

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court Case No. 152036

Court of Appeals Case No. 320443

Plaintiff-Appellee,

Wayne County Circuit Court Case
No: 13-000307-NH

and

SHAKEETA SIMPSON,

Plaintiff,

-vs-

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.

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF

EXHIBITS (ATTACHED SEPARATELY)

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EXHIBITS (ATTACHED SEPARATELY)

1. April 6, 2016 Supreme Court order;
2. June 16, 2016 Court of Appeals published opinion;
3. January 24, 2014 order granting defendants’ motion for partial summary disposition and dismissing plaintiff’s wrongful death claim only;
4. December 19, 2013 transcript;
5. Pertinent statutory provisions;
6. November 28, 2005 Senate Fiscal Agency First Analysis.

STATEMENT OF QUESTION PRESENTED

Whether a plaintiff must meet the affirmative act requirement of MCL 600.2922a in order to bring a wrongful death action under MCL 600.2922 for the death of a fetus or embryo?

Plaintiff argues the answer is “No.”

Defendants submit the answer is “Yes.”

The Court of Appeals held the answer is “No.”

The trial court held the answer is “Yes.”

STATEMENT OF FACTS

Plaintiff filed the instant action in the Wayne County Circuit Court on or about January 7, 2013 alleging a claim of medical malpractice/wrongful death, asserting that defendants were negligent in the prenatal care and treatment rendered to plaintiff Shakeeta Simpson, allegedly resulting in the death of Antaun Simpson, a nonviable fetus, at 18.2 weeks gestation (see complaint, ¶¶32, 50, 80, 88-91, 93, 96-102). Specifically, plaintiff alleged that defendants were negligent in failing to place a cerclage, which plaintiff claims would have preserved the pregnancy (complaint, ¶¶11, 14, 18, 20-21, 32).¹ The complaint stated that a wrongful death action was being brought on behalf of the estate of Antaun Simpson, specifically citing to and relying on both MCL 600.2922 and MCL 600.2922a (complaint, ¶¶105-111).

Defendants filed a motion for partial summary disposition, seeking dismissal of the wrongful death claim, submitting that, since the claim was brought under MCL 600.2922a, the plaintiff must show “an affirmative or positive act” as articulated by this Court in *Johnson v Pastoriza, infra* (see defendants’ motion for partial summary disposition of the wrongful death claim, pp 8-10). The trial court (the Honorable Lita M. Popke) agreed, holding that the amendment of MCL 600.2922 to reference MCL 600.2922a incorporated all of MCL 600.2922a into MCL 600.2922 and, in the absence of an alleged “affirmative or positive act”, plaintiff’s claim must fail (see Exhibit 4, Tr 12/19/13, pp 39-40). An order dismissing the wrongful death claim was entered on January 24, 2014 (see Exhibit 3, 01/24/14 order).

¹ A cerclage “is a procedure in which sutures are used to close the cervix — the lower part of the uterus that opens to the vagina — during pregnancy to help prevent premature birth.” See Mayo Clinic online <<http://www.mayoclinic.org/tests-procedures/cervical-cerclage/basics/definition/prc-20012949>> (accessed May 16, 2016).

After the stipulated dismissal of plaintiff's remaining claims, plaintiff appealed to the Court of Appeals, which reversed the dismissal of the wrongful death claim in a published decision (see Exhibit 2, *Simpson v Alex Pickens, Jr., & Associates, MD, PC, infra*). The court (Patrick J. Meter, P.J., and Mark J. Cavanagh and Kurtis T. Wilder, JJ) held that the amendment to the wrongful death act to reference "death as described in section 2922a", merely incorporated "the death of an embryo or fetus" into the wrongful death act, but no other portion of MCL 600.2922a.

Defendants timely filed an application for leave to appeal to this Court. By order entered April 6, 2016, this Court ordered oral argument on the application and directed the parties to submit supplemental briefing:

On order of the Court, the application for leave to appeal the June 16, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing whether, in order to bring a wrongful-death action under MCL 600.2922 for the death of a fetus or embryo, a plaintiff must meet the affirmative-act requirement of MCL 600.2922a. See *Johnson v Pastoriza*, 491 Mich 417 (2012). The parties should not submit mere restatements of their application papers. [See Exhibit 1, 04/06/16 order.]

Defendants submit this supplemental brief in compliance with this Court's April 6, 2016 order.

ARGUMENT

A plaintiff must meet the affirmative act requirement of MCL 600.2922a in order to bring a wrongful death action under MCL 600.2922 for the death of a fetus or embryo.

The Legislature, through its 2005 amendment to the wrongful death act, incorporated the prenatal tort statute, MCL 600.2922a, into the wrongful death act. This incorporation thereby incorporated all relevant portions of the prenatal tort statute, including, as this Court held in *Johnson v Pastoriza, infra*, the requirement that the plaintiff must allege an “affirmative or positive act” of alleged negligence to maintain a cause of action based on the claimed wrongful death of a nonviable embryo or fetus. The underlying claim is brought pursuant to and relies on MCL 600.2922a. The underlying claim must proceed as a wrongful death claim pursuant to MCL 600.2922 when death results. Yet, this requirement to “filter” the claim through the wrongful death act does not change the underlying cause of action and/or the statutory restrictions applicable to the underlying cause of action.

