STATE OF MICHIGAN
IN THE SUPREME COURT
(On appeal from the Michigan Court of Appeals)

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

Plaintiffs / Appellees

vs.

PRIME HEALTHCARE SERVICES-GARDEN CITY, LLC d/b/a GARDEN CITY HOSPITAL, a foreign limited liability company, KELLY W. WELSH, D.O., and MEGAN SHADY, D.O., jointly and severally,

Defendants / Appellants

Supreme Court No. 165377
Cout of Appeals No. 358209

Wayne County Circuit
Case No. 20-004169-NH

***AMICI CURIAE* BRIEF ON BEHALF OF COREWELL HEALTH AND McLAREN HEALTH CARE**

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AMICI CURIAE BRIEF ON BEHALF OF COREWELL HEALTH AND McLAREN HEALTH CARE

APPENDIX OF EXHIBITS

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STATEMENT OF INTEREST OF *AMICI CURIAE* COREWELL HEALTH AND McLAREN HEALTH CARE[1]

Corewell Health ("Corewell") is Michigan's largest healthcare system. Corewell includes 21 hospitals; 300+ ambulatory and outpatient locations; 12,000+ physicians (affiliated, independent staff, and employed); and 65,000+ employees.

McLaren Health Care ("McLaren") is a fully integrated health care delivery system, which includes 13 hospitals throughout the state, ambulatory surgery and imaging centers, post-acute services, and Michigan's largest network of cancer centers.

Corewell and McLaren each have a strong interest in the medical malpractice laws governing actions against health care providers and health care facilities. This includes laws governing the damages that are available in medical malpractice and other wrongful death actions. Corewell and McLaren jointly seek to present a unified position on the important issues being presented to this Court that will impact the liability of health care providers and health care facilities in Michigan.

[1] In accordance with MCR 7.312(H)(5), *Amici Curiae*, Corewell and McLaren, state that neither Appellants' counsel nor Appellees' counsel authored this brief in whole or in part, or contributed money that was intended to fund the preparation or submission of this brief. Further, no person and/or entities, other than Corewell and McLaren, have contributed money for the preparation and submission of this brief.

STATEMENT OF QUESTION PRESENTED

I. IS THE ESTATE OF A MINOR WHO BRINGS A WRONGFUL DEATH ACTION ALLOWED TO RECOVER DAMAGES FOR THE MINOR'S FUTURE LOST EARNINGS, WHERE THE LEGISLATURE HAS EXPRESSLY AND SPECIFICALLY LIMITED THIS CATEGORY OF ECONOMIC DAMAGES TO THOSE FOR LOSS OF FINANCIAL SUPPORT THE DECEDENT WOULD HAVE PROVIDED FOR THE BENEFICIARIES OF THE ESTATE?

The trial court answered, "yes."

The Court of Appeals answered, "yes."

Plaintiffs-Appellees answer, "yes."

Defendants-Appellants answer, "no."

Amici Curiae Corewell and McLaren answer, "no."

STATEMENT OF JURISDICTION

Corewell and McLaren adopt Defendants-Appellants' Jurisdictional Statement.

STATEMENT OF FACTS

Corewell and McLaren adopt the Statement of Facts found in Defendants-Appellants' Brief on Appeal.

INTRODUCTION TO THE ARGUMENT SECTION

The Plenary Brief on Appeal filed by Defendants-Appellants ("Prime Healthcare") persuasively provides a historical overview of wrongful death and survival statutes in Michigan and around the country. *Amici Curiae,* Corewell Health ("Corewell") and McLaren Health Care ("McLaren") endorse Prime Healthcare's compelling statutory analysis and its conclusion that MCL 600.2922(6) does not allow for the recovery of damages for a minor's lost future earnings, and that the Court of Appeals' Opinions in Daher v Prime Healthcare, 344 Mich App 522; -- NW3d --- (2022), Zehel v Nugent, 344 Mich App 490; --- NW3d --- (2022), and Denney v Kent Co' Road Comm'n, 317 Mich App 727; 896 NW2d 808 (2016) should be reversed. The text of the statute, MCL 600.2922, confirms Defendant's view that the Michigan Legislature specifically opted for a "loss of financial support" model rather than a "loss of earnings impairment" standard of recovery. On leave granted, the Supreme Court should reaffirm its decision in Baker v Slack, 319 Mich 703; 30 NW2d 403 (1948), an opinion that better served the State of Michigan for nearly 75 years.

The revolutionary act of the Court of Appeals to overturn the Supreme Court's decision in Baker v Slack is even more radical than the Opinion's holding that the parents of a deceased child should be allowed to recover the child's future wages. The impact of the Court of Appeals' decisions in Daher, supra, Zehel, supra, and Denney, supra will go much farther than the two issues identified by this Court's Order Granting Leave; 512 Mich 959; 994 NW2d 789 (2023). These decisions (Daher, supra and Zehel, supra in particular) have interpreted the Wrongful Death Act as allowing

damages on a case-by-case basis, both as to when recovery may be made (some 13 year-olds in Daher) but not others (never newborns in Zehel), but also qualitatively as to the types of damages that may be available, idiosyncratically decided according to the unique facts and circumstances of each particular case.

In the Court of Appeals' estimation, MCL 600.2922(6) provides a non-exhaustive list of damage categories as illustrative examples that serve as a starting point. Additional types of damages that may be appropriately awarded in one case may not appropriately fit another, based on the facts and circumstances of any given case. Absent a reversal on leave granted, under this analysis, the statute would have a chaotically different meaning and application for each individual wrongful death claimant.

While in the context of civil litigation, the notion that wage loss damages for a deceased minor should be allowed rather than foreclosed may have gut-level instinctual appeal, this notion makes little sense outside of the courtroom, because a parent is generally not entitled to his or her child's future earnings. The Court of Appeals' holding also ignores the plain language of MCL 600.2922(6), which confirms the legislative choice to forbid such damages. On these and other points, Corewell and McLaren offer additional support for Prime Healthcare's statutory analysis in argument section I.

In argument sections II and III, Corewell and McLaren advocate how the Supreme Court's refusal to reverse the Court of Appeals would result in a cascade of negative consequences for Michigan residents. While it is a tired trope to argue

against a rule of law on purely hypothetical, unfounded grounds that a particular industry or profession will flee the state or be unable to continue providing much needed services if it is accepted, here, Michigan is already experiencing a shortage of health care providers, particularly for high-risk health care services like labor and delivery, and particularly in rural communities where access to health care is already limited due to closures of medical facilities and high-risk units, including labor and delivery services.

Corewell and McLaren's concerns are well-founded and not fictional scare tactics – the argument sections below document closures of medical facilities and labor and delivery units in underserved communities that are already happening. Exposing medical providers to un-actuarialized legal liabilities previously unseen in Michigan will only exacerbate a serious problem that already exists and threatens access to quality health care for Michigan residents.

On leave granted, the Supreme Court should reaffirm its Opinion in Baker v Slack, 319 Mich 703; 30 NW2d 403 (1948) and reverse the Court of Appeals Opinions in Daher v Prime Healthcare, 344 Mich App 522; -- NW3d --- (2022), Zehel v Nugent, 344 Mich App 490; --- NW3d --- (2022), and Denney v Kent Co' Road Comm'n, 317 Mich App 727; 896 NW2d 808 (2016).

ARGUMENT

I. WELL-ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION, THE EVIDENT LEGISLATIVE INTENT BEHIND THE WRONGFUL DEATH ACT, AND *STARE DECISIS* DO NOT SUPPORT A READING OF THE STATUTE WHICH WOULD EXPAND THE CATEGORIES OF DAMAGES AVAILABLE TO INCLUDE ECONOMIC DAMAGES FOR SPECULATIVE LOST FUTURE EARNINGS OF A MINOR CHILD

Introduction

The damages provision of Michigan's Wrongful Death Act, MCL 600.2922(6) provides:

> 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.

Citing Denney, supra, the Panel in this case held that, "although lost earnings are not explicitly specified in MCL 600.2922(6), the Legislature's use of the word 'including' meant that the enumerated list of kinds of damages available is not exhaustive". 344 Mich App at 527. The Denney Opinion relied on another phrase in the statute ("fair and equitable, under all the circumstances") to further discern a legislative intent that additional damages above and beyond those that are listed may be awarded on a case-by-case basis. Denney, 317 Mich App at 731. This is a broad expansion of potential liabilities and the analytical path the Court of Appeals took to get there is reversible.

The Court of Appeals' holding is that the Wrongful Death Statute is a non-exhaustive list of damages and that what the legislature actually meant to provide was that the damages allowed "include, but [are] not limited to," the damages identified with specificity. But this language is not found in the statute at issue here (yet found in many others); confirmation that the legislature deliberately chose not to use expansive "including but not limited to" language. The Court should reject any interpretation of the Wrongful Death Act that treats the list of damages as non-exhaustive under principles of statutory interpretation and on policy grounds. Treating the list of damages as mere illustrative examples would remove well-entrenched rules on what damages are and are not available under Michigan law.

A. The Court of Appeals' Interpretation of MCL 600.2922(6) as Providing a Non-Exhaustive List of Damages Should Be Rejected

The Legislature knows how to be clear when it uses the term "including," to encompass those items listed in a statute. Conversely, when the Legislature intends to leave the door open for other potential options, it specifically employes the phrase "including, but not limited to". See, e.g. MCL 750.462a(b) ("'Coercion' **includes**, **but is not limited to**, any of the following:"); MCL 450.4102(q) ("'Membership interest' or 'interest' means a member's rights in the limited liability company, **including**, **but not limited to**, any right to receive distributions of the limited liability company's assets and any right to vote or participate in management."); MCL 257.602b(13) ("(13) Except as otherwise provided in subsection (2), as used in this section, 'use a mobile electronic device' means using a mobile electronic device to do

any task, **including, but not limited to**, any of the following"); MCL 123.1391 ("A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to provide to an employee any specific fringe benefit or any other benefit for which the employer would incur an expense, **including, but not limited to**, those enumerated in sections 6 to 10.") [2]

These are just a few examples where the legislature specifically chose the phrase "including but not limited to". In fact, the Revised Judicature Act of 1961, which contains the Wrongful Death Act, mentions the phrase "not limited to" ***78 times*** and Chapter 29, itself, contains the phrase 9 separate times. But MCL 600.2922(6) is not one of them.

The Court should refuse any invitation to read the additional words ("but not limited to") into the statute. "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 63; 642 NW2d 663, 667 (2002). The maxim *expressio unius est exclusio alterius* effectively means that "[p]rovisions not included in a statute should not be included by the courts." People v Carruthers, 301 Mich App 590, 604; 537 NW2d 16 (2013).

Any suggestion that the phrases "including" and "including but not limited to" mean the same thing should also be rejected. See State Farm Fire Ins v Old Republic Ins Co, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every

[2] All emphasis supplied by counsel unless noted.

word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.") Although this Court has relaxed the surplusage canon away from an absolute rule of statutory interpretation, e.g., People v Seewald, 499 Mich 111, 123; 879 NW2d 237 (2016) ("When possible, we strive to avoid constructions that would render any part of the Legislature's work nugatory"), these two particular phrases should not be given interchangeable meaning where the legislature chooses at times to use the phrase "including" and at other times, "including but not limited to," confirmatory proof of legislative intent that these two phrases do not mean the same thing.

B. Damages Under the Defunct Survival Act are Statutorily Limited to Those for Conscious Pain and Suffering

The only category of survival damages retained in the current version of the Wrongful Death Act is compensation for pain and suffering while conscious during the time between injury and death. See Olivier v Houghton County Street R Co, 134 Mich 367; 96 NW 434 (1903) (where death was not instantaneous, the survival act gave the estate the right of action the decedent had at the time of his death, which included damages for pain and suffering and loss of past and future wages). The Legislature did not carry over damages categories from Michigan's survival statute, such as the loss of future earnings, other than conscious pain and suffering which the Legislature specifically listed in subsection (6). The Legislature's specific decision to not also list future wages when it could have is indicative of a deliberate intent

As stated by Defendant Prime Healthcare, the Public Act 297 of 1939 resulted

in a change of the law and consolidation of Michigan's survival and death statutes into a single statutory enactment, requiring all actions for injuries resulting in death to be brought under the Wrongful Death Act, where damages for conscious pain and suffering were added, with the estate of the decedent being the residual recipient of the damages, and loss of future earnings was replaced by the "pecuniary injury" suffered by the decedent's spouse or family members.

"Pecuniary injury" was subsequently read to encompass only injuries resulting in an actual loss of money suffered by the surviving spouse and next of kin. A husband could recover for the future cost of household services resulting from his wife's death. Strong v Kittenger, 300 Mich 126; 1 NW2d 479 (1942). Parents could recover for the loss of financial contributions which would have been made by a deceased child. Thompson v Ogemaw County Board of Road Commissioners, 357 Mich 482; 98 NW2d 620 (1959); Mooney v Hill, 367 Mich 138; 116 NW2d 231 (1962). *Loss of financial support from the deceased* cannot comprehensibly mean that a parent is entitled to recover damages for all of his or her minor child's lost future earnings that would not have been provided to his/her parents for support. Should both categories be available, there would in fact be double recovery, since said financial support would have necessarily originated from the child's earnings, contrary to well-established law forbidding a double recovery for a single injury. See, for example, Stitt v Mahaney, 403 Mich 711; 272 NW2d 526 (1978).

Indeed, the notion that a parent was entitled to financial contributions from a minor decedent finds its origin at a time when child labor was common. The U.S.

Census of 1870, the first census to report child labor numbers, recorded that 1 out of 8 children was employed, increasing to more than 1 in 5 children by 1900, with at least 18% of all children ages 10-15 working between 1890 and 1910.[3] It is no wonder, then, that families relied on the wages of their children for financial contribution. These statistics documenting child labor no longer hold true today.[4]

In Baker v Slack, 319 Mich 703, this Court explained that the 1939 merger of the survival and death acts by the Legislature had resulted in a change to damages available under the survival act, noting that subsection (2) of the statute as it existed at the time *limited* damages to "what the court or jury shall deem fair and just with reference to *pecuniary injuries* to the surviving spouse or next of kin[.]" Id. at 713. This Court concluded that recovery was limited to what the decedent would have owed in support to the plaintiff, holding that the loss of "probable future earnings without diminution for cost of maintenance," was not recoverable. Id. at 711, 712.

The holding in Baker was later directly contradicted by the Court of Appeals' decision in Denney which construed §2922(6) to show "an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, **deemed justified by the facts of the particular case**." Denney, 317 Mich App at 731. In reality, since Baker, the change made by the Legislature was the replacement of

[3]https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-1.htm (accessed February 15, 2024).

[4] History of Child Labor in the United States-part 2: the reform movement, Monthly Labor Review < https://www.bls.gov/opub/mlr/2017/article/history-of-child-labor-in-the-united-states-part-2-the-reform-movement.htm> (accessed March 9, 2024).

"pecuniary injury" with "under all of the circumstances." This legislative change was in direct response to this Court's decision in Breckon v Franklin Fuel Co, 383 Mich 251; 174 NW2d 836 (1970), which held that damages for loss of society and companionship were not recoverable under the Wrongful Death Act. "Pecuniary injury" was removed, therefore, to allow for *this* category of noneconomic damages – a reaction to Breckon, not Baker.

