

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee,

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.

Supreme Court Case No.

Court of Appeals Case No. 320443

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

NOTICE OF HEARING

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

**NOTICE OF FILING OF DEFENDANTS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL**

EXHIBITS (BOUND SEPARATELY)

TANOURY, NAUTS, McKINNEY &
GARBARINO, P.L.L.C.

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NOTICE OF HEARING

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that defendants-appellants' application for leave to appeal will be brought on for hearing on **Tuesday, August 18, 2015 at 9:00 a.m.** before the Michigan Supreme Court, 925 W. Ottawa, Lansing, MI 48909.

Respectfully submitted,

TANOURY, NAUTS, McKINNEY &
GARBARINO, P.L.L.C.

BY: /s/Anita Comorski

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Dated: July 23, 2015

S:\Garbarino-Team\APPEALS\SIMPSON\PLEADINGS\Sup Ct. App Lv Appeal.wpd

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4. Defendants' motion for partial summary disposition of plaintiff's wrongful death claim;
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 - A. Medical record excerpt;
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ORDERS APPEALED FROM/GROUNDS FOR RELIEF/RELIEF SOUGHT

Defendants-appellants seek leave to appeal from the June 16, 2015 published opinion of the Court of Appeals (Patrick M. Meter, P.J., and Mark J. Cavanagh and Kurtis T. Wilder, JJ) reversing the trial court's order which granted partial summary disposition and dismissed plaintiff's wrongful death claim brought on behalf of a pre-viable fetus.¹

In this action alleging medical malpractice/wrongful death, defendants moved for partial summary disposition, seeking dismissal of the wrongful death claim on grounds that plaintiff could not pursue such a claim on behalf of a pre-viable fetus in the absence of an affirmative or positive act. Defendants submitted that the amendment to the wrongful death act to include "death as described in section 2922a [MCL 600.2922a]" incorporated all of MCL 600.2922a that served to define the deaths described therein, including the need for an affirmative or positive act, as this Court held in *Johnson v Pastoriza, infra*. Wayne County Circuit Court Judge Lita Masini Popke granted summary disposition, agreeing with the defense position that the use of the phrase "death as described in section 2922a" incorporated, among others, the need for an affirmative or positive act.

After the voluntary dismissal of the remaining claims in this action, plaintiff filed a claim of appeal with the Court of Appeals. On appeal, plaintiff challenged only the dismissal of the wrongful death claim. After briefing and oral argument, the Court of Appeals on June 16, 2015, in a published opinion authored by Judge Cavanagh, reversed the grant of summary disposition to defendants, finding that the amendment to the wrongful death act to reference "death as described in section 2922a" incorporated only the type of death in MCL 600.2922a, i.e., the death of an embryo or fetus,

¹ Any additional claims that were originally alleged in the complaint were dismissed by stipulation and are not part of this appeal. The only remaining claim is the wrongful death claim.

and no other provision of MCL 600.2922a.

Defendants submit that the Court of Appeals' decision in this case is clearly erroneous and inconsistent with the plain language of the relevant statutory provisions, as well as the legislative history of these statutory provisions. If such decision is allowed to stand, material injustice will result. By finding that only the type of death was incorporated, the Court of Appeals failed to give effect to the phrase "death as described in section 2922a", which indicates that the Legislature incorporated more than simply the "type" of death referenced in MCL 600.2922a. Simultaneously, the Court of Appeals rendered MCL 600.2922a completely nugatory in the context of the very reason why this statute was enacted, that is, to create a cause of action for certain pre-viable fetus injuries/deaths.