As this rationale is applied to the instant case, plaintiff, in asserting a wrongful death claim based on the death of a nonviable embryo or fetus, alleged only claimed negligent omissions. Thus, plaintiff failed to state a claim and the trial court properly dismissed the wrongful death claim.

A. Standard of review.

A trial court’s decision on a motion for summary disposition is reviewed *de novo*. *Sholberg v Truman*, 496 Mich 1, 6; 852 NW2d 89 (2014). Issues of statutory construction are also reviewed *de novo*. *Herald Co v City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

B. This Court interpreted the prenatal tort statute, MCL 600.2922a, to require an “affirmative or positive act” of alleged negligence to maintain a cause of action brought pursuant to MCL 600.2922a.

This Court in *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012), for the first time interpreted the provisions of the prenatal tort statute, MCL 600.2922a, a statute originally enacted in 1998 and amended in 2000 to its current form. Almost identical to the claims in the instant case, the plaintiff in *Johnson* alleged that she had lost a pre-viability pregnancy at 20 weeks gestation due to the defendant’s alleged failure or refusal to perform a cerclage. Although the *Johnson* case was decided after the 2005 amendment to MCL 600.2922 was enacted, the cause of action in *Johnson* accrued before the effective date of the amendment. This Court held that the amendment did not apply retroactively and, thus, the plaintiff in *Johnson* could not bring a claim under the wrongful death act and could only proceed, if at all, pursuant to MCL 600.2922a. 491 Mich at 420.

Examining the language of MCL 600.2922a, this Court in *Johnson* held that this statute requires “an affirmative or positive act” to state a claim. Further, this Court held that an alleged negligent omission or a claimed failure to act could not form the basis for liability under MCL 600.2922a:

MCL 600.2922a(1) provides that a person “who commits a wrongful or negligent act” against a pregnant woman is liable for damages if “the act” results in a miscarriage or stillbirth by that individual or physical injury to or the death of the embryo or fetus. The term “act” commonly means “anything done, being done, or to be done[.]” The phrases “wrongful act” and “negligent act” also have plain legal connotations. According to Black's Law Dictionary, the phrase “wrongful act” is synonymous with the phrase “wrongful conduct,” which means “[a]n act taken in violation of a legal duty; an act that unjustly infringes on another's rights.” And Black’s Law Dictionary defines “negligent act” as an “act that creates an unreasonable risk of harm to another.” Further, Black’s Law Dictionary compares the

phrase, “active negligence,” with the phrase “passive negligence.” The former means “[n]egligence resulting from *an affirmative or positive act*, such as driving through a barrier.” On the other hand, “passive negligence” means “[n]egligence resulting from a person’s failure or omission in acting, such as failing to remove hazardous conditions from public property.” **The Legislature clearly intended to impose liability for affirmative or positive acts under MCL 600.2922a(1).** [*Johnson, supra*, 491 Mich at 436-437, emphasis added and in original, footnotes omitted.]

This Court in *Johnson* further held that, since the claimed failure or refusal to place a cerclage was not an affirmative or positive act, but rather, was an alleged negligent “omission”, the claimed refusal and/or failure to place a cerclage did not state a claim under MCL 600.2922a. Therefore, summary disposition was held appropriate in that case. 491 Mich at 439-440.

C. The rationale articulated in *Johnson* applies to this case since the incorporation of MCL 600.2922a into MCL 600.2922 also incorporated the elements of the MCL 600.2922a cause of action.

The wrongful death statute, MCL 600.2922, was amended in 2005 to explicitly reference the prenatal tort statute, MCL 600.2922a.² Relevant to the instant case, the wrongful death statute in its current form provides in subsection (1):

Whenever the death of a person, injuries resulting in death, **or death as described in section 2922a** shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured **or death as described in section 2922a**, and although the death was caused under circumstances that constitute a felony. [Emphasis added.]

² Pertinent statutory provisions attached as Exhibit 5.

The instant case accrued after the effective date of the 2005 amendment to the wrongful death statute to reference “death as described in section 2922a”. Thus, in contrast to *Johnson*, this case directly implicates the impact of this amendment to a claim based on the alleged wrongful death of a pre-viable embryo or fetus.

Defendants submit that the amendment to the wrongful death act to incorporate MCL 600.2922a, incorporates the requirement to show “an affirmative or positive act” to maintain the cause of action. Thus, a plaintiff pursuing a wrongful death action on behalf of a nonviable fetus is required to show an “affirmative or positive act” to maintain the cause of action, as this Court held in *Johnson, supra*. Defendants submit that this interpretation of the relevant statutes is consistent with the plain statutory language, the legislative history, and any other cause of action that is similarly filtered through the wrongful death act.