The Legislature directed 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." This historical development was recognized by Justices Viviano and Zahra of this Court in a dissent to this Court's denial of the Application for Leave to Appeal in Touma v McLaren Port Huron, 508 Mich 976; 965 NW2d 550 (2021), which correctly noted that wrongful death damages in Michigan "focus upon the financial loss actually incurred by the survivors as a result of their decedent's death." Id. (dissent) at 552, quoting Miller v State Farm Mut Auto Ins Co, 410 Mich 538, 561; 302 NW2d 537 (1981).

As recognized by this Court, "a court 'should not casually read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute." McCormick v Carrier, 487 Mich 180, 209; 795 NW2d 517 (2010), quoting Kreiner v Fischer, 471 Mich 109, 157; 683 NW2d 611 (2004) (CAVANAGH, J., dissenting). Corewell and McLaren urge this Court to follow the clear statutory language of §2922 and hold that damages for lost future earnings are not recoverable in a wrongful death action because the Legislature deliberately

opted not to carry them over from the Survival Statute.

Conclusion—Argument I

In conjunction with the engrafting of "including but not limited to" onto MCL 600.2922(6), one other phrase within MCL 600.2922(6) is being cited to support an interpretation of the statute that would render the statute arbitrarily flexible and idiosyncratic on a case-by-case basis: that the jury may award damages it considers "fair and equitable, under all the circumstances". This language, most prominently highlighted by the Panel in Denney, has been offered as proof of legislative intent in favor of a broad reading of MCL 600.2922(6), a proposition that fails *a priori* since the Wrongful Death Act is in derogation of the common law and must be construed narrowly. Velez v Tuma, 492 Mich 1, 17; 821 NW2d 432 (2012); Courtney v Apple, 345 Mich 223, 228; 76 NW2d 80 (1956).

But even more importantly than a violation of well-entrenched rules of statutory construction, the "including but not limited to" construction would call into question dozens of opinions of this Court and the Court of Appeals where certain damages were held to be unavailable under MCL 600.2922(6). See, for example, Currie v Fiting, 375 Mich 440, 456; 134 NW2d 611 (1965) (punitive and exemplary damages not allowed in wrongful death case); Wycko v Gnodtke, 361 Mich 331, 340; 105 NW2d 118 (1960) (sorrow, anguish or grief of family members not compensable in wrongful death cases).

If the statute is now to be construed as providing a non-exhaustive list of damages based on what is "fair and equitable, under all the circumstances" in a

particular case, the natural consequence will be innumerable challenges to existing authorities which hold that the prohibition on punitive or exemplary damages should be lifted because an award of these prohibited damages would be fair and equitable in light of a particular defendant's egregious misconduct. Or Wycko should not be followed in a particular case based on its unique facts and circumstances where familial grief damages would be "fair and equitable."

An opinion that elevates the phrase "fair and equitable, under all the circumstances" over the specifically enumerated damages would cause complete chaos under Michigan law and would greenlight parties and the lower courts to ignore Currie, supra or Wycko, supra because the unique facts and circumstances of a particular case render it fair and equitable to allow damages that were not allowed in another case under a different set of circumstances. And who decides, the Judge or the Jury? MCL 600.2922(6) should mean the same thing across all cases, otherwise adherence to precedent would be optional, rendering the law unpredictable and ensuring future challenges to bedrock precedent that has been on the books for decades.

Contrary to the doctrine of vertical *stare decisis*, the Court of Appeals already overruled Baker, 319 Mich 703, and additional precedents will be at risk. See, Paige v City of Sterling Hts, 476 Mich 495, 524; 720 NW2d 219 (2006) ("The obvious reason for this is the fundamental principle that only this Court has the authority to overrule one of its prior decisions. Until this Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly

decided or has become obsolete.") If MCL 600.2922(6) is applied on a case-by-case basis according to the whims of a particular judge or jury, additional precedent will come under fire.

The Court should not open the door to the placement of additional controlling case law precedent on the chopping block by engrafting "including but not limited to" language into the statute that expressly does not include such language. If the Court does not close this loophole, the exceptions will swallow the rule and the appellate courts will be inundated with new challenges to a wide range of prior precedents on wrongful death damages. And even then, what is "fair and equitable" under the circumstances will be different in each and every case, rendering it virtually impossible for an appellate court to issue decisions that will guide any parties or case other than the one directly before it. Each new precedent could be ignored on grounds that those circumstances were different, and it would be fair and equitable to have a different menu of damages in a particular case.

Stare decisis is a legal maxim upon which uniformity, consistency, and fairness depend, a fundamental tenet dating back to the early ages of our courts:

> Shall it be said that all this important and extensive branch of the law is uncertain and fluctuating, dependent on the ever varying opinions and passions of men, and liable to change with every change of times and circumstances? Shall it be said that each individual judge may rightfully disregard the decisions of the court to which he belongs, and set up his own notions, his prejudices, or his caprice, in opposition to their solemn judgment? This is not the principle of our law; this is not the tenure by which we hold our rights and liberties. *Stare decisis* is one of its favourite and most fundamental maxims. [*Ex parte* Bollman, 8 US 75, 87–88; 2 L Ed 554 (1807).]

The principles of statutory construction by the judiciary demand deference to legislative intent to prevent inconsistent results in applying the law as written, especially with statutes like MCL 600.2922, expressed in specific, non-ambiguous language that cannot be reasonably subject to differing interpretations.

Above and beyond the value of s*tare decisis* in adherence to Baker v Slack, adoption of the Court of Appeals' approach to wrongful death damages here and in Denney, this Court's goals of uniformity and stability in the law would be undermined if the available damages are decided on a case-by-case basis based on unique facts and circumstances. No precedent would be controlling because no two cases are exactly alike.

II. ALLOWING THE RECOVERY OF DAMAGES FOR A DECEASED CHILD'S LOST FUTURE EARNINGS WILL NEGATIVELY IMPACT ACCESS TO HEALTH CARE WITHIN COMMUNITIES ACROSS THE STATE

Introduction

It is an economic reality that hospitals have faced and will continue to face financial pressures and constraints as the landscape of the health care system continues to evolve through unprecedented challenges. Corewell and McLaren encourage the Court to not add yet another unprecedented challenge, a previously unrecognized category of damages.

The cost of health care facilities, labor, equipment, supplies, and other items needed to provide quality patient care are rising and health systems continue to deal with revenue deficits, increases in charity care, and workforce shortages. This,

coupled with the financial burden of increased verdict awards in medical malpractice cases, has the potential to intensify physician shortages if certain care is discontinued or if entire facilities are forced to close. Patients in some areas (particularly rural areas[5]) will be left without adequate health care options or access to certain medical specialists nearby which would require these patients to travel unknown distances to receive the care needed, often on an emergency basis.

Since the passage of medical malpractice reforms in the early 1990s in Michigan, the goal has been to strike a balance in fairly compensating patients and families in medical malpractice cases while simultaneously allowing hospitals to maintain their ability to provide quality care to the residents of Michigan. Allowing an estate to recover a deceased child's lost future earnings in medical malpractice cases disrupts this balance and exacerbates these scenarios already prevalent within the health care community.

Additionally, an unknown scenario looming over access to health care would be a health system's ability to obtain reinsurance in a new volatile liability market. Reinsurers have already required Michigan-based medical providers and hospital systems to dramatically increase levels of self-insurance before reinsurance obligations will be triggered, placing additional pressures on hospital operations budgets.

[5] McLaren has several hospitals in rural locations (McLaren Central Michigan, McLaren Lapeer Region, McLaren Caro Region, and McLaren Thumb Region).

Legal Analysis

Generally, the size of jury verdicts is on the rise across the country, including an increasing surge of "nuclear verdicts" in personal injury and wrongful death cases.[6] A nuclear verdict is defined as a jury verdict totaling $10 million dollars or more.[7] The Medical Professional Liability Association reported in 2021 that the number of multi-million-dollar awards in medical malpractice cases was increasing nationwide and that the average verdict increased by 50% between 2016 and 2019 alone.[8] Anecdotal experience supports this general rise in the magnitude of jury verdicts, in medical malpractice litigation and other cases (Ex A, Largest Verdicts in Michigan for 2021, 2022 and 2023).

Data provided by the US Chamber of Commerce Institute for Legal Reform has reported that from 2010-2019, medical liability cases made up 20.6% of the nuclear verdicts that were reported:[9]

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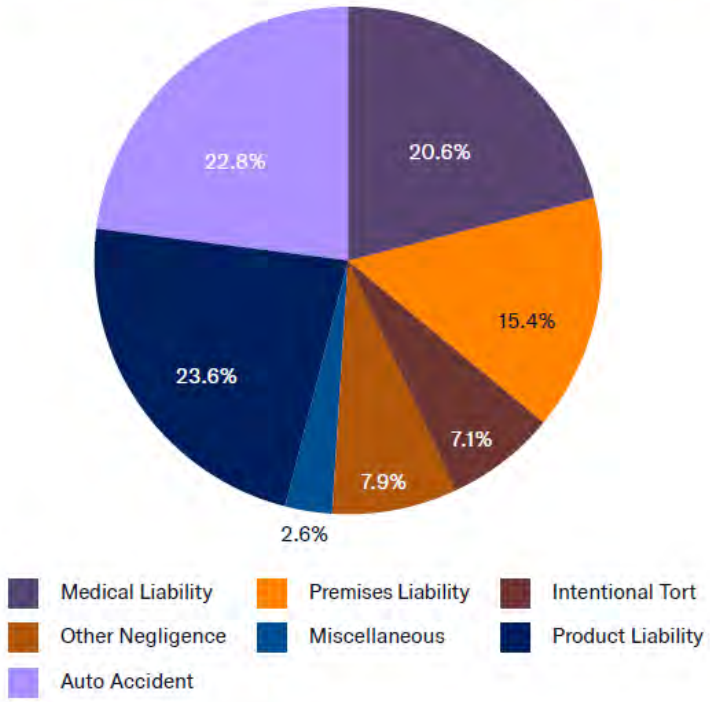
[6] Cary Silverman and Christopher E. Appel, Nuclear Verdicts Trends, Causes and Solutions, US Chamber of Commerce Institute for Legal Reform (September 22, 2022), available at < https://instituteforlegalreform.com/wpcontent/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf>.

[7] Id.

[8] Amy Buttell, Nuclear Verdicts Escalate, Inside Medical Liability (First Quarter 2021), available at < https://www.mplassociation. org/Web/Publications /Inside_Medical_Liability/Issues/2021/Q1/Articles/Nuclear_Verdicts_Escalate_Verdicts.aspx>.

[9] Cary Silverman and Christopher E. Appel, Nuclear Verdicts Trends, Causes and Solutions, US Chamber of Commerce Institute for Legal Reform (September 22, 2022), available at < https:// instituteforlegalreform.com/wpcontent/uploads/2022 /09/NuclearVerdicts_RGB_FINAL.pdf>.

Figure 1: Nuclear Verdicts by Case Type, 2010 – 2019



In medical liability cases resulting in nuclear verdicts, one of the most common lawsuit allegations related to a child being born with permanent injuries due to complications during delivery which can engender eye-popping future wage loss projections.[10] This is an important distinction for the Court to be aware of given the fact that it is considering allowing the recovery of a deceased minor's lost future earning damages. This paints an accurate picture of the types of jury verdict awards that can be expected if these damages are allowed in death cases going forward.

Using the present case as an example, the increased damages exposure to Defendant Prime Healthcare alone could inexplicably be between $10 million and $19

[10] Id.

million based on the projections of Plaintiff's economist who offered two different lost earnings impairment assessments based on a high school diploma alone or high school plus a four-year degree. In other cases, we could expect projections to include graduate or professional degrees which would push the exposure even higher.

Application of those numbers across other similar pending claims would represent an astronomical increase in potential liabilities for Michigan health care providers, which would, of course, be passed along to Michigan consumers and threaten the viability of health care facilities or particular high-risk medical units, such as labor and delivery.[11] Despite their unpredictability, nuclear verdicts are trending upwards in both their frequency and amount each year, and there is no indication of this upward momentum plateauing.[12]

A. High Verdicts in Medical Malpractice Cases Will Diminish Hospital Resources and Ultimately Impact Patient Access to Health Care Within Michigan Communities

Most recently, data from 2023 reported that 57 medical malpractice verdicts within the United States reached over $10 million dollars, with over half of those

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[11] Currently, there are 4 cases being held in abeyance pending this Court's decision: Zehel v Nugent, __Mich__; 994 NW2d 787 (Docket No. 165375, 2023); Stewart-Hinkley v McLaren Healthcare Corp, __Mich__; 996 NW2d 459 (Docket No. 165291, 2023); Rassey v Holtrop, __Mich__; __NW3d__ (Docket No. 166349, 2024); Shulte v Women's Healthcare Alpena OB/GYN, PC, __Mich__; __NW3d__ (Docket No. 166444, 2024); Another case that was held in abeyance, has been dismissed on stipulation of the parties. Encarnacion v Ascension St John Hosp, __Mich__; 996 NW2d 472 (Docket No. 165621, 2023).

[12] Cary Silverman and Christopher E. Appel, Nuclear Verdicts Trends, Causes and Solutions, US Chamber of Commerce Institute for Legal Reform (September 22, 2022), available at < https:// instituteforlegalreform.com/wpcontent/uploads/2022 /09/NuclearVerdicts_RGB_FINAL.pdf>.

verdicts touching $25 million or more.[13] If recovery for a deceased child's lost future earning damages is permitted, Michigan will see a significant increase in medical malpractice verdicts, including nuclear verdicts, beyond the trend that is already present across the country. A significant increase in jury verdicts illustrates one subset of the risk imposed on hospital resources.

Settlement value will also see a significant increase if these damages are allowed because the value of other cases is always a measuring-stick at facilitation. The party's ability to even engage in settlement discussions will be undermined in light of the headline-grabbing jury verdicts that are issued because they will create unreasonable expectations. In other words, increased jury verdicts will have a direct and indirect impact because even in cases that do not proceed to verdict, the cost to settle will increase alongside the increased verdicts, themselves.

The inexorable increase in verdict amounts to account for lost future earning damages would have a negative impact on patient access to health care. This potential adverse impact may manifest itself in the form of rate increases for medical services or the complete loss of services at certain facilities as economically unfeasible. Either scenario impacts overall access to health care in all communities, but especially the health systems serving rural communities because this burden may be experienced instantaneously.

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[13] Alicia Gallegos, Mega Malpractice Verdicts Against Physicians on the Rise, Medscape, <https://www.medscape.com/viewarticle/mega-malpractice-verdicts-against-physicians-rise-2024a10002bz> (accessed February 8, 2024).

As a collective, rural hospitals already face the struggle to maintain their operations, and several rural hospitals are currently at risk of closing in Michigan. Because rural hospitals are experiencing financial strain, they are unable to cover the increased costs associated with providing care to patients and they are left with low financial reserves which creates a small margin for error for any unexpected or catastrophic losses.[14] The Center for Healthcare Quality & Payment Reform released data in February 2024 assessing rural hospitals across the country and the risk of closure of those rural hospitals in each state:[15]

RURAL HOSPITALS AT RISK OF CLOSING

State	Closures Since 2005	Current Rural Hospitals	Hospitals With Losses on Services		Hospitals At Risk of Closing		Hospitals At Immediate Risk	
			Number	Percent	Number	Percent	Number	Percent
Texas	25	158	100	63%	75	47%	28	18%
Kansas	10	102	83	81%	58	57%	27	26%
Oklahoma	10	78	55	71%	33	42%	22	28%
Mississippi	6	73	45	62%	30	41%	21	29%
New York	6	51	40	78%	30	59%	21	41%
Alabama	7	52	34	65%	29	56%	19	37%
Tennessee	14	55	22	40%	22	40%	16	29%
Georgia	9	68	32	47%	19	28%	12	18%
Arkansas	2	48	35	73%	20	42%	9	19%
California	9	56	33	59%	17	30%	9	16%
Kentucky	4	72	29	40%	15	21%	9	12%
Missouri	10	57	30	53%	19	33%	8	14%
Iowa	1	93	66	71%	23	25%	7	8%
Michigan	3	63	23	37%	13	21%	7	11%
Louisiana	2	52	36	69%	21	40%	6	12%
Maine	3	25	14	56%	10	40%	6	24%

[14] Rural Hospitals at Risk of Closing, Center for Healthcare Quality & Payment, <https://chqpr.org/downloads/Rural_Hospitals_at_Risk_of_Closing.pdf> (accessed February 2, 2024).