Further, while the Court of Appeals misinterpreted the plain statutory language, which is the primary basis to reverse the decision, it must be emphasized that the impact of the court's misinterpretation will be far reaching. Importantly, by finding that no provision of MCL 600.2922a was incorporated into the wrongful death act other than death of "an embryo or fetus", the Court of Appeals decision has invalidated the exceptions to recovery that are contained in MCL 600.2922a(2). These provisions provide that there is no liability for acts committed by the pregnant individual herself, medical procedures performed with the pregnant individual's consent or without consent in a medical emergency, and for the "lawful dispensation, administration, or prescription of medication." Since the Court of Appeals decision renders these provisions without effect, actions for damages can now be maintained (as but one example) by an interested party against a pregnant woman who is alleged to have "negligently" lost her pre-viability pregnancy. Immunity provisions for certain actions of health care providers have also been invalidated.

Defendants respectfully request that this Honorable Court peremptorily reverse the published Court of Appeals opinion and reinstate the trial court's order granting summary disposition as to the wrongful death claim. In the alternative, defendants request that this Court grant the application for leave to appeal and hear the matter on the merits.

JURISDICTIONAL STATEMENT

The Court of Appeals issued its published opinion reversing the trial court's order granting partial summary disposition and dismissing the wrongful death claim on June 16, 2015. Defendants have filed this application within 42 days of that opinion. This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(b).

STATEMENT OF QUESTIONS PRESENTED

- I. Whether the trial court properly dismissed the wrongful death claim brought on behalf of a pre-viable fetus where plaintiff could not show that defendants committed an alleged negligent “affirmative or positive act”, required where a claim is brought pursuant to MCL 600.2922a, even when filtered through the wrongful death act?**

Plaintiff argues the answer is “No.”

Defendants submit the answer is “Yes.”

The trial court held the answer is “Yes.”

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

- II. Whether the Court of Appeals erred in finding that no provision of MCL 600.2922a was incorporated into the wrongful death act other than “the death of an embryo or fetus”, thus rendering the remainder of MCL 600.2922a nugatory, including the exceptions to recovery in MCL 600.2922a(2)?**

Plaintiff argues the answer is “No.”

Defendants submit the answer is “Yes.”

The trial court held the answer is “Yes.”

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

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This application involves an issue of statutory construction, focusing on the interplay between MCL 600.2922 (the wrongful death act) and MCL 600.2922a (a statute allowing certain actions for injury to or death of an embryo or fetus). More specifically, at issue in this appeal is the availability, following the Legislature's amendment of MCL 600.2922 to reference "death as described in section 2922a", of a wrongful death claim brought on behalf of a pre-viable fetus, where the alleged negligence is based on an "omission" rather than an "affirmative or positive act". In granting defendants' motion for partial summary disposition of the wrongful death claim, the trial court, pursuant to the January 24, 2014 order of Wayne County Circuit Court Judge Lita Masini Popke, held that plaintiff could not pursue a wrongful death claim on behalf of a pre-viable fetus where plaintiff could not demonstrate that the death was caused by defendants' "affirmative or positive act", as described by this Court in *Johnson v Pastoriza, infra*, when interpreting the provisions of MCL 600.2922a.

Plaintiff appealed from the trial court's order dismissing the wrongful death claim. The Court of Appeals reversed, finding that no provision of MCL 600.2922a had been incorporated into MCL 600.2922 other than the death of an "embryo or fetus" and that plaintiff need not rely on MCL 600.2922a when bringing the wrongful death claim. Rather, to pursue the wrongful death claim, plaintiff need only show that the death was of an "embryo or fetus." This determination was in error. The decision of the trial court should have been affirmed.

Statement of Material Facts

Plaintiff filed the instant action 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 Exhibit 4-A, complaint, ¶¶32, 50, 80-102). Plaintiff alleges that Shakeeta Simpson had previously been diagnosed with an incompetent cervix and that defendants were negligent in failing to place a cerclage, which plaintiff claims would have preserved the pregnancy (Exhibit 4-A, ¶¶11, 14, 18, 20-21, 32).² The complaint states 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 (Exhibit 4-A, ¶¶105-111).³

Statement of Material Proceedings

A. Trial court proceedings.

Defendants filed a motion for partial summary disposition, seeking dismissal of the wrongful death claim (see Exhibit 4, defendants' motion for partial summary disposition of the wrongful death claim). Defendants submitted that the incorporation of MCL 600.2922a into MCL 600.2922 did not change the essential nature of the underlying claim brought under MCL 600.2922a Exhibit 4, pp 7-8). That is, regardless of whether death results, where a claim is brought under MCL 600.2922a, the

² 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 December 15, 2014).