D. The underlying cause of action is a cause of action brought pursuant to MCL 600.2922a.

Defendants maintain that the underlying cause of action is a cause of action brought pursuant to MCL 600.2922a and, thus, the requirements and limitations contained in MCL 600.2922a apply even where the claim proceeds as a wrongful death claim. This is so because the amendment to the wrongful death act incorporated those elements of MCL 600.2922a that serve to define or limit the “deaths” described therein. Indeed, this Court in *Johnson* characterized the 2005 amendment to the wrongful death statute as an incorporation and cross-referencing of the prenatal tort statute:

The Legislature amended the wrongful-death statute in 2005 to specifically incorporate and cross-reference MCL 600.2922a. [*Johnson, supra*, 491 Mich at 425.]

Accepting this Court's description in *Johnson* of the amendment to the wrongful death act as an incorporation and cross-referencing of MCL 600.2922a, the underlying cause of action is a cause of action brought pursuant to MCL 600.2922a. Thus, the requirements and limitations set forth in MCL 600.2922a have been incorporated and cross-referenced into the wrongful death statute where a claim brought pursuant to MCL 600.2922a proceeds as a wrongful death claim. Such is consistent with what is ordinarily meant by "incorporate" and "cross-reference". Consulting dictionary definitions, to "incorporate" means:

to include (something) as part of something else

to unite or work into something already existent so as to form an indistinguishable whole

to blend or combine thoroughly^[3]

A "cross-reference" is defined as:

a note in a book (such as a dictionary) that tells you where to look for more information

a notation or direction at one place (as in a book or filing system) to pertinent information at another place^[4]

If the two statutes have been combined, blended, united, and/or cross-referenced in a way consistent with the ordinary meaning of the words "incorporate" and "cross-reference" chosen by this Court to define the 2005 amendment, the amendment to the wrongful death act should be

³ See <<http://www.merriam-webster.com/dictionary/incorporate>> (accessed April 28, 2016).

⁴ See <<http://www.merriam-webster.com/dictionary/cross-reference>> (accessed April 28, 2016).

interpreted to incorporate and cross-reference all of the provisions of MCL 600.2922a, including the need to show an “affirmative or positive act” have been incorporated into the wrongful death act.

E. The Legislature chose to use very broad language to incorporate the prenatal tort statute into the wrongful death act.

Further supporting the conclusion that the underlying cause of action is a cause of action brought pursuant to MCL 600.2922a, is the Legislature’s use of the phrase “death as described in section 2922a” in the amendment to the wrongful death statute. Neither this phrase nor the individual words are defined in either statute.⁵ However, this Court may look to the dictionary for aid in “construing those terms in accordance with their ordinary and generally accepted meanings.” *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). A “description” is defined in *Merriam-Webster’s* online dictionary as:

1 a : an act of describing; *specifically* : discourse intended to give a mental image of something experienced

b : a descriptive statement or account

2 : kind or character especially as determined by salient features <opposed to any tax of so radical a *description*> [⁶]

The verb “describe” is defined by the same dictionary as:

: to tell someone the appearance, sound, smell, events, etc., of (something or someone) : to say what something or someone is like

⁵ A Westlaw search of the Michigan Compiled Laws for the phrase “as described in section” currently returns a result of approximately 400 statutes that use this or a similarly worded phrase. In the Legislature’s use of this phrase, there generally appears to be an intent to simply refer to and incorporate the terms of the referenced statute (i.e., the interpretation urged by defendants with reference to the at-issue statutes here).

⁶ See <<http://www.merriam-webster.com/dictionary/description>> (accessed May 16, 2016).

: to make a motion or draw a line that shows the shape of (something)
[⁷]

The online Free Dictionary contains similar definitions. “Describe” is defined as:

1. To give an account of in speech or writing: *describe a sea voyage*.
2. To convey an idea or impression of; characterize: *She described her childhood as a time of wonder and discovery*.
3. To represent pictorially; depict: *Goya's etchings describe the horrors of war in grotesque detail*.
4. To trace the form or outline of: *describe a circle with a compass*. [⁸]

The noun “description” is defined in the same dictionary as:

1. The act, process, or technique of describing.
2. A statement or an account describing something: *published a description of the journey; gave a vivid description of the game*.
3. A pictorial representation: *Monet's ethereal descriptions of haystacks and water lilies*.
4. A kind or sort: *cars of every size and description*. [⁹]

Thus, a “description” of or “to describe” something involves more than simply reciting a list. Describing involves conveying the “salient features” of and/or to “characterize” whatever is being described. In this case, the “death as described in section 2922a” includes the mechanism of that death as the description constitutes a “salient feature” of the death.

⁷ See <<http://www.merriam-webster.com/dictionary/describing>> (accessed May 16, 2016).

⁸ See <<http://www.thefreedictionary.com/describe>> (accessed May 16, 2016).