[15] Id.

Of the 63 hospitals in Michigan that are located within rural areas, 21% are already at risk for closure with 11% being immediately at risk.[16] The struggle rural hospitals are experiencing now is based on the *status quo* conditions within the state – revenue deficits, staffing shortages, increased cost of equipment and supplies. If the Court were to allow recovery of lost earning damages for a deceased minor, rural hospitals would suffer even more financial strain, which has the potential to detrimentally impact members of a rural hospital's community. Hospitals may be faced with no choice but to discontinue particular services, such as labor and delivery, or shutting down entire facilities. Examples of hospital closures or the discontinuing of services due to financial struggle have been prevalent across the state and the country in the past, and the future risk is not hypothetical.

For example, Sturgis Hospital, located south of Battle Creek near the Indiana border, and servicing approximately 11,000 residents, closed birthing services and its hospice programs in December 2018 due to financial strain centering around decreasing revenue and rising costs to provide quality care.[17] The decision was made to close these particular departments in order to ensure the hospital could continue to provide additional care to the community in the future.[18] But in 2022, the entire

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[16] Id.

[17] More than a dozen hospitals in rural Michigan at 'high risk' of closing, Bridge Michigan, (September 2019) <https://www.bridgemi.com/michigan-health-watch/rural-hospitals-michigan-face-dilemma-merge-or-not> (accessed February 3, 2024).

[18] One rural Michigan hospital averts closure, as others struggle to hold on, Bridge Michigan, (July 2022) < https://www.bridgemi.com/michigan-health-watch/one-rural-michigan-hospital-averts-closure-others-struggle-hold> (accessed February 3, 2024).

hospital faced potential closure because of the continued financial issues.[19] Labor and delivery and family planning services would be the most negatively impacted by a new rule of law that allows the recovery of a minor's future earnings.

In 2019, Munson Healthcare Manistee Hospital ("Manistee Hospital") located in Manistee, Michigan, a city of approximately 6,000 people, closed its maternity unit and no longer offered birthing services to its patients.[20] The driving force behind closing Manistee Hospital's birth unit was financial strain.[21] In order to continue providing quality care for all patients, the difficult decision was made to discontinue providing maternity services.[22]

The closure of the maternity unit at Manistee Hospital upended the community, especially for women who were expecting to give birth at their local hospital. Because of the closure, Manistee Hospital patients would be moved to Munson Healthcare Cadillac Hospital's Family Birth Center, which is approximately 50 miles away from Manistee Hospital:[23]

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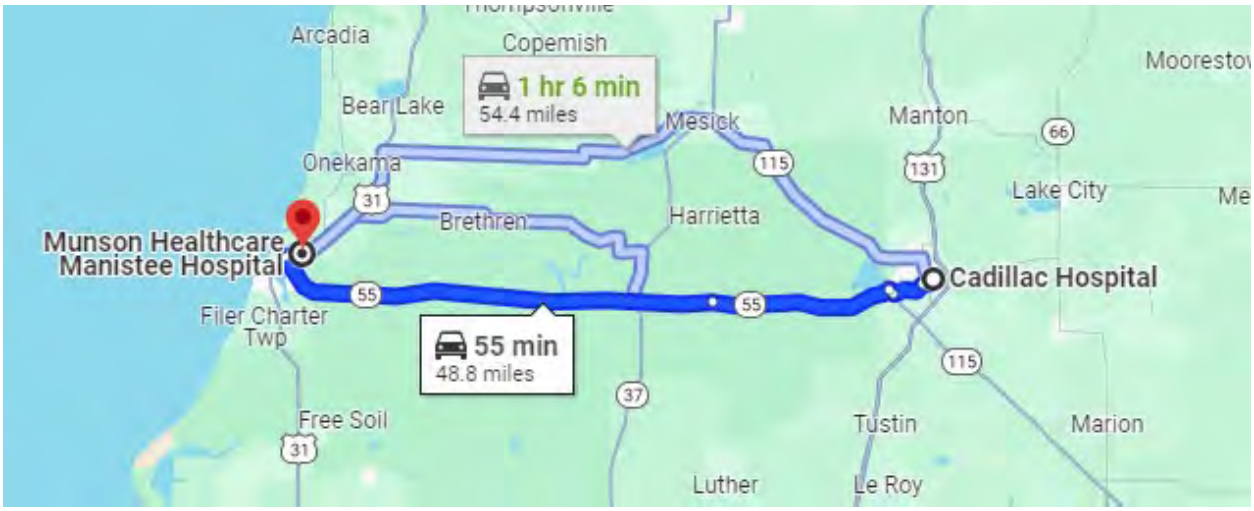
[19] Id.

[20]Munson Healthcare, Manistee Hospital Maternity Unit to Close May 31, (April 2019)<https://www.munsonhealthcare.org/about-the-system/news-mediarelations/news/news-details?news=907> (accessed February 2, 2024).

[21] Id.

[22] Ashlyn Korienek, Rally Cry: 'Keep OB in Manistee', Manistee News Advocate, https://www.manisteenews.com/local-news/article/Rally-cry-Keep-OB-in-Manistee-14253508.php, (accessed January 31, 2024).

[23] Munson Healthcare, Manistee Hospital Maternity Unit to Close May 31, <https://www.munsonhealthcare.org/about-the-system/news-media-relations/news/news-details?news=907> (accessed February 2, 2024).



Residents in the Manistee area reported feeling fearful about their current pregnancies and future pregnancies because they would not have quick access to care where they live, especially if any emergency situations were to arise.[24] Multiple news reports at the height of the closure highlighted the emotional impact on the women of Manistee and the very real concern these women felt about needing to embark on farther journeys to give birth.[25] Needing to travel farther to get necessary health care services inherently puts these women and their babies at risk under normal circumstances, with that risk increasing in emergency situations.

At the end of 2023, the ProMedica Coldwater Regional Hospital in Coldwater, Michigan closed its labor, delivery, recovery, and postpartum department to maintain the economic viability of the entire hospital.[26] In 2023, it was reported that ProMedica

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[24] Ashlyn Korienek, Rally Cry: 'Keep OB in Manistee', Manistee News Advocate, https://www.manisteenews.com/local-news/article/Rally-cry-Keep-OB-in-Manistee-14253508.php, (accessed January 31, 2024).
[25] Id.
[26] ProMedica closes Coldwater OB-GYN department amid confusion over pending sale, The Daily Reporter (November 2023) <https://www.thedailyreporter.com/

Coldwater Regional Hospital lost $12.6 million dollars.[27] For cost-saving purposes, the decision was made to discontinue offering pregnancy services with the hopes of maintaining the viability of the rest of the hospital.[28] This closure has forced Michiganders in the area to seek pregnancy-related services with other health care providers.

In other words, already existing financial strains from labor and delivery units are threatening to shutter these units but also entire health care facilities. Adding more financial strain in the form of potentially eight figure future earnings damages for a minor as requested here, a category of damages the legislature specifically saw fit not to allow, will hasten the pace of closures and further threaten access to health care including essential labor and delivery services.

These documented accounts of closures that are already occurring dissuade any notion of fear mongering or scare tactics. The problem is already here and would only get worse if the Court of Appeals' view of MCL 600.2922(6) is validated.

B. Hospital Closures Around the Country Foreshadow What Could Happen in Michigan

Across the county, there have also been a number of hospital closures due to financial challenges. South City Hospital, a 178-bed facility in St. Louis, closed in August after struggling to overcome various financial challenges.[29] The hospital faced

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story/news/healthcare/2023/11/15/promedica-closes-coldwater-ob-gyn-department-amid-confusion-over-pending-sale/71594316007/> (accessed February 8, 2024).

[27] Id.

[28] Id.

[29] Alan Condon, St. Louis hospital to close, Becker's Healthcare (August 2023)

bankruptcy twice, as well as several damaging lawsuits which led to its closure.[30] In Warsaw, New York, Wyoming County Community Health System discontinued birthing services in June of 2023 because of financial challenges and declining births in the community.[31] Madera Community Hospital and its three rural clinics in California closed in December 2022, and then later filed for bankruptcy in March 2023,[32] leaving the town residents without access to care and a facility on which they depended.[33]

A patient's access to adequate health care is heavily dependent on a health system's ability to operate and provide services for the entire community. In the event of serious financial trouble, when a health system is forced to make a hard decision about care that will be offered for the good of the community as a whole, the highest risk units are the first to go. This utilitarian approach to health care raises very real

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<https://www.beckershospitalreview.com/finance/st-louis-hospital-to-close.html> (accessed February 4, 2024).

[30] Justina Coronel, 'It'll be a blow' | South City Hospital, formerly St. Alexius, closing its doors after years of financial troubles, KSDK (August 2023) <https://www.ksdk.com/article/news/local/south-city-hospital-closing-financial-troubles/63-92658092-0e78-4b1f-9fc5-cfaeedadcb73> (accessed February 4, 2024).

[31] Andrew Cass, 72 Hospitals closing department or ending service, Becker's Healthcare (November 2023) < https://www.beckershospitalreview.com/finance/61-hospitals-closing-departments-or-ending-services.html> (accessed February 8, 2024).

[32] 1A Remaking America: What Happens to a Community when a Hospital Closes?, NPR (March 2023) <https://www.npr.org/2023/03/16/1163911049/1a-remaking-america-what-happens-to-a-community-when-a-hospital-closes> (accessed February 8, 2024).

[33] After Madera's hospital closure, could others follow?, Cal Matters (January 2023) < https://calmatters.org/health/2023/01/hospital-closure/> (accessed February 10, 2024).

concerns about the health of community members who are no longer provided the local care they need.

Without particular services being offered, a subset of the community will undoubtedly suffer and be inherently at risk. Having access to care is critical in emergency situations where minutes can make a difference. Logically, the closure of rural hospitals elongates the time that members of rural communities will have to wait before obtaining emergency care. According to a study by the University of Kentucky completed in 2019, an ambulance trip to hospital emergency rooms increases by more than 25% the year after a hospital closes in a rural area.[34] The situation in Manistee is even more dire as expectant mothers are having to travel to Cadillac, nearly an hour away from the now-shuttered local labor and delivery unit.

Preserving access to care in rural communities should be a priority and a significant consideration when this Court is assessing whether to allow a deceased minor's estate the ability to recover lost future earning damages in a medical malpractice case, especially where the legislature made the choice to not allow lost future earnings of a minor under MCL 600.2922(6). These examples demonstrate the very real impact hospital closures and discontinued services have on access to quality health care, all the more troubling where the Court of Appeals' Opinion strays from

[34] SuZanne Troske and Alison Davis, Do Hospital Closures Affect Patient Time in an Ambulance?, (February 20, 2019), Rural & Underserved Health Research Center Publications, <https://uknowledge.uky.edu/ruhrc_reports/8> (accessed February 1, 2024).

plainly stated legislative intent. Nuclear verdicts will undeniably diminish access to quality medical care that is offered throughout the state.

To further demonstrate the significant impact that large verdicts can have on health systems, and how that impact should be a primary consideration when assessing the recovery of these damages, the Court can look to Pennsylvania's Medical Care Availability and Reduction of Error Act ("MCARE Act.") Pennsylvania has enacted alternative means to address the negative impact high jury verdicts have on a community's access to medical care.

Section 515 of Pennsylvania's MCARE Act directs a trial court to consider evidence of a verdict's potential impact on a community's health care access when deciding a defendant's motion for remittitur on the basis of an excessive verdict:

> (a) General rule. In any case in which a defendant health care provider challenges a verdict on grounds of excessiveness, the trial court shall, in deciding a motion for remittitur, **consider evidence of the impact, if any, upon availability or access to health care in the community** if the defendant health care provider is required to satisfy the verdict rendered by the jury. [40 Pa. Stat. Ann. 1303.515, Emphasis added.]

Under Section 515 of the MCARE Act, given the significant medical malpractice verdicts in Pennsylvania and the landscape of hospital closures across the country, courts will be asked to consider the excessiveness of medical malpractice verdicts and the impact these verdicts have on access to health care within a community, additional confirmation that Corewell and McLaren are not fear mongering. If anything, this should illustrate for the Court the importance of considering how a sizable jury verdict could inhibit a community's access to healthcare and further

disadvantage already marginalized communities within Michigan, a consequence that should not arise out of a statute that forecloses an award of damages for the lost future earnings of a minor.

C. An Increase in Hospital Liability Could Jeopardize the Ability of Medical Providers to Obtain Reinsurance, Risking Hospitals' Continued Operations

With healthcare systems already facing tremendous financial pressure, high jury verdict awards against hospitals have the capacity to impact a health system's ability to obtain insurance or reinsurance, a contingency that would negatively impact a plaintiff's ability to collect and a medical provider's ability to provide high-risk services.[35] Coastal states such as California and Florida have recently experienced the withdrawal of property damages reinsurers due to the increase in natural disasters like hurricanes and extreme flooding. Insurance companies like AAA and Farmers Insurance have decided to end writing some homeowner insurance policies in Florida.[36] In California, State Farm, Allstate, Merastar Insurance Company, Unitrin Auto and Home Insurance Company, Unitrin Direct Property and Casualty Company, and Kemper Independence Insurance Company have all

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[35]Melanie Gall, Why insurance companies are pulling out of California and Florida, and how to fix some of the underlying problems, PreventionWeb (June 7, 2023), <https://www.preventionweb.net/news/why-insurance-companies-are-pulling-out-california-and-florida-and-how-fix-some-underlying> (accessed January 9, 2024).

[36] Kinsey Crowley, Another company avoids risky Florida home insurance policies: Here's what caused the crisis, USA Today (July 2023) < https://www.usatoday.com/story/money/personalfinance/2023/07/19/florida-home-insurance-aaa-farmers-policy-reduction/70427062007/> (accessed January 30, 2024).

announced they would stop accepting applications for insurance coverage in the state.[37] The driving force behind the departures of these insurance companies is the increased risk of natural disasters within the state.[38] The cost for these insurance companies to write policies has outweighed any benefit. A similar scenario is possible in Michigan if lost future earning damages become available for minors.

The significant increase in jury verdict awards could eventually expose re-insurers to a risk they are no longer willing to take within the state. Re-insurers will have no choice but to increase their rates in response to the expensive payouts if a dramatic increase is seen in medical malpractice verdicts, since claim severity has a direct impact on the premium rates that are offered. Michigan-based medical providers have already been feeling the crunch as re-insurers have raised the level at which reinsurance kicks in, which increases the amount of "self-insurance" the medical facility must carry.

