

IN THE MICHIGAN SUPREME COURT

SHAKEETA SIMPSON, as Personal
Representative of the ESTATE OF ANTAUN
SIMPSON,

Plaintiff-Appellee,

Supreme Court Case No. 152036
Court of Appeals Case No. 320443
Wayne County Circuit Court Case
No. 13-000307-NH

and

SHAKEETA SIMPSON, Individually,

Plaintiff,

v

ALEX PICKENS, JR. & ASSOCIATES, M.D.,
P.C., a Michigan corporation, d/b/a PICKENS
MEDICAL CENTER, BRIGHTMOOR GENERAL
MEDICAL CENTER INCORPORATED, a
Michigan Corporation, d/b/a BRIGHTMOOR-
PICKENS MEDICAL CENTER, ALEX PICKENS
JR., M.D., and LINDA S. HARTMAN, P.A.,

Defendants-Appellants.

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**BRIEF OF AMICUS CURIAE
RIGHT TO LIFE OF MICHIGAN**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Right to Life of Michigan, Inc. (“Right to Life of Michigan”) submits this *amicus curiae* brief in response to an invitation issued by the Michigan Supreme Court in its Order dated April 6, 2016. Right to Life of Michigan is a statewide non-profit advocacy organization dedicated to advancing respect and legal protection for the inalienable right to life of every human being from conception until natural death. Established in 1972, Right to Life of Michigan engages in legislative advocacy and the advancement of prolife public policy. The organization has played a direct role in the enactment of dozens of Michigan statutes, including the statutes at issue in this case. Right to Life of Michigan appears before this Court on behalf of its hundreds of thousands of members across Michigan with an interest in preserving the intent and effect of the statutes in question, and as an organization intimately involved in the legislative process that produced the statutes in question.

The opinion of the Court of Appeals in this matter involves an issue of fundamental importance to *amicus curiae*.

QUESTION PRESENTED FOR REVIEW

Amicus Curiae, the Right to Life of Michigan, addresses the following issue, as framed by the Michigan Supreme Court:

I. SHOULD THIS COURT DENY DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL SINCE THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PLAINTIFF NEED NOT MEET THE AFFIRMATIVE-ACT REQUIREMENT OF MCL 600.2922A TO HAVE A VIABLE CAUSE OF ACTION UNDER MICHIGAN'S WRONGFUL-DEATH ACT, MCL 600.2922?

Amicus Curiae responds, "Yes."

INTRODUCTION

The Court of Appeals correctly interpreted Michigan's wrongful-death act as amended. The Court of Appeals correctly found the language of the wrongful-death act unambiguous and not susceptible to multiple meanings. *Amicus curiae* reinforces the Court of Appeals' premises and findings for the following reasons:

(1) Michigan's wrongful death act establishes liability and creates a cause of action for death caused by an omission. *Johnson v Pastoriza*, 491 Mich 417, 437; 818 NW2d 279, 289 (2012) (discussing that "neglect" and "fault of another" in MCL 600.2922(1) allows liability for wrongful-death caused by omission).

(2) When the Court of Appeals decided *McClain* in 2003, it held that the wrongful-death act did not apply to claims regarding a "non-viable" unborn child. *McClain v University of Michigan Bd of Regents*, 256 Mich App 492; 665 NW2d 484 (2003).

(3) Two years later in 2005, the Michigan Legislature expressly rejected the holding in *McClain* and amended the wrongful-death act to include a cause of action for the death of an unborn child, regardless of viability.

(4) Therefore, Michigan's wrongful-death act now provides a claim for the wrongful death of an unborn child, regardless of viability, caused by an omission.

(5) Defendants' argument that the wrongful-death act precludes a claim based on the death of a "non-viable" unborn child lacks merit. Grounded in flawed legal reasoning, it manifests illogical inconsistencies with the statutory scheme that one cannot credibly attribute to the intent of Michigan's Legislature.

The Court of Appeals' interpretation of Michigan's wrongful-death act provides a clear and exact understanding of the law and should be upheld. This Court should, therefore, deny Defendants' application.

BACKGROUND

Right to Life of Michigan adopts and incorporates by reference the Statement of Facts and History contained in Plaintiff-Appellee's Brief in Response to Defendants' Application for Leave to Appeal.

ANALYSIS

A. Overview

This appeal involves the interpretation of the phrase "or death as described in section 2922a," found in Michigan's wrongful-death act, MCL 600.2922(1) (hereinafter the "Act"). The legislature amended the Act in 2005 to expressly ensure its application to the death of unborn children. This application is not confined by the requirements of MCL 600.2922a, which required claims under the Act to be caused by an affirmative act. The appellate court, therefore, correctly held that the Act, as amended, did not require a wrongful-death claim be caused by an affirmative-act pursuant to MCL 600.2922a. For the following three reasons, this Court should deny Defendants' application for leave to appeal:

First, Plaintiff's underlying claim is a medical malpractice claim. The medical malpractice liability theory unquestionably recognizes a viable cause of action for an instance of "passive negligence"—commonly known as an omission.