⁹ See <<http://www.thefreedictionary.com/description>> (accessed May 16, 2016).

Defendants' interpretation of the statutory provisions is further supported by the language of MCL 600.2922a itself. Subsection (1) of that statute, in a single sentence, describes the recoverable deaths as those resulting from specific acts:

A person who commits a wrongful or negligent act against a pregnant individual is liable for damages if the act results in a miscarriage or stillbirth by that individual, or physical injury to or the death of the embryo or fetus.

Thus, the death "described" in MCL 600.2922a includes the mechanism of that death. That is, the "way" the death occurs or the "manner" of death is an integral part of the description of that death. A death "as described" in MCL 600.2922a is a miscarriage, stillbirth, or the death of an embryo or fetus resulting from a wrongful or negligent act committed against the pregnant individual. Thus, where the prenatal tort claim proceeds as a wrongful death action, the plaintiff is required to establish an alleged "affirmative or positive act" of negligence to maintain the action.

F. A wrongful death claim based on the death of a nonviable embryo or fetus does not exist without the prenatal tort statute.

A conclusion that the amendment to the wrongful death act incorporated and cross-referenced the prenatal tort statute is also consistent with the wrongful death act itself, which is not a separate cause of action, but merely allows recovery for an underlying cause of action where the plaintiff is deceased. That is, as MCL 600.2922(1) itself plainly provides, recovery under the wrongful death act is limited to those situations where the action could proceed if the injured individual had survived. In pertinent part, MCL 600.2922(1) provides:

Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, **and the act, neglect, or fault is such as**

would, if death had not ensued, have entitled the party injured to maintain an action and recover damages . . . [Emphasis added.]

The Court of Appeals in its decision issued in this case did acknowledge the basic principle that a cause of action brought under the wrongful death act included “all of [the] statutory and common-law limitations” that applied to the underlying cause of action, but nonetheless accepted plaintiff’s argument and concluded that a wrongful death action brought on behalf of a nonviable embryo or fetus was an action brought solely under the wrongful death act, and not brought pursuant to MCL 600.2922a:

As our Supreme Court noted in *O’Neill v Morse*, 385 Mich 130, 133; 188 NW2d 785 (1971), the “obvious purpose” of the wrongful-death statute “is to provide an action for wrongful death whenever, *if death had not ensued*, there would have been an action for damages.” In other words, the action brought on behalf of the deceased is the same legal action—with all of its statutory and common-law limitations—that the deceased could have brought if the injuries the deceased sustained because of the wrongful act, neglect, or fault of another had not caused death. The nature and purpose of this type of action does not change because it is the death of an embryo or fetus giving rise to the wrongful-death action.

Further, contrary to defendants’ argument, a wrongful-death action brought on behalf of an embryo or fetus is not required to be construed as “brought under § 2922a” because of the amendatory language at issue. As our Supreme Court noted in *Johnson*, MCL 600.2922a “is separate from the wrongful-death statute....” While MCL 600.2922a does recognize as actionable certain prenatal injuries—miscarriage, stillbirth, and physical injury to, or the death of, an embryo or fetus—it does not require that the prenatal injuries result in death to be actionable. Therefore, for example, the “pregnant individual” and the child who suffered but survived injury in utero may pursue statutory causes of action under MCL 600.2922a for such prenatal injuries. However, a legal action for death or injuries resulting in death brought on behalf of a deceased person, fetus, or embryo must be brought under the wrongful-death statute, MCL 600.2922, which provides the exclusive remedy. [*Simpson v Alex*

Pickens, Jr., & Associates, MD, PC, 311 Mich App 127, 136-137; 874 NW2d 359 (2015), emphasis in original, citations omitted.]

The Court of Appeals further relied on the more expansive language in the wrongful death statute allowing recovery based on the alleged “wrongful act, neglect, or fault of another” to conclude that liability in this case could be based on an alleged negligent “omission” (such as a claimed failure to place a cerclage). *Simpson, supra*, 311 Mich App at 138. However, while a wrongful death action can be maintained under MCL 600.2922, based on the expansive terms “wrongful act, neglect, or fault of another,” the statute, as noted above, simultaneously limits the particular “act, neglect, or fault” upon which a wrongful death action can be based to those that “if death had not ensued, [would] have entitled the party injured to maintain an action and recover damages”. That is, this language provides that a particular act, neglect, or fault can comprise the basis for a wrongful death action only if that act, neglect, or fault could be the basis for a cause of action if the decedent had lived.