Michigan health systems could become a type of high-risk, high-loss market causing re-insurers to retreat because the state has become too financially burdensome. Without re-insurers, self-insured hospitals, like Corewell and McLaren, would be left holding the entire risk when an unfavorable jury verdict is issued. With catastrophic verdicts, this could result in more hospitals going out of business in

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[37] More insurance companies announce plans to leave California, KTLA, (November 2023) < https://ktla.com/news/california/more-insurance-companies-announce-plans-to-leave-california/#:~:text=More%20insurance%20companies%20have%20announced,Direct%20Property%20and%20Casualty%20Co.> (accessed February 12, 2024).

[38] Id.

Michigan or hospitals discontinuing types of care in certain areas because an excessive or unpredictable verdict was finically crippling. This directly impacts a patient's access to care because it would force patients to travel longer distances to receive the care they need. Or it could leave community members feeling like they are unable to access any necessary care because there is no health system conveniently located.

The reinsurance market trajectory is already on a path of increased rates and limited coverage to protect itself from nuclear verdicts.[39] In order for Michigan's hospitals to continue operations and ensure access to healthcare, they need to be able to rely on reinsurance coverage. While larger health systems will have more expansive financial reserves, not all of those reserves are allocated for losses, and the level of self-insurance continues to increase. Depleting those reserves takes away funding for the workforce, equipment, and supplies to be able to provide care to the community. Without the protection of reinsurance coverage, a nuclear verdict could cripple any Michigan health system, and would ultimately disadvantage the community members they serve.

[39] Amy Buttell, Reinsurers Adjust to Hardening Market, Pandemic, MPL, Fourth Quarter 2020 < https://www.mplassociation.org/Web/Publications/Inside_Medical_Liability/Issues/2020/Q4/Articles/Reinsurers_Adjust_to_Hardening_Market_Pandemic.aspx> (accessed February 26, 2024).

Conclusion - Argument II

Since the COVID-19 pandemic and by December 6, 2022, Michigan hospitals lost approximately 1,700 hospital beds.[40] Studies into the issue showed that a major cause of this problem was staffing challenges. The Michigan Health and Hospital Association (MHA) also reported other causes, including sicker patients, rising costs of medical equipment, technology, and drugs, and the overall impact of rising inflation costs.[41]

The pandemic greatly affected the mental health of healthcare workers, who underwent trauma and burnout after having to work extremely long shifts and endure the stress and pain of watching patients afflicted with the virus. This resulted in an increase of nurses transitioning to contract labor to 19% in 2021. Staffing expenses account for over 50% of a hospital's budget. In fact, the MHA reported that as of 2022, hospitals were spending an astronomical sum of $1.1 billion more on labor expenses than they did in 2020.

These budgetary concerns affect staffing capacity for healthcare systems. According to a Mercer report, a shortage of more than 3.2 million lower-wage healthcare workers is expected within the next five years in the United States.[42] And

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[40] Andrew Cass, Michigan hospitals want more funding after losing 1,700 beds, Becker's Hospital Review (December 12, 2022), <https://www.beckershospitalreview.com/finance/michigan-hospitals-want-more-funding-after-losing-1-700-beds.html> (accessed February 12, 2024).

[41] Hospital Funding Crisis, Michigan Health & Hospital Association, <https://www.mha.org/issues-advocacy/key-issues/hospital-funding-crisis/> (accessed February 12, 2024).

[42] US healthcare labor market, Mercer, <https://www.mercer.com/content

according to the U.S. Bureau of Labor Statistics, the country will need 6% more new registered nurses within the next eight years, a job growth faster than the average for all other occupations.[43]

Another factor playing a role in financial trouble for healthcare systems is the denial of claims by health insurers, including Medicare Advantage plans, private alternatives to Medicare that are expected to cover what Medicare covers. But Medicare rules provide room for interpretation, according to the Department of Health and Human Services. In a report by the department's Inspector General of June of 2019, 15 popular Medicare Advantage plans had denied authorization for 13% of claims that met Medicare rules, and 18% of claims that Medicare would cover.[44] This, despite the fact that Medicare payments to these plans totaled $27 million more in 2023 than if those patients were enrolled in traditional Medicare.[45] These denials further drive up healthcare costs and force hospital closures, particularly in rural

/dam/mercer/assets/content-images/north-america/united-states/us-healthcare-news/us-2021-healthcare-labor-market-whitepaper.pdf> (accessed February 12, 2024).

[43] Registered Nurses Job Outlook, U.S. Bureau of Labor Statistics, <https://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-6> (accessed February 27, 2024).

[44] Some Medicare Advantage Organization Denials of Prior Authorization Requests Raise Concerns About Beneficiary Access to Medically Necessary Care, U.S. Department of Health and Human Services, Office of Inspector General, <https://oig.hhs.gov/oei/reports/OEI-09-18-00260.pdf> (accessed February 27, 2024).

[45] The Medicare Advantage program: Status report, Medicare Payment Advisory Commission (March 2023) <https://www.medpac.gov/wp-content/uploads/2023/03/Ch11_Mar23_MedPAC_Report_To_Congress_SEC.pdf> (accessed February 27, 2024).

areas.[46] And this impact becomes even greater in states like Michigan, where a survey by Altarum showed that three in five uninsured adults forewent healthcare coverage for being "too expensive."[47]

In light of these financial pressures already being felt system-wide by large hospital systems like Corewell and McLaren, but primarily by smaller, rural medical providers, access to care should be a concern of this Court when considering granting the recovery of lost future earning damages for the estate of a deceased minor which, as noted, is not authorized by MCL 600.2922(6). Future awards including these damages will exceed the typical medical malpractice award ranges Michigan currently sees. These large jury verdicts will negatively impact the functioning of health systems within Michigan by creating unprecedented financial strain and forcing health systems to run a cost-benefit analysis on which services are beneficial to a community but not too expensive to provide.

[46] Gretchen Morgenson, 'Deny, deny, deny': By rejecting claims, Medicare Advantage plans threaten rural hospitals and patients, say CEOs, NBC News (October 31, 2023) <https://www.nbcnews.com/health/rejecting-claims-medicare-advantage-rural-hospitals-rcna121012> (accessed February 27, 2024).

[47] Altarum's Consumer Healthcare Experience State Survey, Michigan Residents Struggle to Afford High Healthcare Costs; Worry About Affording Future Care; Support Government Action across Party Lines (January 2022) <https://www.healthcarevaluehub.org/advocate-resources/publications/michigan-residents-struggle-afford-high-healthcare-costs-worry-about-affording-future-care-support-government-action-across-part> (accessed February 27, 2024).

III. ALLOWING FUTURE ECONOMIC DAMAGES WILL CREATE INCENTIVE STRUCTURES ENSURING THAT A DECEASED MINOR'S FUTURE PROSPECTS WILL BECOME A CASE WITHIN A CASE WHERE THE CHILD'S FUTURE PROJECTIONS (BOTH POSITIVE AND NEGATIVE) WILL BE HOTLY LITIGATED AND WILL RENDER AMICABLE RESOLUTION OF THESE CASES EXTREMELY DIFFICULT

Introduction

Through the combination of damages caps and clearly defined economic damages, death cases involving minors had been capable of amicable resolution, often pre-suit, because plaintiff's counsel could anticipate the range of available damages and the medical provider could reasonably predict the exposure it would face at trial. Both parties could operate within an ascertainable range of valuations of the case under existing legal authorities because future wage loss damages were not available and non-economic damages were subject to an identifiable cap under MCL 600.1483.

Setting aside the economic benefits and Michigan public policy in favor of amicable resolution of cases, Clark v Al-Amin, 309 Mich App 387, 395; 872 NW2d 730 (2015); Pratt v Castle, 91 Mich 484, 486-487; 52 NW 52 (1892), in cases involving the death of a child, this system also allowed the grieving parents to achieve closure without drawn-out litigation, which exposes their lives and their relationship with their child to public, contested scrutiny during the discovery process and at trial. Similarly, others impacted by the death of the child, namely medical providers and entities who were sued, can also move past the heartbreak they might feel when a case is resolved.

If economic damages are allowed to include wage loss for a minor with no work history, the range of liability outcomes would be completely unpredictable and cases much less likely and more difficult to settle. Headline-grabbing nuclear verdicts will make amicable resolution of the most gut-wrenching lawsuits an even bigger challenge because a case's settlement value is measured against verdicts.

Using the present Daher case as an example, Plaintiff's economist has provided two separate earnings impairment calculations based on whether the decedent completed high school or high school plus a bachelor's degree. Plaintiff's expert opined that the decedent would have earned $10 million with a high school diploma only and $19 million if he also earned a college degree, a $9 million fluctuation in estimated damages, on top of additional damages that are available.

Plaintiff's economist could even add a third calculation for a master's or graduate degree, providing even more uncertainty and projections beyond $19 million. And this does not even consider cases in which a child has displayed some sort of unique aptitude or skill (in art or athletics, for example) that could further complicate the measure of such hypothetical damages. Furthermore, rather than an out-of-court resolution, future wage loss claims for a deceased minor have the very real potential to be incendiary, uncivil and will likely only serve to make the family's grief even worse.

Legal Analysis

The Court of Appeals Opinion guarantees that the character and traits of the child as well as the family will be a hotly contested issue at trial if future earning

capacity damages for a deceased minor are allowed: "it is also well-known that a **child's environment**, including the **child's parents**, school system, general area of residence, participation in extracurricular activities, **exposure to traumas** or role models, and similar extrinsic influences will affect the child's future earning potential." Daher, supra, 344 Mich App at 536. The Court of Appeals Opinion places these factors front-and-center in the future wage loss projection and mandates that these factors will be litigated from both sides.

The same wide range of outcomes for a child's future earnings potential would be found in the personal consumption and tax offsets requested by Prime Healthcare if the Court allows future earnings to be awarded. On this point, the parents' lifestyle would come into focus. If the parents lived a glamorous lifestyle, would the child grow up to have similarly expensive tastes that would offset the future wage loss claim? Or, conversely, if the parents were modest and frugal, would we expect their offspring to live a similarly frugal existence? The Court of Appeals Opinion ensures these questions will be addressed by the legal system.

These considerations would lead to not only a mini-trial on the outlook for the deceased child, but also on the parents and their choices as this would have to be assessed by the jury. The result will be ugly, contentious proceedings where the grieving parents see their deceased child's prospects for success debated by lawyers and retained experts, and then also see their own personal choices lauded or questioned in order to arrive at future personal consumption figures for a child who is no longer with them.

These considerations also highlight just how speculative both a minor's future work loss and future personal consumption habits would be. The Daher opinion paid lip service to this concern, "We think the above cases establish that a child's expected future earning potential is not *inherently* too speculative to permit recovery." 344 Mich App at 535 (emphasis in original). But predicting the future of a middle school student to any degree of reasonable certainty seems impossible even under the best models of predictive behavior. Adding purely subjective considerations of environmental factors, geographical upbringing, childhood ambitions, scholastic performance of a minor with no work history push the envelope of reasonable certainty. See, for example, Hannay v Dept of Trans, 497 Mich 45, 75; 860 NW2d 67 (2014) ("Damages in tort actions that are '[r]emote, contingent, or speculative' are not compensable"), quoting Sutter v Biggs, 377 Mich 80, 86; 139 NW2d 684 (1966).

Using gender and race as environmental/family factors in valuing a child's life will inevitably result in unsavory situations. One such example was a decision by a federal judge in 2015 in New York, who was asked to use a race-based table to estimate damages for a four-year-old child who was permanently injured after inhaling lead paint dust. The issue often arises in lead paint cases because low-income and minority families are more likely to occupy older homes with lead-based paint. In that case, the defendant's attorney wanted to use expert economic testimony based on race-based data to show the improbability of the Hispanic child obtaining an advanced degree and elevated income. Judge Weinstein excluded the evidence,

finding it to be discriminatory. GMM *ex rel* Hernandez-Adams v Kimpson, 116 F Supp 3d 126 (EDNY 2015).

Under the Court of Appeals' rubric here, which includes factors such as "general area of residence," "and similar extrinsic influences," evidence and data based on race, religion, gender and sexual orientation, for example, which this Court has historically held to be out-of-bounds and inadmissible, will become fair game when debating the future earnings prospects of a deceased child. Pellegrino v AMPCO Sys Parking, 486 Mich 330, 354; 785 NW2d 45 (2010) (use of race to pick juries prohibited); People v Knight, 473 Mich 324, 342; 701 NW2d 715 (2005) (same), People v Bell, 473 Mich 275; 702 NW2d 128 (2005) (same); Gilbert v DaimlerChrysler Corp, 470 Mich 749; 685 NW2d 391 (2004) (ethnic politics to inflate damages); Nemet v Friedland, 273 Mich 692, 697; 263 NW 889 (1935) (anti-Semitic tropes); Cluett v Rosthenthal, 100 Mich 193; 200 58 NW 1009 (1894) ("The courts are open to aliens and citizens alike; and any attempt, by arousing the prejudice of jurors, to curtail this right, is a departure from the proper privilege of counsel, and, when carried to the extent indicated by the language quoted, is sufficient to justify a reversal of the case.")

A. The Supreme Court's Focus on Civility and Professionalism Will be Undermined by the Court of Appeals Opinion

The Administrative Order entered by this Court on December 16, 2020, AO 2020-23, reflects the judiciary's concern with the growing lack of civility and courtesy shown by litigants in Michigan courts. Chief Justice Elizabeth T. Clement recently reminded Michigan attorneys of their duty to comply with the Rules of Professional

Conduct and the Administrative Order in her article titled "Professionalism: Inspiring respect, building trust," published in January of 2024 by the Michigan Bar Journal:[48]

> [W]e all are aware of instances when civility is sacrificed — sometimes for sake of argument, sometimes because of frustration or anger, and sometimes for other reasons. No excuse is acceptable for bad behavior, especially when we are talking about judges and lawyers. We know better and we must act like it.
>
> . . .
>
> Take this reminder seriously. Professionalism and civility in the practice of law builds public confidence in the justice system. A lack of professionalism puts clients at risk, interferes with the justice system's ability to function fairly and efficiently, and often brings attorneys and courts into disrepute. This discussion is about more than any one of us or any one moment. Our commitment to professionalism is about maintaining — at all times — our greater responsibility to our clients, our community, and our democratic society. All lawyers and judges should conduct themselves in a manner that promotes a positive image of the legal system, fosters its reputation, and preserves public trust. [1.]

Opening the door to the recovery of damages for a minor's future lost earning capacity will hinder the continuing efforts of this Court and the Michigan Bar to promote professionalism and civility in the courtroom. The Court of Appeals Opinion will interject a host of inflammatory evidentiary, opinion testimony and rhetorical devices into wrongful death cases that already run hot and will only become more contentious, controversial, and incendiary.

An affirmation of the Court of Appeals' opinion will result in testimony, statistics, proofs, and arguments made by both sides in an already painful situation,

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[48] Available at <https://www.michbar.org/journal/Details/Professionalism-Inspiring-respect-building-trust?ArticleID=4791>

which can quickly turn belligerent and acrimonious. See for example, the case out of the Eastern District of New York mentioned earlier, in which the defendant's attorney wanted to use an economic expert using race data to show that the permanently injured Hispanic child was unlikely to obtain an advanced degree and elevated income due to environmental factors. GMM, 116 F Supp 3d at 128-29. Or the case with the "deaf mute" 13-year-old girl with cerebral palsy who was "clever with her hands," where the New Hampshire Supreme Court found the verdict to be excessive because her earning capacity was limited. Pierce v Mowry, 106 NH 306; 210 A2d 484 (1965). Or the child with Down Syndrome who "can never be a useful member of society, will have no earning capacity, and can be of no financial benefit to her parents or other relatives." Zajaczkowski v State, 189 Misc 299, 303; 71 NYS2d 261 (1947).