³ The complaint also contained a claim that the corporate defendants were “guilty of independent negligence” by allegedly “carelessly and/or negligently” employing defendants Dr. Pickens, Linda S. Hartman, “and other personnel” rendering medical care and treatment (Exhibit 4-A, ¶¶94-95) and a claim for negligent infliction of emotional distress on behalf of Shakeeta Simpson (Exhibit 4-A, ¶109). Plaintiff stipulated to the dismissal of the claims of independent negligence against the corporate defendants by order entered June 10, 2013 (see 06/10/13 order) and to the dismissal of the negligent infliction of emotional distress claim by order entered February 3, 2014 (see 02/03/14 order). Plaintiff did not challenge the dismissal of these claims on appeal.

plaintiff must show “an affirmative or positive act” as articulated by this Court in *Johnson v Pastoriza, infra* (Exhibit 4, pp 8-10). Since plaintiff here had alleged only negligent “omissions”, the wrongful death claim should be dismissed (Exhibit 4, pp 8-10). Defendants submitted that the rules of statutory construction supported their interpretation of the statutes (Exhibit 4, pp 10-17). In addition, defendants submitted that plaintiff’s claim was barred under subsection (2)(b) of MCL 600.2922a, which provides exemptions from liability for “medical procedures” performed by health care professionals (Exhibit 4, p 17).

Plaintiff filed a response to the motion, raising a number of arguments (see Exhibit 5, plaintiff’s response to defendants’ motion). Plaintiff claimed that the incorporation of MCL 600.2922a into MCL 600.2922 meant that the Legislature intended to create a cause of action for the death of a nonviable fetus caused by either negligent acts or omissions (Exhibit 5, p 10). Plaintiff also argued that *Johnson v Pastoriza* was wrongly decided, that it is “unfair and arbitrary” to allow recovery for viable fetuses but not pre-viable fetuses, and that the Legislature intended to allow a wrongful death cause of action for the death of a fetus without regard to viability (Exhibit 5, pp 10-12, 13, 15, 17-18).⁴

The trial court conducted a lengthy hearing on December 19, 2013 (see Exhibit 3, Tr 12/19/13). After hearing extensive argument, the trial court held that the amendment of MCL 600.2922 to reference MCL 600.2922a incorporated all of MCL 600.2922a into MCL 600.2922 (Exhibit 3, p 39). Further, the court found that, since a claim brought under MCL 600.2922a required an affirmative or positive act, the plaintiff’s wrongful death claim here must fail (Exhibit 3, p 40).

⁴ Plaintiff abandoned the majority of these arguments on appeal, arguing before the Court of Appeals that only the “type” of death listed in MCL 600.2922a was incorporated into MCL 600.2922.

By order entered January 24, 2014, the trial court dismissed the wrongful death claim (see Exhibit 2, 01/24/14 order).

Following entry of the order granting defendants' motion for partial summary disposition relative to the wrongful death claim, plaintiff stipulated to the dismissal with prejudice of all remaining claims by order entered February 3, 2014 (see 02/03/14 order). Such order constituted the final order in this case pursuant to MCR 7.202(6)(a)(i).