Here, there is no wrongful death cause of action for a nonviable embryo or fetus without the prenatal tort statute, MCL 600.2922a. Thus, the only “act, neglect, or fault” that can form the basis for the cause of action for death of a nonviable embryo or fetus are those delineated in MCL 600.2922a itself. This statute created the cause of action for the death of a nonviable embryo or fetus as it is undisputed that there was no such cause of action at common law.¹⁰ This Court in *Johnson*,

¹⁰ As this Court noted in *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 508; 309 NW2d 163 (1981), “statutes in derogation of the common law must be strictly construed, . . . and will not be extended by implication to abrogate established rules of common law. The statute, however, must be construed sensibly and in harmony with the legislative purpose.”

supra, noted this point, stating that the amendment to the wrongful death act allowed the claim on behalf of the deceased fetus to proceed as a wrongful death claim:

Before the 2005 amendment of the wrongful-death statute, a plaintiff could not bring an action under MCL 600.2922 for the death of a nonviable fetus. Nothing in the language of either MCL 600.2922 or MCL 600.2922a indicated that the death of a nonviable fetus could be redressed under § 2922. **Under MCL 600.2922, as amended by 2005 PA 270, the representative of the fetus’s estate is now able to file a wrongful-death claim on the basis of the fetus’s death.** Additionally, MCL 600.2922, as amended by 2005 PA 270, permits plaintiffs to bring claims, as the result of the death of a nonviable fetus, for loss of consortium and other damages unique to the wrongful-death statute that plaintiffs would not otherwise be entitled to bring. [*Johnson, supra*, 491 Mich at 433-434, emphasis added.]

The Court of Appeals in its decision in the instant case similarly acknowledged that a wrongful death cause of action for a nonviable fetus did not exist until the wrongful death act was amended to incorporate MCL 600.2922a:

There is no dispute in this case that a wrongful-death action may be brought on behalf of a nonviable fetus. **Before the language of the statute was amended in 2005, however, a wrongful-death action brought on behalf of a nonviable fetus was not cognizable.** That was so because, before the 2005 amendment, MCL 600.2922(1) provided: “Whenever the death of a person or injuries resulting in death shall be caused...” Accordingly, a wrongful-death action could not be based on the death of an embryo or nonviable fetus. [*Simpson, supra*, 311 Mich App at 133, emphasis added.]

* * *

Although **a wrongful-death action could not be filed on behalf of an embryo or nonviable fetus before the 2005 amendment of MCL 600.2922(1)**, a wrongful-death action could be filed on behalf of a *viable* fetus for prenatal injuries that caused death. [*Simpson, supra*, 311 Mich App at 135 n 7, emphasis added and in original.]

The Court of Appeals concluded, therefore, that there was no possible wrongful death action for a nonviable embryo or fetus before the wrongful death statute was amended to incorporate MCL 600.2922a. However, the Court of Appeals simultaneously and inexplicably concluded that this incorporation jettisoned all of the requirements applicable to a cause of action brought under MCL 600.2922a (including the requirement to show an affirmative act) and created a new cause of action for the death of a nonviable embryo or fetus that only required the plaintiff to show that the death was caused by the claimed “wrongful act, neglect, or fault of another.” Defendants submit that the Court of Appeals conclusions in the *Simpson* opinion are inconsistent, both internally and with the statutory language that allows a wrongful death claim to proceed only if the alleged negligent “act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages.”

Strictly construing MCL 600.2922a, and its incorporation into the wrongful death act, the statute allows a cause of action for the death of a nonviable embryo or fetus only if an affirmative or positive act is shown. This is true regardless of whether the claim proceeds under the wrongful death act or under MCL 600.2922a alone. The wrongful death act did not create the cause of action for the claimed wrongful death of a nonviable fetus; the prenatal tort statute did so and within specifically defined parameters. These underlying restrictions remain in effect even though the claim can now proceed under the wrongful death act.

G. The wrongful death act is merely a “filter” through which the underlying cause of action proceeds when death results.

Indeed, this Court in numerous decisions has held that a wrongful death action may not proceed unless the decedent would have been entitled to pursue a cause of action if death had not

ensued. Similarly, statutory restrictions that apply to the underlying cause of action remain in effect, even if the claim must proceed through the wrongful death act. Defendants' interpretation of the at-issue statutes is consistent with this case law.

Interpreting the then-existing version of MCL 600.2922¹¹, this Court in *Maiuri v Sinacola Construction Co*, 382 Mich 391; 170 NW2d 27 (1969), held that a wrongful death action was precluded where the decedent could not have maintained the cause of action if he had lived. The decedent was fatally injured while working for the defendant construction company and, thus, was subject to the worker's compensation act. Since the decedent's exclusive remedy would have been under the worker's compensation act, a separate wrongful death action brought by the decedent's parents could not be maintained:

Even if this action had been brought by the personal representative of the deceased's estate, under the facts of this case, the action could not be maintained. It is undisputed that [the decedent] Albert D. Maiuri at the time of his death was an employee of Sinacola Construction Company and that he died as the result of an injury arising out of and in the course of his employment. If death had not ensued, his only claim would have been against the defendant for compensation under the workmen's compensation act.