Conclusion – Argument III

Valuing the life of a human being is a deeply difficult task, made even more difficult where there is no ascertainable economic loss. In the general case involving the death of a child there will likely be little or no earnings record. For a teenager, it is possible there may be some record of part-time work wages. For a baby, there is no record at all.

Under the Court of Appeals' opinion, Defense Counsel will have no choice but to highlight negative environmental factors and family conditions to attempt to limit damages faced by their client because that is precisely what the Court of Appeals Opinion instructs them to do. If the child's parent had a substance abuse problem,

that issue would be fair game to push down future wage loss damages. A victim of childhood abuse would have those horrifying events re-lived in the court room for the jury's consideration of what the child's future would have held. And parties could delve even deeper, seeking to find affairs or other family discourse that would otherwise never be known because the Court of Appeals Opinion breaks new ground and places these factors front-and-center. These incentive structures exist (to some extent) in other wrongful death cases, but it is different when a child is involved.

CONCLUSION & RELIEF REQUESTED

In not so ancient Michigan history, the very same above stated concerns about patient health and well-being were raised by the medical community in opposition to a package of bills that would have conferred virtual blanket immunity upon medical providers in high-risk units, the emergency room and obstetrics. In the 2013-2014 Michigan legislative term, the Patients First Reform Package was introduced and, if passed, would have provided immunity to emergency room and obstetrical doctors unless the plaintiff could prove "gross negligence" by "clear and convincing" evidence, standards of proof that in conjunction would have been nearly insurmountable. The reforms were pitched as qualified immunity but in actual practice, would have provided nearly absolute immunity from civil lawsuits.

Many members of the medical community, including Beaumont Hospital, now *Amicus Curiae* Corewell and Henry Ford Health System, publicly opposed this legislation and helped to prevent its passage on grounds that the broad conferring of immunity would be adverse to the interests of patients and would not foster quality

medical practice. Access to affordable, quality medical care guided these hospital systems' public opposition to legislation that would have provided them and their medical providers virtual immunity from medical malpractice lawsuits. The same concerns that elevated patient safety over the bottom-line guide Corewell and McLaren's opposition to the new legal standards and enhanced liabilities that are presented in this case.

WHEREFORE, for the above-stated reasons, *Amici Curiae* Corewell Health and McLaren Health Care urge the Supreme Court on Leave Granted to reaffirm its Opinion in Baker v Slack, 319 Mich 703; 30 NW2d 403 (1948) and reverse the Court of Appeals Opinions in Daher v Prime Healthcare, 344 Mich App 522, -- NW3d --- (2022), Zehel v Nugent, 344 Mich App 490; --- NW3d --- (2022), and Denney v Kent Co' Road Comm'n, 317 Mich App 727; 896 NW2d 808 (2016).

Respectfully Submitted,

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Dated: March 11, 2024

CERTIFICATE OF WORD COUNT COMPLIANCE

1. This *Amici Curiae* Brief of Corewell Health and McLaren Health Care complies with the word count limitation of MCR 7.312 and MCR 7.212(G) because:

X This *Amici Curiae* Brief contains 10,254 words.

Respectfully Submitted,

/s/ Timothy A. Diemer

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PROOF OF SERVICE

I hereby certify that on March 11, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile E-Filing File and Serve System which will send notification of such filing to the following:

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Respectfully submitted,

/s/ Timothy A. Diemer
JACOBS AND DIEMER, P.C.

Dated: March 11, 2024

STATE OF MICHIGAN
IN THE SUPREME COURT
(On appeal from the Michigan Court of Appeals)

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

Plaintiffs / Appellees

vs.

PRIME HEALTHCARE SERVICES-GARDEN CITY, LLC d/b/a GARDEN CITY HOSPITAL, a foreign limited liability company, KELLY W. WELSH, D.O., and MEGAN SHADY, D.O., jointly and severally,

Defendants / Appellants

Supreme Court No. 165377
Cout of Appeals No. 358209

Wayne County Circuit
Case No. 20-004169-NH

APPENDIX OF EXHIBIT TO *AMICI CURIAE* BRIEF ON BEHALF OF COREWELL HEALTH AND McLAREN HEALTH CARE

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APPENDIX OF EXHIBIT TO *AMICI CURIAE* BRIEF ON BEHALF OF COREWELL HEALTH AND McLAREN HEALTH CARE

EXHIBIT	DESCRIPTION
A	Largest Jury Verdicts in Michigan from 2021, 2022 and 2023

EXHIBIT A

2021'S TOP VERDICTS

Product Liability

Degloving injury leads to surgical amputation

$27 million verdict

The plaintiff was trained to take samples of soybean hulls by reaching with a cup in his hand through a circular port that was unlocked and unguarded by a protective screen within inches of a continuously rotating screw auger that was buried in the soybean hulls. On his 10th day on the job, he dropped the cup and instinctively reached for it becoming stuck in the auger. With no way to stop the machinery or call for help, the plaintiff was forced to pull himself out of the auger, sustaining a horrific degloving of his forearm and traumatic amputation of most of his fingers and palm. His right arm from mid-forearm down was later surgically amputated.

The lawsuit was brought against Specialty Industries, the manufacturer and installer of the machinery for defective design, negligence, gross negligence, subsequent negligence and avoidance of the non-economic damages cap.

The trial lasted eight days and the seven-person jury deliberated for five and a half hours before resolving all liability issues in favor of the plaintiff and awarding the plaintiff a total of $27 million in damages for past and future non-economic damages, past and future economic damages and lost earning capacity. Damages reduced to present value totaled $13.4 million.

Information of this case was provided by plaintiff's attorney Christopher K. Cooke.

Type of action: Product liability

Injuries alleged: Degloving amputation of dominant right forearm and hand; PTSD

Name of case: Hairston v. Specialty Industries

Court/Case no./Date: Ottawa County Circuit Court; 17-4993-NO; 10/28/2021

Tried before: Jury

Demand: $1.4 million

Highest offer: $500,000

Case evaluation: $800,000

Verdict amount: $27 million; $13,489,447 (damages reduced to present value)

Most helpful experts: William Keefe, engineer; Ronald Smolarski, economist

Insurance carriers: Burlington, Evanston/Markel

Attorney for plaintiff: Christopher K. Cooke, Grand Rapids

Partnership Dispute

Jury sides with plaintiff in pot provisioning center dispute

$19 million verdict

MSY Capital Partners, LLC secured a $19 million jury verdict in Oakland County Circuit Court. The case arose from a partnership dispute involving a marihuana provisioning center in Ferndale.

The verdict included an $18 million award against LIV Wellness Center, LLC for breach of a partnership agreement and a $500,000 award against each of two individual owners for breach of fiduciary duty.

Counsel for the plaintiff provided case information.

Type of action: Partnership dispute

Name of case: MSY Capital Partners, LLC v. LIV Wellness Center, LLC d/b/a LIV Wellness

Court/Case no./Date: Oakland County Circuit Court; 2019-178037-CB; 10/18/2021

Tried before: Judge

Name of judge: Hon. Michael Warren

Verdict amount: $19,000,000

M elpful expert: Jeff Hauswirth, JHauswirth Group, financial expert

Attorneys for plaintiff: Mark Hauck, Detroit; Scott Seabolt, Plymouth; Gavin Fleming and Frank DeLuca, Bloomfield Hills

Third-Party No Fault

Semi hauling heavy cargo struck vehicle three times

$12.87 million verdict

Plaintiff Jonathan Johnson, a 30-year-old father, was stopped in the right lane at a red light. Defendant Kevin Wass was driving a tractor-trailer hauling 75,000 lb. of fertilizer as cargo and was parked in left lane next to Johnson.

Suddenly, and prior to the light turning green, Wass improperly turned right from the left lane and drove his truck directly into the vehicle carrying Johnson. The tractor made three separate impacts with Johnson's vehicle per eyewitness testimony.

Wass admits he felt a vibration during the impacts but failed to stop his tractor-trailer. Wass drove off after hitting Johnson and admits he was unaware of the crash until eyewitnesses caught up with him and stopped him later at a light.

The plaintiff's injuries include a traumatic brain injury, post-traumatic stress disorder, depression, neck (including multiple cervical disc herniation), back, neurogenic bladder and impotence.

Although Johnson was in a minor subsequent accident in 2016, he suffered no injuries in the second accident. Since the crash in 2015, Johnson has been unable to return to his prior employment as a truck driver and, further, has been rendered completely disabled by the government due to injuries sustained in the subject 2015 collision.

The defendant claimed Johnson was contributory negligent because he drove up to the right side of Wass's tractor-trailer as Wass was making a wide right turn. The defendant also claimed Johnson did not sustain any notable injury in this minor incident, and that he had a subsequent automobile accident in March 2016 which thereafter resulted in treatment for the cognitive issues which he now attributes to the accident in this case.

Ryanne Rizzo, one of plaintiff's attorneys, provided case information.

Type of action: Third-party no fault

Injuries alleged: Traumatic brain injury, neurogenic bladder and herniated discs

Name of case: Johnson v. Wass and Plant Products

Court/Case no./Date: Wayne County Circuit Court; 18-012028-NF; Sept. 2, 2021

Tried before: Jury

Name of judge: The Hon. Susan Hubbard

Demand: $8 million

Highest offer: $100,000

Case evaluation: $100,000

Mediation award: $100,000

Verdict amount: $12.87 million

Most helpful experts: Dr. Steven Newman, Dr. Rakesh Ramakrishnan, Dr. Benjamin Krpichak, Dr. Gerald Sheiner, Tim Robbins, Dr. Chintan Desai, Bradley Sewick, PhD, Mike Thomson — Econometrics

In ıce carrier: Zurich Insurance

Attorneys for plaintiff: Dodd Fisher, Alan Latham and Ryanne Rizzo, Grosse Pointe Woods

Auto Negligence

K'zoo jury: UIM coverages applied for fire chief's death

$3,064,723.87 verdict

On June 14, 2017, 55-year-old Comstock Township Fire Chief Edward Switalski was killed in the line of duty. At the time of this incident, Chief Switalski was on the shoulder of eastbound I-94 in Comstock Township in the process of removing his fire gear. While at the back of his vehicle with the rear hatch open, Chief Switalski had doffed his helmet and began attempting to remove his fire boots when he was struck by third-party defendant Brandon Clevenger's vehicle. Chief Switalski was pinned against his tailgate bumper and thrown, causing fatal injuries. Clevenger admitted liability causing the death of Edward Switalski.

Chief Switalski's employer, Comstock Township, purchased from defendant insurance companies Hamilton Mutual Insurance Company and Employers Mutual Casualty Company insurance coverages primary and umbrella coverages, including underinsured motorist coverages.

The first critical issue decided by the jury was whether underinsured motorist coverages, under the contract terms and definitions of defendants' insurance policies, were triggered. In doing so, the jury determined that Chief Switalski was, under the contract policy definitions, "occupying" his Comstock fire chief vehicle, i.e., "in, upon, getting in, on, out of or off" of his Comstock Township fire chief SUV when this incident and his injuries occurred.

As to this critical issue, with no actual eyewitnesses to the event, the plaintiff produced expert witness testimony from an accident reconstruction expert (Det. Donald Smith) and a physician/biomechanics expert (Dr. Lisa Gwin), that this incident and the fatal injuries to Chief Edward Switalski occurred while Chief Switalski was at the back of his fire chief SUV vehicle, with the rear hatch open. At the moment of impact, those experts confirmed that Chief Switalski had just begun the process of removing his fire gear and, therefore, was "getting into" and "getting out" of his SUV fire vehicle and balancing "on" and "upon" the back tailgate of his SUV attempting to remove his fire turnout boots when he was struck by Clevenger's vehicle.

The jury answered "yes" to "occupying," thereby triggering UIM coverage and awarded damages of $942,926 in economic and the same $942,926 in non-economic losses. The verdict amount totaled over $3 million with statutory taxable costs and statutory UTPA penalty interest.

Case information was provided by Louis G. Corey.

Type of action: Auto negligence; breach of contract for underinsured motorist coverages.

Injuries alleged: Wrongful death

Name of case: Holly Switalski, Personal Representative of the Estate of Edward Switalski, Deceased v. Brandon W. Clevenger, Hamilton Mutual Insurance Company and Employers Mutual Casualty Company

Court/Case no./Date: Kalamazoo County Circuit Court; 2017-0522-NI; 11/16/2021

Tried before: Jury

Name of judge: Hon. Alexander C. Lipsey

Demand: $3,000,000

Highest offer: $19,500

V amount: $3,064,723.87 — $1,885,852 jury verdict, plus $61,835.43 taxation of costs, $1,1 7,036.44 statutory penalty interest (MCL 500.2006(4), (UTPA))

Most helpful experts: Retired Detective Donald Smith, accident reconstructionist, Kalamazoo; Dr. Lisa Gwin, biomechanics/physician/engineering expert, San Antonio, Texas

ompany

Personal Injury

Head-on collision led to years of litigation, five-day trial

$3 million verdict, $62,500 in pre-complaint interest

On Jan. 8, 2016, 24-year-old Rebecca Jantzen was seriously injured in a vehicular crash caused by 62-year-old Elizabeth Paauw when Ms. Paauw crossed the centerline on a two-lane county road in Ionia County, striking the Jantzen vehicle head on. Ms. Paauw never applied her brakes and struck the Jantzen vehicle while traveling 50-55 mph.

At the time of the crash, the defendant had multiple medical issues and disordered sleep, and may have simply nodded off and fallen asleep. The defendant claimed, however, that she had an unknown liver disease which caused her to experience hepatic encephalopathy, and asserted a defense of sudden medical emergency.

The plaintiff filed a motion for summary disposition with respect to the sudden medical emergency defense as the testimony of all of defendant's own medical experts on the subject of hepatic encephalopathy established that hepatic encephalopathy is a progressive condition that develops over

time and does not come on like a light switch. The plaintiff argued, therefore, that such condition cannot meet the requirements under Michigan law that the alleged sudden emergency be sudden and unexpected. The trial judge agreed, granting summary disposition and striking the defense.

After three years of litigation contesting the plaintiff's claims — including surveilling the plaintiff (which backfired as the plaintiff put in the surveillance video in her case in chief) and putting plaintiff to significant burden and expense engaging multiple accident reconstruction experts and medical experts — counsel for the defendant during the weekend before the trial began indicated for the first time that the defendant would admit negligence, proximate cause and that the plaintiff's injuries met the threshold requirements of the Michigan No Fault Act, which admissions were placed on the record on the morning of trial. Counsel for defendant also indicated that the defendant's insurer, Allstate, would pay its policy limits of $1.1 million to settle.

The plaintiff rejected that offer, knowing that Allstate's policy required it to pay certain items in addition to its policy limits, but made a counter proposal that Allstate pay some interest and costs on top of its limits, which was rejected.

After a five-day trial on non-economic damages only, the jury returned a verdict for the plaintiff of $3,000,000 in past damages, plus $62,500 in pre-complaint interest, plus $30,000 per year for each year of plaintiff's life expectancy of 52 years.