B. Appellate proceedings.

Plaintiff filed a claim of appeal on or about February 20, 2014, within 21 days of the February 3, 2014 stipulated order. After full briefing, oral argument was held on June 9, 2015 before Patrick M. Meter, P.J., and Mark J. Cavanagh and Kurtis T. Wilder, JJ. On June 16, 2015, the Court of Appeals issued a published opinion reversing the trial court's order dismissing the wrongful death claim. See Exhibit 1, *Simpson v Pickens*, ___ Mich App ___; ___ NW2d ___ (2015). Purporting to apply the plain and unambiguous statutory language, the court 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:

There is no ambiguity; the "death as described in section 2922a" is the death of an embryo or fetus. No other "death" is described in § 2922a. The statutory language is not equally susceptible to more than this single meaning. The amendatory language merely differentiates between the death of "a person" as construed under MCL 600.2922 and the deaths of an embryo or fetus. According to the 2005 amendment, the first requirement for a wrongful-death action—that there be a death—is satisfied when the death is of an embryo or fetus. And that is the extent of the impact this amendment had on the wrongful death statute; it merely expanded the scope of actionable deaths to include the death of an embryo or fetus. [Exhibit 1, *Simpson v Pickens*, slip op at p 5, citations omitted.]

Thus, the Court of Appeals held that MCL 600.2922a need not be considered at all with respect to plaintiff's wrongful death claim brought on behalf of a pre-viable fetus and the claim could therefore be based on an alleged negligent "omission":

In summary, Simpson brought a wrongful-death action on behalf of her decedent and it was grounded in medical malpractice. This action was not brought pursuant to MCL 600.2922a and it need not be considered a statutory cause of action brought under MCL 600.2922a. Therefore, Simpson was not required to allege that defendants committed an affirmative or positive act that caused her decedent's death in order to state a claim under MCL 600.2922. To the contrary, under the wrongful-death statute, MCL 600.2922(1), a cause of action may be brought when death "is caused by wrongful act, neglect, or fault of another" As the *Johnson* Court [*Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012)] explained, the "more expansive terms 'neglect' and 'fault of another' that [the Legislature] included in MCL 600.2922(1) [] permit liability on the basis of omissions." And, here, the alleged "omission" that caused plaintiff's decedent's death was the failure to perform a cerclage; therefore, plaintiff stated a valid cause of action under MCL 600.2922. Accordingly, the trial court's order granting defendants' motion for partial summary disposition of this wrongful-death action is reversed. [Exhibit 1, *Simpson v Pickens*, slip op at p 6, citation omitted.]

Defendants now seek leave to appeal to this Court.

ARGUMENT

The trial court properly dismissed the wrongful death claim brought on behalf of a pre-viable fetus where plaintiff could not show that defendants committed an alleged negligent “affirmative or positive act”, required where a claim is brought pursuant to MCL 600.2922a, even when filtered through the wrongful death act.

At issue in this appeal is the interpretation of the 2005 amendment of the wrongful death act to reference “death as described in section 2922a”. This issue was previously before this Court in the case of *Johnson v Pastoriza*, 491 Mich 417; 818 NW2d 279 (2012). However, this Court’s opinion in *Johnson* contains no clear pronouncement on this issue, as this Court concluded that the 2005 amendment was not retroactive. Since the cause of action in *Johnson* arose before the effective date of the amendment, this Court held that the same simply did not apply. *Id.* at 420.

The Court of Appeals’ published opinion in this case squarely addresses the 2005 amendment of the wrongful death act. However, defendants submit that the Court of Appeals fundamentally misinterpreted the impact of that amendment. The Court of Appeals held that the phrase “death as described in section 2922a” inserted into the wrongful death act incorporated only “the death of an embryo or fetus” and no other part of MCL 600.2922a:

According to the 2005 amendment, the first requirement for a wrongful-death action—that there be a death—is satisfied when the death is of an embryo or fetus. And that is the extent of the impact this amendment had on the wrongful death statute; it merely expanded the scope of actionable deaths to include the death of an embryo or fetus. [Exhibit 1, *Simpson v Pickens*, ___ Mich App ___; ___ NW2d ___ (2015), slip op at p 5.]

The Court of Appeals’ decision fails to apply the plain and unambiguous statutory language. By using the phrase “death as described in section 2922a” the Legislature included more than simply

a list of the types of death referenced in MCL 600.2922a. The deaths described in MCL 600.2922a include all terms of that statute that serve to define, expand, or limit the deaths for which recovery is permitted in section 2922a. The Court of Appeals' opinion ignores the descriptive elements of MCL 600.2922a, with the end result being that MCL 600.2922a no longer has any application in those cases for which this statute was enacted, i.e., to provide a cause of action for certain pre-viability injuries to or deaths of fetuses or embryos.