* * *

The present wrongful death act is an amalgamation of the remedies previously existing under the wrongful death and survival acts. It came about due to difficulties which had arisen under the previous acts as to the remedy if death resulted but was not known to have been instantaneous. Where the injuries result in death, survival and wrongful death actions now, by direction of the legislature, are to be

¹¹ The prior version of MCL 600.2922(1) in effect at the time *Maiuri* was decided, similar to the current version of this statute, allowed recovery "[w]henver the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages". See *Maiuri, supra*, 382 Mich at 394.

brought under the wrongful death act. As a condition to a successful action under the wrongful death act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries (RJA s 2922(1)). This is true even though the wrongful death act creates a new cause of action permitting recovery for the benefit of certain persons who had sustained pecuniary injury as a result of the decedent's death. The language of the statute requiring that the decedent must have been able to maintain the action, 'if death had not ensued,' has remained in the act throughout its legislative history.

* * *

Since the cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued, and since, in this case, the decedent would have been barred from an action for injuries resulting in death because of the exclusive remedy provisions of the workmen's compensation act, the trial court did not err in granting an accelerated judgment for the defendant. [*Maiuri, supra*, 382 Mich at 393-396.]

This Court made similar pronouncements in its more recent decision in *Wesche v Mecosta County Road Commission*, 480 Mich 75, 79-80; 746 NW2d 847 (2008):

The availability of a wrongful-death action hinges on whether the injured party would have been entitled to maintain an action and recover damages had a death not ensued.

Two cases were consolidated for decision in *Wesche*. One issue in the companion case, *Kik v Sbraccia*, was whether the wrongful death act permitted a loss of consortium claim or whether governmental immunity barred such claims. The underlying cause of action in *Kik* relied on MCL 600.1405, which allows liability for "bodily injury and property damage" arising from a governmental official's negligent use of a government-owned motor vehicle. In finding that the plaintiffs in *Kik* did not have a right to recover loss of consortium damages, this Court noted that,

although the wrongful death act does allow for a loss of consortium claim, the underlying cause of action does not. Thus, the underlying statutory provision that gave rise to the cause of action applied, even where the cause of action proceeded as a wrongful death claim:

The wrongful-death act does not waive a governmental agency's immunity beyond the limits set forth in the underlying statutory exception. The three-judge panel in *Kik I* ruled that even if the motor-vehicle exception does not waive immunity, the wrongful-death act nonetheless allows a claim for loss of consortium. This conclusion contravenes both the language of the wrongful-death act and this Court's caselaw.

* * *

The *Kik I* panel reasoned that even if the motor-vehicle exception does not waive immunity, the wrongful-death act expressly authorizes damages for loss of society and companionship. But that analysis fails to give effect to language in MCL 600.2922(1) making liability contingent on whether the party injured would have been entitled to maintain an action and recover damages if death had not ensued. [*Wesche, supra*, 480 Mich at 87-88.]

Therefore, while the wrongful death act, in the abstract, authorizes damages for loss of society and companionship, since the underlying cause of action relying on the motor-vehicle exception to governmental immunity does not, such damages are not recoverable where the claim is brought as a wrongful death action. The same rationale applies to the instant case, leading to the conclusion that the "affirmative or positive act" requirement in MCL 600.2922a applies where the claim is brought under the wrongful death statute. Although the wrongful death act "expressly authorizes" a cause of action for death "caused by wrongful act, neglect, or fault of another", liability is "contingent on whether the party injured would have been entitled to maintain an action and recover damages if death had not ensued."

It has been plaintiff's argument in this case, accepted by the Court of Appeals, that the underlying cause of action is solely a medical malpractice claim and not a claim brought pursuant to MCL 600.2922a. Thus, plaintiff argues that MCL 600.2922a has no application. Yet the same could be said of the underlying claim in *Kik v Sbraccia* (the companion case to *Wesche, supra*). The cause of action underlying the wrongful death claim arose out of injuries sustained in an automobile accident. The underlying cause of action then would be a negligence or possibly a no-fault based action. Nonetheless, the underlying cause of action was analyzed as one brought under the governmental immunity statute, MCL 691.1405. Similarly, in *Maiuri*, the underlying cause of action could be characterized as a negligence action, yet such did not preclude application of the worker's compensation act to the wrongful death claim.

Numerous other causes of action, while ostensibly considered negligence actions, are also considered causes of action brought under specific statutory provisions. The no-fault act, MCL 500.3101, *et seq*, provides one example. While the underlying cause of action arising out of an automobile accident would be negligence-based, the claim must nonetheless comply with the requirements and restrictions of the no-fault act.

A similar situation is presented where the Emergency Medical Services Act, MCL 333.20901, *et seq.*, applies. This act, pursuant to MCL 333.20965, provides immunity from liability to emergency first responders unless "an act or omission is the result of gross negligence or willful misconduct."¹² If the alleged act or omission resulted in death, the claim would again be required to be filtered through the wrongful death act. Nonetheless, the gross negligence/willful misconduct

¹² In contrast to a claim brought under MCL 600.2922a, the Emergency Medical Services Act specifically allows for a claim to be based on either an act or an omission.

standard applies to such claims, even when death results. See, e.g., *Omelenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493 (2002). Thus, a plaintiff could not simply establish that the death was caused by the “wrongful act, neglect, or fault of another.” The plaintiff must establish that the claimed negligent act or omission rose to the level of gross negligence or willful misconduct.