E. Thomas McCarthy, one of plaintiff's attorneys, provided case information.

Type of action: Personal injury; vehicular crash

Injuries alleged: Multiple fractures (pelvis, femur, tibia, patella, wrist and clavicle)

Name of case: Jantzen v. Paauw

Court/Case no./Date: Ionia County Circuit Court; 18-S-33528-NI; 12/17/2021

Tr efore: Jury

Name of judge: Hon. Ronald J. Schafer

Demand: $1,315,000

Highest offer: $1,100,000 (policy limits)

Case evaluation: $1,050,000

Verdict amount: $3,000,000 past damages, plus $62,500 for pre-complaint interest, plus $30,000 per year in future damages for 52 years (all damages non-economic only)

Most helpful expert(s): Plaintiff's various medical treaters

Insurance carrier: Allstate insured defendant Paauw

Attorneys for plaintiff: E. Thomas McCarthy Jr. and John R. Oostema, Grand Rapids

Breach of Contract

Jury sides with buyers over log home's defective construction

$1,875,925.90 verdict

The Prains sued North Arrow Log Homes, Inc. to recover damages arising from the company's defective construction of a log home. The building of a log home is a highly specialized form of construction and the owner of North Arrow, Lyle Kelley, held himself out a highly skilled and experienced log home builder. Mr. Kelley reviewed the architectural plans provided by the Prains and said he was not interested in building the home the way it was drawn up. Instead, Mr. Kelley proposed building the home using his preferred framing method.

Mr. Kelley marked up the plans and explained how North Arrow would build the home and why it was a more desirable method of construction. Completely unknown to the Prains at the time, the revisions resulted in the removal of several vertical posts intended for structural support. The Prains hired North Arrow to complete the project and a proposal and estimate was signed for $245,362 as the total cost of construction.

After North Arrow completed construction, the contractor installing finishings began observing structural problems throughout the home, including the bowing of log walls, moving of window and door framing, cracks throughout the ceramic floor tiles, stone and drywall, and other defects. To prevent further damage, the finishing contractor placed support beams throughout the interior of the home to reinforce the structure. The structural defects in the log home were brought to the attention of North Arrow which initially made efforts to address the problem, but eventually stopped responding to calls. Its owner, Mr. Kelley, refused to appear and testify at trial.

The Prains brought causes of action for breach of contract and negligence against North Arrow and presented expert testimony from a structural engineer to establish liability for the company's defective workmanship. They also presented expert testimony from a log home builder who specializes in restoring log and timber structures in support of damages totaling $1,875,925.90.

North Arrow argued it was not responsible for the defective structural design of the log home because it was the responsibility of the Prains to hire a structural engineer to review and approve its revised plans before the home was built. North Arrow also argued that a separate contractor that handled non-log related work, including the foundation and built-up roof, was a non-party at fault and that the finishing contractor's work performed to support the home after it was built contributed to the problems.

A jury of seven unanimously found North Arrow 100% liable for the Prains' damages without any reduction for comparative negligence or the negligence of non-parties. A special verdict form was provided to the jury to separate damages into two categories, one of which was covered by the liability insurance policy of North Arrow. Based on the special verdict form, the total damages covered under th icy are $1,466,199.40, subject to a $1,000,000 limit of liability.

Adam Kutinsky, counsel for the plaintiff, provided case information.

Type of action: Breach of contract and negligence

Injuries alleged: Damage to Property, Consequential Damages, Cost to Repair, Replace, Rebuild

Name of case: Steven and Jennafer Prain v North Arrow Log Homes, Inc

Court/Case no./Date: Montmorency County Circuit Court; 11-002705-CK; 12/18/2021

Tried before: Jury

Name of judge: Hon. K. Edward Black

Demand: $1,875,925.90

Highest offer: $135,000

Verdict amount: $1,875,925.90

Most helpful expert: Richard Collins, expert log builder

Insurance carrier: Auto Owners Insurance Company

Attorneys for plaintiff: Adam Kutinsky, West Bloomfield; Michael Bill, Birmingham

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2022'S TOP VERDICTS

Medical Malpractice

Doctor performs unconsented experimental surgery, paralyzing patient

$17,344,134 verdict

The defendant performed a "radiofrequency ablation of the inferior hypogastric plexus at S2," a procedure nowhere reported in the scientific medical literature. As such, we developed the theme of unconsented "experimental surgery." The client's S2 nerve was injured, rendering her completely disabled. Previously, she was an executive-functioning art director at an international advertising a(. In fact, she had been the recipient of 5 Clio awards, the ad industry's version of the Emmys.

She has never returned to work after the procedure. She is now 30 years old and lives at home with her parents, who are her caretakers.

The defense argued that this procedure was not experimental, although there was no medical, scientific, or scholarly peer-reviewed medical literature to justify the procedure being done on Ms. Nelson.

Plaintiff's law firm, Jefferson Law Center, provided case information.

Type of action: Medical malpractice

Injuries alleged: S2 Nerve Injury

Name of case: Celia Nelson v. Comprehensive Pain Solutions PLLC and Jeffrey Mark Rosenberg

Court/Case no./Date: 3rd Judicial Circuit Court Wayne County; 20-014461-NH; 12/16/2022

Tried before: Jury

Name of judge: Judge Annette J. Berry

Demand: $22,000,000

Highest offer: $0

Case evaluation: $200,000

Verdict amount: $17,344,134

Most helpful experts: Katherine Jacobs, Beth Pasikowski, Dr. Nitin Paranjpe, Dr. Alexander Ajlouni

Attorneys for plaintiff: Albert Dib and Leanne Pregizer, Saint Claire Shores

Auto Tort

Man suffered TBI after being struck by landscaping truck

$14,210,052 verdict

On Dec 3, 2013, Mr. Brown was struck while working as a garbage collector. Mr. Brown had crossed the street to collect a can from the shoulder of the roadway, when the defendant grew impatient after stopping behind the garbage truck three prior times on the same road. The defendant illegally crossed the solid yellow line and failed to pass the garbage truck with due care and causation.

While the plaintiff could not point to exactly what on the truck or landscaping trailer struck him since he was knocked unconscious, the jury determined that something must have been hanging off the defendant's vehicle or the defendant's trailer left the roadway which caused the injuries.

The defendant claimed no negligence because the plaintiff couldn't point to the exact item that caused his injuries. The defendant further claimed their multiple days of surveillance were dispositive that the plaintiff was faking and exaggerating his symptoms.

The defendant's DMEs of Mary Kneiser, Wilbur Boike and Kenneth Adams all testified that the plaintiff sustained a minor injury, could have returned to work after one week, and accused his medical team of performing unnecessary medical treatment.

The plaintiff's treating physicians all testified that the plaintiff suffered a traumatic brain injury and orthopedic injuries, which required on going treatment and therapies that are necessary for his recovery, but unfortunately were permanently disabling.

The plaintiff testified he has been looking for employment as a condition of his workers' compensation case, but no one will hire him after they meet him. Mrs. Brown testified to the impact of Mr. Brown's injuries on their children, their household, their marriage and her personal struggles.

Plaintiff's counsel said there were three main categories of damages: (1) economic loss – $3,110,052 (only excess wage loss); (2) non-economic loss – $6,300,000; and (3) loss of consortium – $ 4,800,000.

Tom James, counsel for the plaintiff, provided case information.

Type of action: Auto tort

Injuries alleged: mTBI, shoulder surgery for SLAP tear, herniated disks in neck and lower back, major depressive disorder and adjustment disorder

Name of case: Caleb & Diana Brown v. Comstock Turf, Joel Comstock, Colleen Comstock

Court/Case no./Date: Clinton County Circuit Court; 14-11366 NI; 09/07/2022

Tried before: Jury

Name of judge: Hon. Cori Barkman

Name of mediators: Dan Makarski and Eric Zimostrad

Demand: $975,000

Highest offer: $25,000

Verdict amount: $14,210,052

Insurance carrier: Secura Insurance

Attorneys for plaintiff: Thomas James and Richard Moore, Farmington Hills

Premises Liability

Tenant injured when garage door fell on her head

$13,426,000 verdict

The defendant landlord bought a 1956 house out of foreclosure. There was no inspection. The defendant turned it around and rented it within 30 days to tenant. There were no inspections/evaluations by the landlord (waiting until the city inspection done months into lease). Inspection fixes in the city are not verified by the city, and the city relies upon an affidavit by the landlord.

Plaintiff's counsel put on proofs that the landlord did not fix all defects and not all timely after the landlord was cited for property code violations from that later inspection by the city, including "toe plates" (rotting/deteriorating), which are foundational structures for the garage.

The landlord got the violation notices and undertook to fix these violations. The landlord did not ask the tenant to do so.

Months after the city violated the defendant for the inspection violations, the plaintiff was sweeping in the middle of the garage to prepare for a birthday party for a son. The kids were outside. The door was lifted up by one or more of them; it went up into the rails and then out the back rails and down on the plaintiff's head, causing immediate pain/shooting pains. Eventually, the plaintiff had to have a C5-6 neck fusion surgery, with complications and life-long difficulties.

The defendant claimed the lease was "modified" as allowed under MCL 554.139. The plaintiff argued and showed — and got the defendant called as the first witness to concede — that the lease was never modified to extinguish his duty to provide a safe premises (garage and door) fit for its intended purpose on day one of the rental.

The defendant also claimed it was "open and obvious" as to the plaintiff. But the plaintiff argued it was the defendant who got the toe plate notices, and the garage door installers testified that that was a red flag for garage door safety. The broken handle on the garage door was another red flag notice for the unsafe cables/pulleys, and that was red flag notice for the lack of sway bars, which was red flag notice for the lack of safety stop bolts at the end of the rails.

Pl. .f's counsel used garage door installers as expert witnesses; they had never been "experts," but had a lot of knowledge, experience and training on garage doors.

The trial was one week. Judge Stokes in Ingham County allowed the parties to try their respective cases fully and fairly. The defendant's attorney defended the case vigorously and professionally. The jurors spent a considerable amount of time calculating the various damages they found, which included factors such as interest, inflation, and economic and non-economic damages.

Thomas Wuori, a member of the plaintiff's team, provided case information.

Type of action: Premises liability

Injuries alleged: Neck injury from garage door falling out of rails on head, leading to fusion surgery (C/5-6)

Name of case: Phillips v. Dowrick

Court/Case no./Date: Ingham County Circuit Court; 18-409-NO; 8/5/2022

Tried before: Jury

Name of judge: Hon. Wanda Stokes

Case evaluation: $175,000

Verdict amount: $13,426,000

Special damages: Past economic/non-economic, future economic and non-economic

Most helpful experts: Local garage door installers who had been seen post-injury within weeks of injury

Attorneys for plaintiff: Thomas J. Wuori, lead attorney, and Blake Ringsmuth, Traverse City

Negligence

Driver struck, injured by truck tire on interstate

$7.74 million verdict

On Aug. 13, 2018, Vincent Doa of Brighton was driving eastbound on I-96 when a commercial truck, owned by Lower Huron Chemical & Supply Co, Inc., driving westbound on I-96, lost its left front tire due to negligent maintenance and inspection. The 450-pound tire jumped the median wall and violently slammed into the front end of Mr. Doa's vehicle causing TBI, spinal cord compression, massive rotator cuff tear, brachial plexopathy, PTSD and chronic pain.

Numerous treating doctors and experts, including those in biomechanical engineering, neurology, neuropsychology, orthopedics, neurosurgery, PM&R and economics testified.

Plaintiff's attorneys proved the tire detached due to an oil leak in the hub that was ignored by the defendant which was a direct violation of Federal Motor Carrier Safety Regulations. After 1.5 hours of deliberation, an eight-man jury unanimously found the defendant to be solely responsible, despite their denial of liability and claim of non-party fault by a repair facility.

Jeffrey Danzig, counsel for the plaintiff, provided case information.

Type of action: Negligence

Injuries alleged: TBI, spinal cord compression, rotator cuff tear, brachial plexopathy, PTSD and chronic pain

Name of case: Doa v. Lower Huron Chemical & Supply Co., Inc.

Court/Case no./Date: Oakland County Circuit Court; 18-168280; 11/02/2022

Tr[illegible]efore: Jury

Name of judge: Hon. David M. Cohen

Demand: $5,000,000

Verdict amount: $7,744,991.00

Most helpful experts: Michael Thomson, Ph.D., economics; Parmod Mukhi, M.D., PM&R; Tejpaul Pannu, M.D., neurosurgery; Gerald Shiener, M.D., psychiatry; Michael Kaprokavatjhis, D.O., orthopedic spine surgery; Michael Carron, M.D., ENT; Nida Hamid, Psy.D., neuropsychology; Jamie Williams, Ph.D., biomechanics; and Roger Allen, trucking

Insurance carrier: Pioneer State Mutual Insurance Company

Attorneys for plaintiff: Ven R. Johnson and Jeffrey A. Danzig, Detroit

Disability Discrimination /PWDCRA

Trooper ordered to retire after losing sense of smell

$6,402,613 verdict

The plaintiff was a Michigan State Trooper, who joined the force in 1995. In 2011, the plaintiff suffered a head injury in an off-duty accident when he was kicked by a horse. The plaintiff was unable to work for approximately five months. When he returned to work, the defendant put the plaintiff on "desk duty" because he still had not regained his sense of smell.

The plaintiff's union insisted that the plaintiff be reinstated to full duty, arguing that he could perform the essential functions of his job without the sense of smell or, alternatively, that various accommodations could be implemented that would not routinely require the plaintiff to act as a first responder. The defendant refused and kept the plaintiff on limited duty for almost a year. Shortly before the year ended, the defendant sought a medical opinion from the plaintiff's treating doctor who said the plaintiff could do his job despite his anosmia. The defendant then sent the plaintiff to a doctor who blindfolded him for "smell tests." The doctor confirmed that the plaintiff could not smell, something he never denied. The defendant ordered the plaintiff to retire.

Before the plaintiff's last day, the defendant offered him a job as a civilian in the armory; it had been a trooper position and did not involve any activity as a first responder. However, as a condition of the offer, the plaintiff had to resign as a trooper and sign a release, giving up his right to continue to fight for his job. The plaintiff declined and was retired.

The plaintiff filed under the ADA and the Persons with Disabilities Civil Rights Act, or PWDCRA. The defendant obtained a dismissal of the ADA claim based on governmental immunity at the Court of Appeals. However, the PWDCRA claim proceeded.

The defendant argued that all troopers had to have the sense of smell because they had to be able to act as first responders which would, according to the defendant, necessarily involve the ability to smell alcohol, drugs, dangerous chemicals, smoke and similar odors, and that no accommodation could replace the sense of smell in all circumstances. The defendant argued that the ability to smell was a "duty" of the trooper's position. If true, the plaintiff would not be entitled to the protections of the PWDCRA because it protects employees only if their disabilities do not prevent them from performing the essential functions of the job with or without accommodation.

The plaintiff argued that the sense of smell was not a "duty," but was simply one of the tools troopers used to perform their duties. At trial, the plaintiff showed that the defendant never tested troopers for smell and produced other troopers who testified that the job could be performed without the sense of sr

The plaintiff's economic loss totaled $1.474 million. The defendant argued that it had offered the armory job, which would have eliminated any income loss at all.

The plaintiff became depressed and required limited therapy. The plaintiff produced other troopers — along with the plaintiff's daughter and current employer — who recognized the emotional loss to the plaintiff. On cross, the defendant's HR director admitted that job loss was one of the most traumatic experiences people endure.

Debra Fried, one of plaintiff's attorneys, provided case information.

Type of action: Disability discrimination / PWDCRA

Injuries alleged: Loss of career as a Michigan State Trooper; economic damages including loss of income, diminished pension and lost opportunity to participate in DROP program; non-economic damages of shock, humiliation, emotional anguish, etc.