The impact of the Court of Appeals' published decision is enormous. By holding that no other portion of MCL 600.2922a was incorporated into the wrongful death act, the court has allowed wrongful death actions on behalf of pre-viable fetuses to proceed based on alleged negligent acts *or* omissions, contrary to this Court's decision in *Johnson*. The rationale articulated by the Court of Appeals also has the effect of nullifying the exemptions from liability contained in MCL 600.2922a(2).⁵ Absent these exemptions, a cause of action can now be maintained against the pregnant individual herself who "negligently" loses a pre-viability pregnancy, as well as against medical professionals who perform procedures on pregnant individuals with the consent of the pregnant individual and/or without consent in an emergency setting, or who prescribe medication.

The Court of Appeals erroneously interpreted the 2005 amendment to the wrongful death act to incorporate only the types of death listed in MCL 600.2922a. This decision should be reversed and the trial court's order of dismissal reinstated.

⁵ This Court in *Johnson* directed the parties to brief the issue of whether the exceptions to recovery in MCL 600.2922a(2) were incorporated into the wrongful death act, but found it unnecessary to address this issue after finding that the 2005 amendment was not retroactive. See *Johnson, supra*, 491 Mich at 420 n 1.

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. With issues of statutory construction, this Court begins with an examination of the plain language of the statute.

As this Court has stated, “[a]n anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. To do so, [this Court] begin[s] with an examination of the language of the statute.” *Roberts v Mecosta County General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (citations omitted). It is well-established that “[s]tatutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning.” *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). Further, if the language is clear and unambiguous, the statute should be enforced as written and judicial construction is not permitted. *Id.* See also MCL 8.3a (“[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . .”).

The statutes at issue here are MCL 600.2922 and MCL 600.2922a (pertinent statutory provisions attached as Exhibit 4-C). Beginning with the language of the statutes, MCL 600.2922 (the wrongful death statute), as amended in 2005 to reference MCL 600.2922a, 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.]

In turn, “section 2922a”, i.e., MCL 600.2922a, a statute that was originally enacted in 1998, in its current form provides:

(1) 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.

(2) This section does not apply to any of the following:

(a) An act committed by the pregnant individual.

(b) A medical procedure performed by a physician or other licensed health professional within the scope of his or her practice and with the pregnant individual’s consent or the consent of an individual who may lawfully provide consent on her behalf or without consent as necessitated by a medical emergency.

(c) The lawful dispensation, administration, or prescription of medication.

(3) This section does not prohibit a civil action under any other applicable law.

(4) As used in this section, “physician or other licensed health professional” means a person licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

Specifically at issue here is the interpretation of the amendment to the wrongful death statute, which now allows an action to be brought for “the death of a person, injuries resulting in death, **or death as described in section 2922a . . .**” (emphasis added). Even more specifically, the statutory analysis in this case turns on interpretation of the emphasized phrase “death as described in section

2922a”. It is defendants’ position that this phrase incorporates all of MCL 600.2922a that serves to define, expand, or limit (i.e., that “describes”) the deaths for which recovery is permitted in section 2922a. That is, by choosing language referring to a description, rather than simply including a list of types of death referenced in MCL 600.2922a, the Legislature incorporated into the wrongful death act all of MCL 600.2922a that serves to “describe” the relevant “deaths” for which recovery is permitted. Defendants submit that the plain language of these statutes supports this interpretation.

C. The use of the phrase “death as described in section 2922a” indicates that the Legislature incorporated into the wrongful death act the elements, requirements, and/or limitations contained in MCL 600.2922a.

The Legislature’s use of the phrase “as described” is obviously crucial to this analysis, but this term is not defined in either statute. 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

⁶ See <http://www.merriam-webster.com/dictionary/description> <accessed December 9, 2014>.

