held by Arthur Ashe, "... out of the night that covers me black as the pit from pole to pole. I thank whatever Gods may be for my unconquerable soul." It is likely that plaintiff's counsel recited these comments with an intent to appeal to jurors on some spiritual or emotional level, but speculation as to the possible prejudicial effect of the comments is purely that, speculation. When the time came to specifically argue the merits of damages, and to request particular amounts, there was no mention of the donation of decedent's organs. Absent any clear suggestion that plaintiff deserved greater damages based on the fact that her son's organs were donated, I am loathe to reverse a jury verdict of an otherwise valid and arguably appropriate damage award.

I would affirm the determination of liability and the award of damages.

All Citations

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Footnotes

1 The other incidents defendants complain of are less concerning to us. The use of the phrase "world class sprinter" to describe the speed defendants alleged the victim was running at, while inaccurate, is little more than bombastic hyperbole. Plaintiff's counsel's objection during defense counsel's examination of the defense expert regarding whether plaintiff's expert placed the victim's speed at nine miles per hour was not inherently inaccurate. Finally, plaintiff's objection during the direct examination of defendant's expert regarding whether the passenger testified defendant's vehicle was fifty feet or one hundred feet away when the victim was ten feet from the centerline did make a misstatement as to the witness' ultimate testimony, but the witness had changed his testimony on that point.

2 Defendants also complain that plaintiff made use of the pamphlet to erroneously suggest that defendant had an absolute duty to yield the right-of-way to the victim. While there were comments by attorney Fieger during closing argument to that effect, those statements did not invoke the pamphlet as supporting that proposition.

1 This trial occurred over seven days, with five days of testimony covering approximately five hundred and ten pages of transcript. Testimony concerning the donation of the decedent's organs is found on only seven pages.

2 As the majority opinion notes, the issue of organ donation clearly is not relevant to either of the remaining bases for damages under the statute: medical, hospital, funeral and burial expenses; or pain and suffering of the deceased.

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