Name of case: Amenson v. State of Michigan, Michigan Dep't of State Police

Court/Case no./Date: Oakland County Circuit Court; 16-155565 CD; 05/25/2022

Tried before: Judge

Name of judge: Hon. Jeffery Matis

Name of mediator: Pete Dunlap

Demand: Pre-facilitation 2019: $425,000 (withdrawn thereafter)

Highest offer: $50,000 made on Sept. 10, 2021 and immediately rejected

Case evaluation: $275,000 (Sept. 22, 2017)

Verdict amount: $6,402,613 – $1,474,000 economic damages; $4,928,213 noneconomic damages

Most helpful expert: Cal Hoerneman, economist, Midland

Attorneys for plaintiff: Julie Gafkay and Debra Freid, Saginaw

Wrongful Death

Jury sides with plaintiff on deliberate indifference claim

$6.4 million verdict

Mr. Jones was serving a five-day sentence for third-degree retail fraud. Four hours after he was booked into the jail, he began exhibiting signs of alcohol withdrawal. Despite this life-threatening condition, Mr. Jones was not afforded appropriate health care by the Corizon medical staff. Corizon is a private prison healthcare contractor.

On April 27, 2018, Mr. Jones suffered a cardiac arrest after being transferred to the jail infirmary, instead of a hospital. He was later transported to Spectrum Butterworth Hospital, and was declared brain dead on May 2, 2018.

The lawsuit alleged violations of Mr. Jones' Eighth Amendment right. The suit alleged the Corizon Health employees acted with deliberate indifference to Mr. Jones by denying him reasonable and adequate medical care and treatment.

The jury returned a unanimous verdict of $6.4 million on the plaintiff's claim for deliberate indifference to his serious medical needs. The award included $3 million for Mr. Jones' pain and suffering damages prior to his death, $400,000 for his family's past loss of society and companionship, and $3 million for the future loss of companionship suffered by his family.

P f's counsel Lawrence J. Buckfire provided case information.

Type of action: Prison wrongful death

Injuries alleged: Death

Name of case: Estate of Wade Jones v. Corizon Health Inc., et al.

Court/Case no./Date: U.S. District Court, Western District of Michigan, Southern Division; 1:20-cv-36; 12/02/2022

Tried before: Jury

Name of judge: Hon. Hala Y. Yarbou

Demand: $2,750,000

Highest offer: $200,000

Verdict amount: $6,400,000

Most helpful experts: Valerie Tennessen, R.N.; Stephen Furman, R.N.; and Dan Fintel, M.D., cardiology

Attorneys for plaintiff: Jennifer Damico, Sarah Gorski and Lawrence J. Buckfire, Southfield

Wrongful Death

Jury sides with family in death of adult foster care resident

$5,344,000 verdict

An Oakland County jury deliberated for a little over an hour before awarding a $5,344,000 verdict to the estate of Aaron Kelly Miller for his wrongful death in 2017 while a resident at an adult foster care home owned by Angels' Place of Oakland County.

On Dec. 30, 2017, 55-year-old Kelly Miller, who had cognitive disabilities, choked on food and died while a resident at the Joliat Home in Commerce Township. The Joliat home housed six adult men and is one of 21 adult foster care homes providing residency to individuals with intellectual and developmental disabilities and is owned and operated by the non-profit Angel's Place. On the day of his wrongful death Angels' Place did not staff the home with enough direct care workers, according to plaintiff's counsel. In addition, the direct care worker who was scheduled to oversee the home was not qualified to work and had poor work evaluations for safety, a history of mental health issues, as well as falling below State of Michigan standards and Angels' Place's own regulations. Despite those facts Angels' Place negligently scheduled the employee to work on Dec. 30, 2017, ultimately causing Kelly Miller's death.

A wrongful death suit was filed on behalf of Kelly's mother, Joan Miller against the defendant Angels' Place in 2018. The case was filed in Oakland County and heard before the Hon. Victoria Valentine in a four plus year courtroom battle that saw: a detour to the Court of Appeals; court-ordered sanctions due to the discovery of destroyed evidence by the Defendant Angels' Place; and an attempt by Angels' Place to use Dr. Ljubisa Dragovic as a paid witness to make a claim that "cognitively impaired people cannot feel pain" — a claim struck down by the Judge Valentine as being unsubstantiated by any proof or science.

On June 6, 2022, the attorneys for Angels' Place admitted their liability in the death of Kelly Miller leaving only the question of what would be awarded to the estate. A two-day trial on damages began on June 24, 2022, before Judge Valentine. On June 27, 2022, after deliberating for a little over an hour the jury came back with their verdict for more than $5 million.

Jim Spagnuolo Jr., one of plaintiff's attorneys, provided case information.

Type of action: Wrongful death

Injuries alleged: Death of adult foster care home resident

Name of case: Estate of Miller v. Angel's Place

Court/Case no./Date: Oakland County Circuit Court; No. 18-165847-N1/ No. 20-181908-NH; June 27, 2022

Tried before: Jury

Name of judge: Hon. Victoria Valentine

Verdict amount: $5,344,000

Attorneys for plaintiff: Jim Spagnuolo Jr., Zach Morgan and Thomas M. Lizza, Clinton Township

Medical Malpractice

Doctors failed to remove gauze in man's leg wounds

$3.1 million verdict

The plaintiff was shot four times in Detroit while leaving a store. He was put in the back of a police squad car dead with no pulse and rushed to the hospital. After the heroics of the first responders and medical personnel, he was resuscitated and underwent 18 surgeries at DMC hospital.

The plaintiff discharged from the hospital to a rehab facility and other medical providers for care after the hospital and a piece of gauze was identified in his severe leg wounds that began to grow into the flesh. No one took out the gauze or helped the plaintiff. The gauze was in for a year and the flesh on his leg grew over it.

The plaintiff sued the three internal medicine doctors who provided care over this year. The defense was that the doctors did not do anything wrong. First, the defense said that the gauze was actually a surgical mesh that was supposed to be there for healing purposes and did not need to come out. This defense was suddenly raised at trial and had not been previously raised. Second, the defense claimed that the doctors were not wound care specialists, so they did not have the expertise to diagnose and treat the gauze. It was uncontested that internal medicine doctors were not qualified to remove the gauze in the leg. Third, the defense claimed that the plaintiff was at fault for the injuries because he did not follow up with medical professionals and was non-compliant with medical care, including not allowing people to treat his wounds.

The defense refused to offer any money, so the case proceeded to trial. The plaintiff waived any economic damages. The plaintiff argued that the primary care physicians are the "quarterbacks" of patient care and that it is common sense a piece of gauze should not be left in a wound for a year. Even if the doctors weren't specialists in wound care, they should have done something to help the plaintiff.

On cross-examination, the doctors initially denied they knew that the gauze was in the plaintiff's leg or that it had to come out. But after rigorous impeachment by plaintiff's counsel, the doctors finally admitted that (1) they knew the gauze was stuck in the plaintiff's leg; and (2) they knew it had to come out.

The plaintiff is filing a motion for attorney fees and costs as well as interest on top of the verdict. This was the first medical malpractice case plaintiff's counsel had tried himself.

Jon Marko, counsel for the plaintiff, provided case information.

Type of action: Medical malpractice

Injuries alleged: Gauze left in wound; non-economic damages

Name of case: Shamar Nowden v. Dr. Anthony Martin, et al.

C ase no./Date: Wayne County Circuit Court; 18-001919-NH; 09/01/2022

Tried before: Jury

Name of judge: Hon. David Allen

Demand: $175,000

Highest offer: $0

Case evaluation: $70,000

Verdict amount: $3,100,000

Most helpful experts: Dr. Aimee-Garcia, internal medicine; Dr. Smitherman, defendant's internal medicine expert

Attorney for plaintiff: Jon Marko, Detroit

Medical Malpractice

Jury finds nurse liable for burns on patient

$2,880,000 verdict

It was undisputed that the plaintiff was burned by a medical heating pad while recovering from serious heart surgery at U of M. The defendant nurse claimed she checked the heating pad and skin every two hours, but this was not evident from the medical records. Also, the defendant nurse's version of facts was contradicted by her own entries in the records and her colleague which both indicated that the

defendant was deceptive about when the burn was discovered and by whom. The plaintiff's expert was very helpful in establishing the standard of care, and the defendant's expert verified several breaches by the defendant in her care of the plaintiff.

Plaintiff's attorney Jim Rasor provided case information.

Type of action: Medical malpractice

Injuries alleged: Second degree burns

Name of case: Marsha Chatman v. Kelsey Owens

Court/Case no./Date: Washtenaw Circuit; 2019-001100-NM; 07/29/2022

Tried before: Jury

Name of judge: Hon. Carol Kuhnke

Name of mediator: Amy Hathaway

Demand: $750,000

Highest offer: $0

Case evaluation: $45,000

Verdict amount: $2,880,000

Most helpful expert: Laura Conklin, RN

Attorney for plaintiff: Jim Rasor, Royal Oak

D Malpractice

Man suffered 'massive hemorrhage' after procedure

$2,750,000 verdict

The 32-year-old plaintiff was referred to the defendant oral surgeon for examination and removal of his lower left wisdom tooth. During his first visit, a panoramic X-ray of the plaintiff's mouth was taken. The defendant reviewed the film study and discovered a "radiolucency," or dark spot, near the affected tooth in the lower jaw. The defendant recommended that the plaintiff undergo a biopsy to determine whether the lesion was cancerous and also ordered a CT scan *without contrast*. The CT scan was performed a couple months after the initial visit. The radiologist reported that the CT film study was "sub-optimal due to lack of iv contrast" and recommended an MRI with iv contrast. However, the defendant claimed that the MRI would be of no benefit and scheduled the plaintiff for removal of the lower wisdom tooth and an incisional biopsy — taking a sample of the lesion to send for lab testing — without additional diagnostics.

On April 20, 2018, five days after the wisdom tooth was extracted, the plaintiff presented to the defendant's office for an "incision" and biopsy, signing a consent form to that effect. However, after the plaintiff had been sedated, the defendant changed the procedure (and documentation) from an "incision" and biopsy to an "excision" and biopsy, essentially converting the procedure from taking a piece of the mass to attempting to remove the mass entirely. While trying to remove what the defendant believed to be a "cystic mass," he encountered an arteriovenous malformation or AVM, also known as a "vascular malformation." As he drilled into the AVM, the defendant injured the carotid and lingual arteries, causing a massive hemorrhage in the plaintiff's mouth.

Paramedics were called to the office, and the plaintiff was transported to a nearby hospital. When the ER doctors were unable to stop the bleeding, the plaintiff was intubated and airlifted to a level one trauma center where he underwent an emergency embolization surgery to stop the bleeding and save his life.

Plaintiff's counsel argued the defendant breached oral surgery standards of care in the multiple ways, including failure to obtain proper permission for the surgery; failure to obtain the proper diagnostic tests, i.e., MRI or angiogram; failure to "needle aspirate" the mass or lesion prior to attempting to remove all or part of it; and negligently entering the AVM with a drill.

Defense counsel claimed the oral surgeon did not breach the standards of care. He claimed that an MRI with contrast was not warranted nor the delineation of the mass from a vascular lesion. He further claimed that an AVM of the ramus was so rare (comparing it to a "unicorn") that it should not be considered as part of a differential diagnosis.

The jury delivered their verdict in one hour and 15 minutes and never requested a copy of the trial exhibits. Plaintiff's counsel asked the jury for $2.63 million, and the jury awarded more than was asked — $2.75 million. The verdict amount is the largest in Macomb County thus far in 2022.

Plaintiff's law firm provided case information.

Type of action: Dental malpractice

Injuries alleged: Injured carotid and lingual arteries, causing massive hemorrhage

Name of case: Webster v. Osguthorpe

Court/Case no./Date: Macomb County Circuit Court; 4/14/2022

Tried before: Jury

Demand: $2,630,000

Highest offer: $0

Verdict amount: $2,750,000

Attorneys for plaintiff: Vince Colella and Melanie Duda, Southfield

Construction

Jury sides with homeowner in construction dispute

$2.5 million verdict

The plaintiff contracted to remodel the defendant's home within seven months. After 14 months, the defendant terminated the plaintiff, and the plaintiff liened the property. Eventually, the trial court struck the plaintiff's lien, but by then, the cost of construction had escalated, and the bank would not release additional funds to complete the project or repair extensive water damage to areas of the home not part of the scope of work, both of which continued to increase during and after Covid.

The jury returned a no cause on the plaintiff's claims and found for the defendant on his counterclaims. The derdict was $2,500,000, judgment was $2,760,640.63.

A confidential settlement was reached while motions were pending for new trial, JNOV.

Type of action: Construction

Injuries alleged: Both parties claimed breach of contract, Defendant also claimed negligence

Name of case: Superb Custom Homes v. James Mick

Court/Case no./Date: Oakland County Circuit Court; 18-164657-CK; 4/14/2022

Tried before: Jury

Name of judge: Hon. Cheryl A. Matthews

Name of mediators: Ron Strote and Thomas Ryan

Demand: $133,000 for Plaintiff; $950,00 for defendant

Highest offer: $0 for both parties

Case evaluation: Mixed

Verdict amount: $2,500,000 for defendant on counterclaims

Most helpful experts: Steve Templeton and Robert Clarke

Insurance carrier: Cincinnati

Attorneys for defendant: Steven A. Matta and Sabrina Cronin, Bloomfield Hills

Medical Malpractice

Man suffered rare complication after surgical procedure

$2,475,000 verdict

Mohammmed Khalique, 61, underwent a right sided cervical fusion on July 13, 2016, performed by defendant Martin Kornblum at Ascension Macomb Hospital.

During the surgery Dr. Kornblum unknowingly injured the right laryngeal nerve, which is a recognized though rare complication of cervical fusion surgery.

Shortly after the surgery, Mr. Khalique began to experience trouble breathing, shortness of breath and problems speaking. An otolaryngology consult was requested and, following a laryngoscopy, a diagnosis of bilateral laryngeal nerve palsy was formed.

Surgeons performed a permanent tracheotomy to permit Mr. Khalique to breathe and save his life. The la al nerve palsy caused Mr. Khalique to be unable to breathe normally, caused pain and interfered wi s ability to talk.

Mr. Khalique was discharged with the tracheotomy after a week's stay in the hospital. He experienced continuing problems with breathing, sleeping, talking and underwent several surgical procedures. Ultimately, the tracheotomy was reversed after approximately two years.

The plaintiff's theory of negligence was based upon the fact that several years prior to the 2016 surgery, Dr. Kornblum performed a cervical spine fusion on Mr. Khalique below the second surgery site with a left sided approach. He failed to consider Mr. Khalique may have suffered an injury to the laryngeal nerve on the left side during the prior surgery. Laryngeal nerve injuries following spine surgery are sometimes asymptomatic and not diagnosed when only one side is injured. The standard of care when performing a repeat cervical repair surgery or revision requires the surgeon to consider a previous nerve injury during the first surgery and order a simple laryngoscopy exam to determine nerve injury or approach the spine with the incision on the same side as the earlier surgery. Dr. Kornblum failed to do either.

The defense argued Mr. Kornblum had no reason to suspect a previous nerve injury and subtly blamed his patient for not telling Dr. Kornblum about it. The defendants also claimed it was not economically feasible to consider nerve palsy in every revision surgery despite requiring at least two MRIs and medical clearance costing much more than a laryngoscope would have prior to performing the 2016 surgery.