: 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. As this Court held in *Johnson*

⁷ See <http://www.merriam-webster.com/dictionary/describing> <accessed December 9, 2014>.

⁸ See <http://www.thefreedictionary.com/describe> <accessed June 23, 2015>.

⁹ See <http://www.thefreedictionary.com/description> <accessed June 23, 2015>.

v Pastoriza, supra, MCL 600.2922a “specifically requires a wrongful or negligent act, a wrongful or negligent omission does not impose liability under the statute.” 491 Mich at 438. Thus, a “death as described in section 2922a” is a miscarriage, stillbirth, or the death of the embryo or fetus caused by a wrongful or negligent act committed against the pregnant individual.

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. Nonetheless, the Court of Appeals in this case adopted plaintiff’s argument, concluding that the phrase “death as described in section 2922a” incorporated *only* the type of death referenced in MCL 600.2922a:

There is no ambiguity; the “death as described in section 2922a” is the death of an embryo or fetus. No other “death” is described in § 2922a. The statutory language is not equally susceptible to more than this single meaning. The amendatory language merely differentiates between the death of “a person” as construed under MCL 600.2922 and the deaths of an embryo or fetus. [Exhibit 1, *Simpson v Pickens, supra*, slip op at p 5, citation omitted.]

The Court of Appeals’ interpretation ignores the Legislature’s use of “as described” to

reference the death in MCL 600.2922a, as well as the commonly understood meaning of this phrase. The Legislature could have simply amended MCL 600.2922 to allow recovery if “the death of a person, injuries resulting in death, or death of an embryo or fetus shall be caused by wrongful act, neglect, or fault of another . . .” Such language would have been consistent with the Court of Appeals’ interpretation of the relevant statutes. Yet the Legislature did not do so, instead choosing the more expansive language of “death as described in section 2922a”. As set forth above, the term “as described”, in its ordinary and common usage, constitutes more than simply reciting a list. As applied to these statutes, the “death as described in section 2922a” includes those provisions that define, expand, or limit the deaths for which recovery is available pursuant to MCL 600.2922a, including the need to show an affirmative or positive act, as this Court held in *Johnson, supra*. The Court of Appeals erred in concluding otherwise.

D. The Court of Appeals failed to apply the plain statutory language which provides that a wrongful death action can proceed only if the underlying action could proceed.

The interpretation of the phrase “death as described in section 2922a” primarily governs the outcome of this case. Yet there is additional language that support defendants’ interpretation of the relevant statutory provisions. Specifically, as MCL 600.2922(1) 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.]

This language allows a wrongful death action to proceed only if the same action could have

proceeded as a separate personal injury action if death had not resulted. Indeed, the Court of Appeals here seemed to agree with that conclusion:

The third requirement is that the “wrongful act, neglect, or fault of another” be such that, if death had not ensued, a cause of action could have been filed against the responsible party and damages recovered from them. See MCL 600.2922. 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.” (Emphasis in original). 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. [Exhibit 1, *Simpson v Pickens*, *supra*, slip op at pp 4-5, citations omitted, emphasis in original.]

Nonetheless, while recognizing that the underlying cause of action retains “all of its statutory and common-law limitations”, the court conversely concluded that, where death results from a cause of action that would otherwise originate under MCL 600.2922a, MCL 600.2922a has no application:

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. Thus, 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 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. [Exhibit 1, *Simpson v Pickens*, *supra*,

slip op at p 5, citations omitted.]

Thus, the Court of Appeals has concluded that the amendment to the wrongful death act to refer to “death as described in 2922a” created a cause of action that originates under the wrongful death act. That is, despite there being no recovery for the type of claim asserted here in the absence of MCL 600.2922a (i.e., for the wrongful death of a pre-viable fetus), the Court of Appeals held that MCL 600.2922a has no application in a wrongful death action based on that death. This conclusion is inconsistent with the plain language of MCL 600.2922 providing that recovery is only permitted “if death had not ensued”, the injured party would have a right to recover damages. As discussed in the following section, the Court of Appeals’ conclusion is also inconsistent with this Court’s interpretation of the wrongful death act as a “filter” through which an underlying cause of action should proceed when death results.