This Court has specifically held that the wrongful death act is simply a “filter” through which claims that result in death must be brought. The fact that such a claim must be brought through the wrongful death act does not change the essential nature of the underlying claim. It merely expands the damages available:

The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called “death act”, MCL 600.2922; MSA 27A.2922, does not change the character of such actions except to expand the elements of damage available. [*Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982).]

Where statutory restrictions or requirements apply to the underlying cause of action, the same restrictions or requirements will apply if the claim is brought as a wrongful death action. As pronounced in *Jenkins v Patel*, 471 Mich 158, 165; 684 NW2d 346 (2004), “[c]learly, the wrongful death act is not the only act that is pertinent in a wrongful death action.” A “wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent.” *Id.* This Court in *Jenkins* held that the statutory restrictions applicable to a medical malpractice action, including the cap on noneconomic damages in MCL 600.1483, applied even where the claim was filtered through the wrongful death act. 471 Mich at 168-169.

As applied to the instant case, plaintiff's wrongful death claim brought pursuant to MCL 600.2922a must also be "filtered" through the wrongful death act. However, such does not change the nature of the underlying claim. Rather, plaintiff is still required to comply with MCL 600.2922a, including the requirement to show an affirmative or positive act to maintain a cause of action.

There is no doubt that there is a separate potential cause of action pursuant to MCL 600.2922a. Plaintiff has argued and the Court of Appeals held that a separate cause of action pursuant to MCL 600.2922a survived the incorporation of the prenatal tort statute into the wrongful death act. Defendants agree that there is an independent and separate potential cause of action pursuant to MCL 600.2922a, even after the amendment to the wrongful death act, and it is this cause of action with all of its elements and restrictions that is filtered through the wrongful death act.

Defendants' interpretation of the two statutes results in equal and balanced requirements. If a plaintiff chooses to proceed under MCL 600.2922a, the plaintiff must show an "affirmative or positive act" to maintain the cause of action. Similarly, where death results and the claim is filtered through the wrongful death act, the plaintiff must show an "affirmative or positive act" to maintain the cause of action. In contrast, if plaintiff's interpretation of the amendment to the wrongful death act is accepted, the result is a two-tiered system. A claim proceeding pursuant to MCL 600.2922a alone will require the plaintiff to show an affirmative act. Where death results, however, a different standard would apply, allowing recovery for both alleged negligent affirmative acts and omissions.

H. The legislative history supports the conclusion that the elements of the prenatal tort statute were incorporated into the wrongful death act.

The 2005 amendment to the wrongful death statute was in direct response to a judicial interpretation of a statute, specifically, the Court of Appeals' decision in *McClain v University of*

Michigan Board of Regents, 256 Mich App 492, 495; 665 NW2d 484 (2003), wherein the court noted that “an action for wrongful death, MCL § 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a ‘person’ within the meaning of the wrongful-death act.”

While defendants submit that the statutes are not ambiguous and defendants’ interpretation is consistent with the unambiguous statutory language, even the legislative history supports defendants’ position as to the interpretation of sections 2922 and 2922a. When considering legislative history, actions taken by the Legislature in response to judicial construction of a statute are of the most value:

Clearly of the highest quality is legislative history that relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent with respect to an ambiguous statutory provision. **Examples of legitimate legislative history include actions of the Legislature intended to repudiate the judicial construction of a statute**, see, e.g., *Detroit v Walker*, 445 Mich 682, 697; 520 NW2d 135 (1994), or actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted. See, e.g., *Miles ex rel Kamferbeek v Fortney*, 223 Mich 552, 558; 194 NW 605 (1923). **From the former, a court may be able to draw reasonable inferences about the Legislature's intent, even when the Legislature has failed to unambiguously express that intent.** From the latter, by comparing alternative legislative drafts, a court may be able to discern the intended meaning for the language actually enacted.

Of considerably diminished quality as legislative history are forms that do not involve an act of the Legislature. “Legislative analyses” created within the legislative branch have occasionally been utilized by Michigan courts. These staff analyses are entitled to little judicial consideration in resolving ambiguous statutory provisions[.] [*In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), emphasis added.]

Tracing the then-existing history of the prenatal tort act, the authors of the Michigan Bar Journal article, Marks and Marks, *Prenatal Torts in Michigan*, 83 MBJ 28 (June 2004), noted that MCL 600.2922a was originally enacted in 1998, apparently to provide a cause of action in certain circumstances for the death of (or injury to) a pre-viable fetus. MCL 600.2922a was amended in 2000 to its current form to insert the language allowing recovery for simply causing “the death of” an embryo or fetus.¹³ Yet the statute was not referenced or apparently even considered by the Court of Appeals in its *McClain* decision. The *McClain* court did hold that the plaintiff-mother had a claim for medical malpractice in her own right based on the miscarriage allegedly caused by the defendants’ claimed negligence, but there was no cognizable claim for wrongful death of a nonviable fetus. *McClain, supra*, 256 Mich App at 495-496.