Second, Michigan's wrongful-death act allows for a cause of action based on a negligent omission. Importantly, it further recognizes an action involving the death of an embryo or

unborn child regardless of his or her gestational age. Nothing in the plain language of the Act states or implies an exemption for negligent omissions applying to unborn children.

Third, Defendants' complicated and revisionist interpretation of the Act injects legal contradictions into the reading and understanding of the Act so as to render Defendants' proposed interpretation logically inconsistent and thus not credibly attributable to Michigan's Legislature.

B. Medical Malpractice is the Underlying Claim

Defendants are medical care providers accused of failing to provide a medical procedure deemed necessary to prevent the death of Plaintiff's unborn child. Thus, the Michigan Court of Appeals correctly identified the underlying claim for this action as medical malpractice, specifically in the form of an omission. Plaintiff did not assert a claim under section 2922a. The underlying claim is medical malpractice, and it is clear that a viable claim for medical malpractice exists when a negligent omission by a medical provider results in death. *Jenkins v Patel*, 471 Mich 158, 165-166; 684 NW2d 346 (2004); *Johnson v Pastorzia*, 491 Mich 417, 437; 818 NW2d 279 (2012).

C. Wrongful Death Actions Apply to Omissions and to Unborn Children

As with medical malpractice claims, negligent acts of omission are actionable under the wrongful-death act. *See Johnson* at 437. The Act applies to actions that result in the death of an embryo or unborn child, regardless of the child's age of gestation. Therefore, the appellate court fittingly held: "There is no dispute in this case that a wrongful-death action may be brought on behalf of a nonviable fetus." *Simpson v Pickens*, 311 Mich App 127, 133; 874 NW2d 359 (2015).

Defendants contend that when the legislature amended MCL 600.2922(1) to include an embryo or unborn child as a potential decedent in a wrongful death action by referencing "a

death described in Section 2922a,” that the legislature intended the following: In wrongful death actions, negligent omissions are actionable, and medical malpractice cases involving omissions are actionable, but if the decedent is an embryo or unborn child, then negligent omissions are not actionable, only “affirmative acts” of negligence are actionable. Defendants’ contention strains logical credulity.

In 2003, the Court of Appeals decided *McClain v University of Michigan Bd of Regents*, a case involving a nearly identical circumstance of medical malpractice by omission for failure to perform a cervical cerclage. 256 Mich App 492; 665 NW2d 484. Plaintiff McClain predicated her medical malpractice and wrongful death claims on the loss of her unborn child caused by omission. *Id.* at 493-95. Plaintiff McClain asserted that the treating physician’s failure to perform a medical procedure caused her to miscarry her child. *Id.* The Court of Appeals, at that time, held that Michigan’s wrongful-death act failed to provide the plaintiff with a cause of action because her unborn child was not a person, for purposes of Michigan’s wrongful-death act. *Id.* at 495-96.

The Michigan Legislature responded to the holding in *McClain* by promptly amending the wrongful-death act to reverse the court’s opinion. MCL 600.2922, amended by 2005 PA 270. Thus, the legislative intent underlying the statutory language on which the Plaintiff in this case relies, intentionally and expressly extended the wrongful-death act to include the death of an embryo or unborn child. Significantly, the claim in the case that provoked the 2005 amendment to the Act is almost identical to the factual claim Plaintiff asserts in this case.

Logic compels the conclusion that the legislature’s intent in amending the Act was to prevent another outcome like *McClain*, in which the court held that the wrongful-death act does not provide redress for the death of an unborn child due to the omission of a medical care

provider. Further, the Michigan Legislature manifested its intent by amending the Act to incorporate by reference another definitional provision that already applied to the death of an unborn child. Defendants, inexplicably, seek to portray this common legislative practice of referencing existing definitions, in what was an obvious expansion of the Act's scope, as a partial restriction of which claims are meritorious under the Act. The clear language of the Act prohibits Defendants' interpretation. But even if this Court were to find some potential ambiguity here, this Court would still need to refrain from overriding the will of the legislature by interpreting the Act in a way that would defeat the legislature's intent. Here, the legislature's unmistakable intent was to extend the Act's full protection to the wrongful death of an unborn child.

D. Defendants' Desired Statutory Interpretation Creates Illogical Contradictions in the Law

Defendants contend the legislature intended its 2005 amendment to subsection 2922(1), (inserting the phrase "or death as described in section 2922a,") to describe not only the death of an embryo or unborn child, *but also the manner of death*. Defendants insist that in interpreting subsection 2922(1), this Court must read the phrase "death as described in section 2922a" to exclude a negligent omission theory of the case. This interpretation, however, creates inherent contradictions within subsection 2922(1) on three levels.

