

# Michigan Supreme Court Overrules *Denney*, Eliminates Plaintiffs' Ability to Recover Lost Earning Capacity Damages Under Wrongful Death Act

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The Michigan Supreme Court recently issued a long-anticipated opinion in *Daher v Prime Healthcare Servs-Garden City, LLC*, \_\_\_ Mich \_\_\_ (2024), holding that Michigan's Wrongful Death Act (WDA) does not allow for the recovery of lost future earnings.

The opinion reaffirms *Baker v Slack* and overrules the often relied on *Denney* decision by the Michigan Court of Appeals.

In *Daher*, the parents of the decedent brought a medical malpractice action under the WDA, alleging that the defendants failed to diagnose and treat bacterial meningitis in their 13-year-old son. The complaint sought damages for the decedent's lost future earnings, which plaintiffs' expert valued between \$11 million and \$19 million. The appellate court relied on *Denney v Kent Cnty Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016) to affirm the denial of summary disposition to the defendants, rejecting application of *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948). The Supreme Court granted leave, directing the parties to address whether the estate of a child may recover damages for the child's lost future earnings.

In *Baker*, the Supreme Court, applying a predecessor to the modern WDA, held that a plaintiff's damages must be tethered to the decedent's support or maintenance of the plaintiff. As the high court put it, a wrongful death plaintiff's "right to recover for pecuniary loss must be predicated upon the existence of some next of kin having a legally enforceable claim to support maintenance by the deceased." *Baker*, 319 Mich at 714. That holding precluded recovery in a wrongful death action of a decedent's lost earning capacity.

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Decades after the Supreme Court's decision in *Baker*, the Court of Appeals issued *Denney*, which contradicted *Baker* and held that a wrongful death plaintiff could recover for the decedent's lost earning capacity, in addition to loss of financial support provided by the decedent. Since its issuance, a number of courts have followed *Denney* rather than the Supreme Court's decision in *Baker*.

But in its recent ruling, the Supreme Court in *Daher* put a stop to this continued reliance on *Denney*. In doing so, the high court first rejected the argument that deletion of the "pecuniary injury" phrase in the 1971 amendments to the WDA demonstrates an intent by the Legislature to transform the WDA's list of damages from an exclusive to a non-exhaustive list. The Supreme Court relied on *Baker*, explaining that "the threshold determination in *Baker* was that the WDA only provides for enumerated damages."

The *Daher* opinion also rejects the argument that addition of the "under all of the circumstances" language via the 1971 amendments demonstrated an intent by the Legislature to broaden the types of recoverable damages under the WDA. The Supreme Court explained that such language applies to the jury's role of determining the *amount* of damages, not the *type* of damages.

The Supreme Court also disagreed that insertion of the word "including" into the WDA as part of the 1971 amendments demonstrates clear action by the Legislature to overrule *Baker* and abrogate the common law. The high court reasoned that to "effect such a sea change in the WDA ... the Legislature must be clear and 'speak in no uncertain terms.'"

The *Daher* court noted the following additional points in support of its decision:

- The fact that the Legislature explicitly added loss of society and companionship damages in the 1971 amendments ("[w]hy ... would the Legislature go to this trouble of specifying this new damages category if the word 'including' already accomplished the task?");
- providing the jury with the discretion to determine the type of damages available is contrary to the legal norm that the *court* determines what *type* of damages are available, and the *jury* determines the *amount* of damages;
- the 1985 amendments to the WDA added another specific type of damages—loss of financial support—and the fact that the Legislature adopted loss of financial support and not loss of future earnings "indicates that it was doing so to the exclusion of damages for a decedent's future earnings (or at least to clarify that they were not permitted)."

Because the Supreme Court's holding in *Baker* was never explicitly superseded by the Legislature or clearly overruled by the Supreme Court, the Supreme Court in *Daher* held that the Michigan Court of Appeals was bound to follow *Baker* and erred by failing to do so. Under *Baker*, which *Daher* reaffirms, lost-earning-capacity damages are not available under the WDA.

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The *Daher* opinion is a huge development in the realm of tort law, especially since the current Supreme Court does not tend to reach such defense-friendly outcomes. The decision will significantly reduce the amount of damages plaintiffs can seek in wrongful death actions, limiting the recovery of future earnings only to financial support the decedent *would* have provided to beneficiaries, and excluding loss-of-earning capacity damages that the decedent *could* have earned.

**Key Takeaway:** In *Daher*, the Michigan Supreme Court confirmed (as was held decades earlier in *Baker v Slack*) that Michigan's Wrongful Death Act does not allow for the recovery of lost future earnings. As can be seen from the amount of lost future earnings sought by the plaintiffs in *Daher* (between \$11 million and \$19 million), the *Daher* opinion significantly reduces the damages available to plaintiffs in wrongful death actions and is a huge victory for the Michigan defense bar.