E. The Court of Appeals failed to interpret the wrongful death act as the “filter” through which the underlying cause of action must proceed.

As this Court has repeatedly recognized, the wrongful death act is simply a “filter” through which the underlying cause of action must be brought when death results. However, the fact that such a claim must be brought through the wrongful death act does not change the essential nature of the underlying claim (a point which, as noted above, the Court of Appeals seemed to recognize but then ignore in this case). Rather, the fact that a claim must be brought under the wrongful death act 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).]

This Court made similar pronouncements in *Jenkins v Patel*, 471 Mich 158, 165; 684 NW2d 346 (2004), noting that “[c]learly, the wrongful death act is not the only act that is pertinent in a wrongful death action.” Thus, this Court stated that “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.* A similar conclusion applies here. A wrongful death action grounded in MCL 600.2922a is a MCL 600.2922a action where the plaintiff is allowed to collect damages related to the death of the decedent. Indeed, the availability of potentially expanded damages for claims brought under MCL 600.2922a, by incorporating the statute into the wrongful death act, was recognized by this Court in *Johnson, supra*, as one motivation for the 2005 amendment:

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. [491 Mich at 434.]

As applied to the instant case, plaintiff’s wrongful death claim could not exist in the absence of MCL 600.2922a, which created the cause of action for the death of a pre-viable fetus/embryo. Thus, this claim is brought pursuant to MCL 600.2922a and simply must be “filtered” through the wrongful death act. However, such does not change the nature of the underlying claim (as the Court of Appeals seemed to recognize but nonetheless failed to apply in this case). Rather, plaintiff is still required to comply with MCL 600.2922a, including the requirement to show an affirmative or positive act.

F. Where a claim is filtered through the wrongful death act, the restrictions/requirements applicable to the underlying claim remain the same.

The fact that the wrongful death act does not change the essential nature of the underlying claim, or the underlying claim's elements, is illustrated by other causes of action that are "filtered" through MCL 600.2922 if death results. Heightened standards or requirements applicable to the underlying action, through statute or case law, apply even where death results. An analogous situation is presented with respect to medical malpractice actions in general. A medical malpractice action has four required elements, including the need to establish that the defendant breached the applicable standard of care. See, e.g., *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). See also MCL 600.2912a.

While in this particular case, the claim is also a medical malpractice claim, as this Court has stated (and the Court of Appeals seemed to recognize), there are other statutes applicable to medical malpractice claims. Thus, where the claimed medical malpractice results in death, the medical malpractice claim must be brought pursuant to MCL 600.2922. See MCL 600.2921. Yet such does not change the nature of the underlying medical malpractice claim, nor is the plaintiff relieved of the burden to establish (through expert testimony), among other required elements, that the "wrongful act, neglect, or fault of another" rose to a breach of the applicable standard of care and was not simply "wrongful".¹⁰ Thus, although where death occurs, the medical malpractice action is filtered

¹⁰ The negligence standard for professional malpractice is reflected in the civil jury instructions. M Civ JI 30.01 defines "Professional Negligence and/or Malpractice" as the following:

When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do

(continued...)

through the wrongful death act, such does not change the underlying medical malpractice claim. In particular, the plaintiff in an action alleging medical malpractice/wrongful death cannot simply prove a “wrongful act, neglect, or fault of another.” Rather, the plaintiff must prove negligence rising to a breach in the standard of care, considering the defendant’s learning, judgment, or skill, the particular speciality, and the other circumstances existing in the case. Thus, a particular act may be considered “wrongful” in certain contexts but, in a different context, the same act may be within the standard of care.