First, the phrase "death as described in section 2922a" is identically inserted into subsection 2922(1) in two places within the same sentence. MCL 2922(1) provides a cause of action for "death as described in section 2922a" that is "caused by wrongful act, neglect, or fault of another." Later, in the same sentence, MCL 2922(1) provides that a person who causes such

death through wrongful action or negligence “shall be liable to an action for damages, notwithstanding . . . death as described in section 2922a.”

When the legislature “repeatedly uses the same phrase in a statute, that phrase must be given the same meaning throughout the statute.” *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010); *Hannay v Mich Dep’t of Transportation*, 497 Mich 45, 62, n 40; 860 NW2d 67 (2014). Defendants’ interpretation offers two different meanings of the phrase not only within the same section of law, but in the same sentence. It is clear that the second instance of the phrase “or death as described in section 2922a” describes the death of an embryo or unborn child with no reference to the manner of death or the level of tortious culpability required to bring a claim under the Act. Yet, Defendants argue that the first instance of the phrase pertains to a limitation on a plaintiff’s ability to bring a claim for wrongful death due to passive negligence or omission. Defendants’ reading would have one instance of the phrase refer to the manner of death and the level of culpability needed for an actionable wrongful death claim, while having the identical phrase used later in the same sentence *not* do so. The Court should not apply such an uneven and contradictory approach to statutory interpretation.

Second, with the inclusion of the 2005 amendment to subsection 2922(1), the word “death” appears eight times in the subsection. In none of the other seven instances is there an understanding of the word “death” that incorporates or implies that any element of the manner or cause of the death is a necessary qualifier of the word “death.”

Finally, given the clear language and longstanding interpretation of the wrongful-death act as encompassing both affirmative and passive negligent acts, Defendants’ proposed interpretation attributes to the legislature’s 2005 amendment a contradiction as to the manner or

cause of death covered by the act. The practical effect of Defendants' interpretation would have subsection 2922(1) read as follows:

“(1) Whenever the death of a person, injuries resulting in death, or [the death of an embryo or fetus caused by a wrongful act or an act of affirmative negligence, but excluding passive negligence] shall be caused by wrongful act, neglect [which includes both passive and affirmative negligence], or fault of another, and the act, neglect [which includes passive or affirmative negligence], or fault is such as would, if death had not ensued”

Such a tortured interpretation of the simple phrase “death described,” creates contradictory standards for negligence. No evidence or reason suggests that the legislature’s 2005 amendment intended to eliminate acts of passive negligence in this one narrow instance. Indeed, such an interpretation defies the very purpose of the 2005 amendment.

Simply put, if the “death described in section 2922a” is *only* the death caused by *active* negligence, as Defendants insist, then it is very difficult to see how it could be “caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault,” which clearly includes *passive* negligence. *See, e.g., Johnson, supra*, at 437.¹ Alternatively, if the “death described in

¹ Defendants’ entire theory of how to read section 2922(1) depends upon this Court’s interpretation of section 2922a in *Johnson* which did not appear until 2012. Yet, the amendment to section 2922(1) was added *seven years earlier*. It is pure speculation to suggest that the 2005 legislature, in referencing 2922a, presumed that they were incorporating liability limited only to active negligence. Even if the legislature did intend in 1998 to distinguish between various types of negligent liability when crafting section 2922, that has no bearing on the intention of a later legislature amending a different section of law.

Amicus curiae assert that the reasoning in *Johnson* regarding passive negligence is flawed and contradicted by the entire context of the legislature’s actions to extend wrongful-death protection to the unborn. At each turn, when a court decision has undermined legislative action to extend both criminal protection and civil liability for unborn victims of criminal, wrongful, and negligent conduct, the Michigan Legislature responded by passing a new law to contravene the court’s decision. *McClain*, 256 Mich App 492; 665 NW2d 484; *see also People v Fletcher*,

2922a” refers to the death of an embryo or unborn child, then it is very easy to understand how it fits into the context of the Act’s creation of liability for passive negligence.

The Court of Appeals’ statutory interpretation is correct on every point. The language of the Act is unambiguous. The phrase “a death described in section 2922a” plainly refers to the “death of an embryo or fetus.” This unambiguous interpretation obviates the Defendants’ attempt to unduly complicate the phrase and to undermine the legislature’s clear intent.

RELIEF REQUESTED

Based on the foregoing, *amicus curiae* respectfully requests that this Court deny Defendants’ application for leave to appeal in its entirety.

Respectfully submitted,

GREAT LAKES JUSTICE CENTER

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260 Mich App 531; 679 NW2d 127 (2004) (prompting the legislature to amend both MCL 600.2922a and its criminal parallel, MCL 750.90a). *Amicus curiae*, as a party uniquely and intimately involved in the crafting of this legislation and in advocating for the rights of the unborn, finds the various court rulings in *Fletcher*, *McClain*, and *Johnson* blatantly antithetical to the substantive context and purpose of the legislature’s repeated enactments.