Subsequently, in 2005, the wrongful death act, MCL 600.2922, was amended (to its current form) to explicitly reference MCL 600.2922a, in apparent response to the Court of Appeals decision in *McClain, supra*. This amendment inserted in MCL 600.2922 the language “or death as described in section 2922a” as set forth above and, in subsection (2), changed the requirement that every action be brought in the name of the “deceased person” to instead require that every action be brought in the name of the “deceased.”

¹³ This amendment was in response to developments during the trial court proceedings in *People v Fletcher*, 260 Mich App 531; 679 NW2d 127 (2004). In *Fletcher*, the defendant was charged with the murder of his wife, who was in the early stages of pregnancy. The defendant was also charged pursuant to MCL 750.90a, a companion statute to MCL 600.2922a, providing criminal penalties for causing a miscarriage or stillbirth. The MCL 750.90a charge was dismissed as the defendant’s wife did not technically suffer a “miscarriage or stillbirth” as those terms are generally defined (i.e., the fetus was not expelled from her body). Following *Fletcher*, both the criminal and civil statutes were amended to provide penalties for causing “the death of” an embryo or fetus.

The Senate Fiscal Agency analysis, dated November 28, 2005, in describing the “rationale” for the amendment to MCL 600.2922, specifically mentions the *McClain* decision and indicates an intent to simply incorporate MCL 600.2922a into the wrongful death act. That is, the amendment would incorporate the elements and restrictions of MCL 600.2922a where a wrongful death claim is brought on behalf of a nonviable embryo or fetus:

Despite the enactment of Section 2922a, a 2003 opinion of the Michigan Court of Appeals did not mention that section in a case that involved the miscarriage of an 18-week-old fetus caused by alleged medical malpractice. In *McClain v The University of Michigan Board of Regents*, the Court stated, “...under Michigan law, an action for wrongful death, MCL 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a ‘person’ within the meaning of the wrongful death act” (256 Mich App 492). Apparently, this decision has contributed to uncertainty among the circuit courts and within the legal community as to whether Section 2922a allows actions on behalf of an embryo or nonviable fetus. According to a June 2004 article in the *Michigan Bar Journal*, Section 2922a is not classified as a wrongful death act by various authorities, including Michigan Civil Jurisprudence (“Prenatal Torts in Michigan”, by Marks and Marks). Also, although Section 2922a establishes civil liability, the language does not specify that the estate of the embryo or fetus may bring an action or otherwise indicate who the plaintiff may be.

To address this situation, it has been suggested that the wrongful death statute, Section 2922 of the RJA, should encompass the death of an embryo or fetus caused by the negligent or wrongful conduct of another. [See Exhibit 6, p 1, emphasis added.]

The Legislature’s actions in amending MCL 600.2922 to incorporate and cross-reference MCL 600.2922a in response to the *McClain* decision indicates that the incorporation of MCL 600.2922a into MCL 600.2922 did not change the nature of the underlying action. The underlying cause of action remains one that relies on the prenatal tort statute. There is nothing in the legislative history that indicates an intent to expand the cause of action or otherwise eliminate the restrictions

in MCL 600.2922a. The amendment to the wrongful death act to incorporate and cross-reference MCL 600.2922a did not change the requirement that plaintiff must show an “affirmative or positive act” to maintain the cause of action for the death of a nonviable embryo or fetus.

I. Conclusion.

The plain statutory language, the legislative history, and this Court’s interpretation of the wrongful death act as a “filter” through which the underlying cause of action must proceed all support the conclusion that the 2005 amendment to the wrongful death act did not change the nature of a claim that relies on the prenatal tort statute. When bringing a claim for the death of a nonviable fetus or embryo, a plaintiff must meet the affirmative act requirement of MCL 600.2922a, as this Court held in *Johnson v Pastoriza, supra*.

Plaintiff in the instant case did not allege an affirmative or positive act as the basis for the claim. Instead, plaintiff relied on an alleged negligent “omission” (the claimed failure to place a cerclage), that this Court in *Johnson* found insufficient to state a claim pursuant to the prenatal tort statute. Since plaintiff alleged only a claimed negligent “omission”, the trial court properly dismissed the wrongful death claim. The Court of Appeals decision should be reversed and the trial court’s order dismissing the wrongful death claim should be reinstated.

RELIEF REQUESTED

WHEREFORE, defendants-appellants respectfully request that this Honorable Court peremptorily reverse the Court of Appeals' June 16, 2015 opinion and reinstate the trial court's order granting defendants' motion for partial summary disposition and dismissing the wrongful death claim. In the alternative, defendants request that this Court grant their application for leave to appeal. Defendants request costs and attorney fees.

Respectfully submitted,

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