Dr. Fishgrund, plaintiff's expert, clearly won the "battle of experts," according to plaintiff's counsel. He trained defendant Dr. Kornblum and Dr. Kornblum's expert when they were residents. He also edited the textbook published by the American College of Orthopaedic Surgeons. The book, together with several learned treatises which supported the plaintiff's theory, allowed the plaintiff to cross examine the defendant and his expert and destroy the defense witnesses' credibility.

Paul W. Broschay, counsel for the plaintiff, provided case information.

Type of action: Medical malpractice

Injuries alleged: Vocal cord paralysis resulting in permanent tracheotomy

Name of case: Mohammed Khalique v. Martin Kornblum, M.D. & Mendelson Orthopedics

Court/Case no./Date: Macomb County Circuit Court; 19-00089-NH; 01/31/2022

Tried before: Jury

Name of judge: Visiting Judge William Giovan

Demand: $350,000

Highest offer: $0

Case evaluation: $350,000

Verdict amount: $2,475,000

Special damages: No economic damages were awarded

Most helpful experts: Jeffrey Fischgrund, M.D., orthopaedic surgeon, Southfield

Attorneys for plaintiff: Paul W. Broschay, Detroit

No Fault

6-year battle for benefits ends in multimillion-dollar verdict

$2,135,991 verdict

H[illegible]s Kaur, a 76-year-old wife, mother and grandmother, was walking in a residential neighborhood of Ca[illegible]n. She was struck while crossing the street by a vehicle owned and operated by a driver insured by defendant Citizens Insurance Company. Kaur, a Canadian citizen, stayed with her son in Michigan six months out of the year, and stayed in Canada with her other children the other six months.

She suffered catastrophic injuries, including an acetabular fracture, pelvic fractures, nasal fracture, broken tooth, a rotator cuff tear and TBI.

The driver told police at the scene that he hit Kaur and he apologized to the family. He was given a hazardous action by the police. Kaur could not remember anything from the accident. Her husband, who was walking with her, did not see her get hit because he was talking to a neighbor, but he heard a loud "thump" when her body was hit.

The defendant driver changed his story after the accident and claimed Kaur simply "fell over" 1-2 feet in front of his vehicle. He called the police officer and told him his police report was wrong and asked him to change it.

Kaur's family made a claim for no-fault insurance benefits with Citizens. Citizens did a minimal investigation over 13 days and denied the claim on the basis that, under the no-fault act, Kaur had to go through her son's insurance. Kaur's family made a claim with her son's insurance, Meemic, which paid a small amount of benefits before cutting Kaur off for the reason that it determined Citizens was the responsible insurer.

The conflict between the insurer companies was based on domicile. If Kaur was domiciled in Canada, Citizens was responsible to pay. If she was domiciled in Michigan, Meemic was responsible. The insurance companies fought each other for six years. The case went to the Michigan Court of Appeals twice on this and other issues.

At trial, the insurance companies pointed fingers at each other. Citizens made the claim that Kaur fell over in the street, she was not hit by a car at all and was not entitled to no fault benefits. However, Citizens IME doctor admitted Kaur was hit by a car. Every witness who testified other than the driver and

a biomechanical expert for the defense was forced to admit that Kaur was hit by a car, including every medical professional.

The jury did not believe the driver. Before trial, plaintiff's counsel obtained a court order allowing a forensic examination of the driver's cell phone. The exam revealed the driver was Googling things like "what is my liability for a car accident in Michigan," and "what are caps on damages in Michigan for a car accident" and "how much will a jury award for a car accident." The driver deleted this search history prior to giving his phone to the forensic examiner, but this was able to be recovered. The driver's phone records indicated he talked to the insurance company 36 minutes prior to calling the police officer to change his story.

The jury was out about 2.5 hours before coming back with a unanimous verdict.

A motion for attorney fees and costs is pending. Plaintiff expects more than $1 million in extra attorneys' fees and costs.

Jon Marko, counsel for the plaintiff, provided case information.

Type of action: No Fault

Injuries alleged: Attendant care, medical bills, replacement services

Name of case: Kaur v. Citizens and Meemic Insurance Company

Court/Case no./Date: Wayne County Circuit Court; 17-014352-NI; 11/16/2022

Tried before: Jury

Name of judge: Hon. Dana Hathaway

Demand: $2.5 million (inclusive of fees)

Hi t offer: $0

Case evaluation: $200,000

Verdict amount: $2,135,991.03, plus no fault attorneys' fees and costs

Most helpful experts: Tim Robbins, accident reconstruction; Dr Jeffrey Rosenberg, treating PMR; Dr. Mark Hake, treating ortho

Insurance carrier: Citizens

Attorneys for plaintiff: Jon Marko, Detroit; Manny Chahal, Bingham Farms

Inverse Condemnation

City seized plaintiff's property without just compensation

$1,976,820 verdict

HRT Enterprises filed this inverse condemnation case because of the City of Detroit's interference with its use of the property.

Judge Cohn granted summary judgment on liability. A prior trial determined that the taking of plaintiff's property occurred on Jan. 1, 2009. The jury in the second trial decided that the value of plaintiff's property was $1,976,820 as of that date.

The court will award pre-judgment interest and statutory attorney's fees under 42 USC Section 1983.

Plaintiff's counsel Mark Demorest provided case information.

Type of action: Inverse condemnation

Injuries alleged: Taking of private property without just compensation

Name of case: HRT Enterprises v. City of Detroit

Court/Case no./Date: U.S. District Court, Eastern District of Michigan; 12-CV-13710; 08/26/2022

Tried before: Jury

Name of judge: Hon. David M. Lawson

Verdict amount: $1,976,820

Most helpful expert: Andrew Reed, appraiser

Attorneys for plaintiff: Mark S. Demorest, Royal Oak; Neil Strefling, Madison Heights

Negligence

Woman choked, died while under facility's care

$1.3 million verdict

Margaret Baker choked to death on an uncut roast beef sandwich while in the care of the defendant, Life Skills. Margaret was bipolar and schizophrenic, and had Parkinson's disease. She was 71 years old. Margaret was survived by three adult children and nine grandchildren.

Life Skills knew about her choking risk but failed to cut her sandwich up before serving it to her. The defendant's insurer refused to consider a high-low with a high in excess of $1 million; no other settlement discussions occurred.

Marc Lipton, counsel for the plaintiff, provided case information.

Type of action: Negligence

Injuries alleged: Wrongful death

Name of case: Baker Estate v. Life Skills Centers, Inc.

Court/Case no./Date: Macomb County Circuit Court; 2018-000594-NO; 05/18/2022

Tried before: Jury

Name of judge: Hon. Jennifer Faunce

Highest offer: $125,000

Case evaluation: $750,000

Verdict amount: $1,300,000

Insurance carrier: Selective Insurance

Attorneys for plaintiff: Chris Camper and Marc Lipton, Southfield

Civil Rights

Man suffered PTSD after being attacked at work

$1,269,952 verdict

A Macomb County jury rendered a $1,269,952 verdict against the State of Michigan (Michigan Department of Corrections).

The plaintiff, Darin Rushing, developed severe post traumatic stress disorder, or PTSD, after he was attacked by a prisoner at work. When Mr. Rushing returned to work and asked to be kept away from the prisoner, he allegedly was targeted by MDOC management, and his career was ruined, according to plaintiff's counsel.

Jon Marko, counsel for the plaintiff, provided case information.

Type of action: Civil rights

Injuries alleged: Post traumatic stress disorder

Name of case: Rushing v. MDOC

Court/Case No./Date: Macomb County; 19-001635-CD**;** 04/12/2022

Name of judge: Hon. Edward Servitto Jr.

Verdict amount: $1,269,952

Attorney for plaintiff: Jon Marko, Detroit

No Fault

Jury sides with plaintiff after insurer fails to pay no-fault benefits

$1,221,097.31 verdict

The plaintiff obtained a verdict against the defendant insurance company for failure to pay no-fault benefits, including replacement services, attendant care and medical, arising out of a severe car crash. The jury found for the plaintiff and awarded more than $100,000 in interest.

The plaintiff filed a motion for attorneys' fees and costs under the no-fault act. The defendant opposed the motion. The trial court found that the plaintiffs were entitled to attorneys' fees and costs because the jury awarded interest, and implicit in this finding was that the defendant unreasonably withheld benefits. The defendant could not overcome this presumption.

The defendant argued that the plaintiff's attorney rate should be reduced because he normally practices in complex civil rights and employment matters, not PIP matters. However, the trial court rejected this argument and found that the plaintiff's counsel warranted a fee in the 95% percentile of lawyers in the similar practice area / location. The trial court further found that an upward adjustment was warranted for plaintiff's counsel given his professional standing and experience; the skill time and labor involved; and the exceptional results achieved, among other factors. Accordingly, plaintiff's counsel was awarded $750 per hour. The total verdict was $1,221,097.37 before interest was added.

Jon Marko, counsel for the plaintiff, provided case information.

Type of action: No fault

Injuries alleged: Attendant care, replacement services, interest and medical

Name of case: Jackson v. Pioneer Mutual Insurance

Court/Case no./Date: Wayne County Circuit Court; 19-002256-NF; 01/19/2022

Tried before: Jury

Name of judge: Hon. Muriel Hughes

Verdict amount: $1,221,097.31

Attorney for plaintiff: Jon Marko, Detroit

Premises Liability

Women falls, injured heading into workplace

$1.2 million verdict

On Feb. 21, 2014, the plaintiff attempted to enter her workplace. Her employer was a tenant in the defendant's strip mall. The wintery conditions could not be avoided and she fell. As a result, she sustained severe injuries to her lower back. The plaintiff passed away from unrelated causes in 2020.

The plaintiff's video deposition was secured in 2019 while this case was pending in the Court of Appeals. The Michigan Supreme Court's June 30, 2021 opinion allowed this case to get to a jury. Case evaluation sanctions will apply.

Christopher Baratta, counsel for the plaintiff, provided case information.

Type of action: Premises liability

Injuries alleged: L4-L5 fusion surgery

Name of case: Estate of Livings v. Sage's Investment Group, LLC

Court/Case no./Date: Macomb County Circuit Court; 16-001819-NI; 12/16/2022

Tried before: Jury

Name of judge: Hon. Edward A. Servitto

Demand: $1,000,000

Highest offer: $300,000

Case evaluation: $360,000

Verdict amount: $1,200,000

Most helpful expert: Martin B. Kornblum, M.D.

Insurance carrier: Michigan Insurance Company

Attorney for plaintiff: Christopher R. Baratta, Mount Clemens

Underinsured Motorist

Plaintiff needed arthroscopic surgeries on both knees after accident

$1 million verdict

This was an underinsured motorist claim. The plaintiff recovered $100,000 from the tortfeasor on the underlying policy.

The plaintiff struck her left knee on the dashboard and had arthroscopic surgery. Due to overcompensation, she injured her right knee and underwent three additional arthroscopic surgeries.

The main issue in this case was proximate cause. The defendant contended the injury to the left knee was a bruise or contusion and did not require arthroscopic surgery. The defendant further contended that the right knee injury was not related to the accident.

David Jeffrey Elkin, counsel for the plaintiff, provided case information.

Type of action: Underinsured motorist claim

Injuries alleged: Injuries to both knees

Name of case: D'Love v. Auto Owners

Court/Case no./Date: Wayne County Circuit Court; 18-008141-NI; 7/26/2022

Tried before: Jury

Name of judge: Hon. Leslie Kim Smith

Demand: $150,000

Highest offer: $50,000

Case evaluation: $15,000

Verdict amount: $1,000,000

Insurance carrier(s): Auto Owners

Attorney for plaintiff: David J. Elkin, Farmington Hills

Racial Harassment

Lansing firefighter faced harassment, racial bias

$1 million verdict

This was a racial harassment case where the plaintiff, an African American, was harassed and discriminated against based on his race. Evidence at trial established that the Lansing Fire Department had a race problem, and that the plaintiff was harassed on a regular basis, including an incident where a banana was pinned between the windshield wiper and windshield when he got to work one morning.

De[illegible]e the plaintiff's multiple complaints nothing was ever done; instead he was targeted, and the ha[illegible]ment got worse.

The trial involved a limited period of time between January 2016 and February 2021 during which the plaintiff had no economic damages.

Plaintiff's counsel Scott Batey provided case information.

Type of action: Racial harassment

Injuries alleged: Emotional damages

Name of case: Lynn v. City of Lansing

Court/Case no./Date: U.S. District Court for the Western District of Michigan; 19-cv-00039; 10/08/2022

Tried before: Judge

Name of judge: Hon. Paul L. Maloney

Demand: $200,000

Highest offer: $6,000

Verdict amount: $1,000,000

Attorney for plaintiff: Scott Batey, Bingham Farms

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Hospital negligence caused child's brain damage: plaintiff

hospital staff failed to recognize the seriousness of the breath-holding episode, thus delaying the code blue call and resulting in severe brain damage. William Beaumont Hospital did not dispute that Vihn had a breath-holding spell, but argued that it was not due to any negligence on the part of its staff. The hospital claimed the medical team responded appropriately and the outcome was simply unfortunate.
Tran v. William Beaumont Hospital
Oakland County

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Plaintiff attributed bowel perforation to gastric bypass

A verdict of $836,000 was awarded to a man who suffered a bowel perforation following bariatric surgery. Karl Thomsen alleged that a pre-operative sleep apnea assessment showed he had a very high likelihood of severe obstructive sleep apnea. He argued that this sleep apnea led to his post-surgical complications and the bariatric surgery should not have been performed until the apnea was under control. He also argued that other factors increased his risk of post-surgical complications from an open Roux-en-Y and that a laparoscopic sleeve gastrectomy was less risky. He said Dr. Michael Nizzi failed to inform him of the relative risks. Nizzi said he acted within the standard of care and had explained the risks of the procedure to Thomsen.
Thomsen v. Nizzi
Grand Traverse County

View case +

Officer negligently shot, killed 7-year-old girl, per lawsuit

The shooting death of a 7-year-old girl prompted an $8.25 million settlement with the city of Detroit. Aiyana Stanley-Jones was inside her home when she was fatally shot in the head. The gun of Detroit officer Joseph Weekley fired the shot. Weekley and other officers were looking for a man who lived in an adjoining unit of the same duplex. They entered the home after a stun grenade was thrown through the

accidental.

Jones v. Doe

Wayne County

View case +

Largest Michigan Jury Verdicts

(2023 only; based on cases reported to VerdictSearch)

VERDICT	CASE	VENUE	DATE
$96,000,000	Attianese v. Nogueras	Wayne Co.	April 19
$31,620,938	Berthiaume v. MidMichigan Medical Center-Midland	Midland Co.	May 25
$18,500,000	Estate of Montie v. Crossfire LLC	Federal	May 24
$14,500,000	McCann v. Fuller	Federal	Sept. 19
$11,056,718	Mikhail v. Hawasli	Wayne Co.	Sept. 12
$9,702,296	Estate of Allen v. Dixit	Macomb Co.	April 27
$9,500,000	Estate of Caldwell v. H & M Citgo Inc.	Washtenaw Co.	May 30

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$9,300,000	Gonzales-Hall v. City of Dearborn	Wayne Co.	June 13
$8,320,000	Wood v. City of Detroit	Wayne Co.	June 1
$4,197,000	Sefcik v. Leisman	Kent Co.	March 24

Officer negligently shot, killed 7-year-old girl, per lawsuit ***Read More >*** **Hospital negli**