An action in which the Emergency Medical Services Act, MCL 333.20901, *et seq.*, applies provides a similar situation. 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.”¹¹ 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 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, again, 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

¹⁰(...continued)

something which a [name profession] of ordinary learning, judgment or skill in [this community or a similar one / name particular specialty] would do, or the doing of something which a [name profession / name particular specialty] of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.

¹¹ Since this act specifically allows for *both* acts and omissions, in contrast to MCL 600.2922a, this act does not provide a bar to wrongful death actions based on alleged negligent omissions.

the claimed negligence rose to the level of gross negligence or willful misconduct.¹²

Similarly, while a child can sue his or her parent for the parent's negligence that results in injuries to the child, there are important exceptions to this rule. Specifically, such a cause of action is precluded "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Plumley v Klein*, 388 Mich 1, 8; 199 NW2d 169 (1972). Again, where death results, such an action would be filtered through the wrongful death act. Yet by doing so, the plaintiff/personal representative of the deceased child's estate would not be permitted to simply show that the claim was based on the parent's "wrongful act, neglect, or fault." Rather, the plaintiff/personal representative would be required to show a act that did not fall within the definition of an exercise of reasonable parental authority over the child or an exercise of reasonable parental discretion.

¹² The heightened negligence standards that would apply in such cases are defined in the jury instructions. M Civ JI 14.10 defines "Gross Negligence" as:

Gross negligence means conduct or a failure to act that is so reckless that it demonstrates a substantial lack of concern for whether an injury will result.

M Civ JI 14.11 defines "Wanton Misconduct" as:

Wanton misconduct means conduct or a failure to act that shows such indifference to whether harm will result as to be equal to a willingness that harm will result.

M Civ JI 14.12 defines "Willful Misconduct" as:

Willful misconduct means conduct or a failure to act that was intended to harm the plaintiff.

The Court of Appeals in its opinion in the instant case acknowledged that the wrongful death act operates as a “filter” where death occurs, but the underlying claim remains the same:

This is a wrongful-death action brought on behalf of the deceased nonviable fetus. The injuries alleged are those of the nonviable fetus and the underlying theory of liability is medical malpractice. Because it was alleged that the injuries to the nonviable fetus resulted in death, this action had to be brought under the wrongful-death act, MCL 600.2922, which “provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death.” *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004); see also MCL 600.2921. “[T]he wrongful-death act is essentially a ‘filter’ through which the underlying claim may proceed.” *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 88; 746 NW2d 847 (2008). In other words, for example, “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.” *Jenkins*, 471 Mich at 165-166. Therefore, statutory and common-law limitations, like the noneconomic-damages cap applicable in medical malpractice actions, apply to wrongful-death actions. *Wesche*, 480 Mich at 90. [Exhibit 1, *Simpson v Pickens*, *supra*, slip op at p 3.]

Yet despite recognizing that the “statutory and common-law limitations” applicable to the underlying cause of action apply regardless of whether death results, the Court of Appeals failed to give effect to the statutory limitations contained in MCL 600.2922a, instead holding that the underlying theory was simply “medical malpractice.”

The wrongful death act allows a “death as described in section 2922a” to proceed as a wrongful death action, meaning that the MCL 600.2922a action must be filtered through the wrongful death act when death results. Thus, simply because a claim sounds in medical malpractice, such does not negate other statutory provisions that apply, including MCL 600.2922a. As with the above examples, the underlying cause of action still retains its essential elements, requirements, and/or limitations. With respect to an action that arises under MCL 600.2922a, the underlying cause

of action requires the plaintiff to show an affirmative or positive act, as this Court held in *Johnson, supra*. This requirement remains even where death results.

G. If only the “type” of death in MCL 600.2922a is incorporated into MCL 600.2922, the remainder of MCL 600.2922a is also not incorporated into MCL 600.2922.

In granting leave to appeal in *Johnson v Pastoriza*, this Court recognized that there was an impact if the Court were to conclude that only the type of death referenced in MCL 600.2922a was incorporated into the wrongful death act. This Court asked the parties in *Johnson* to address whether “the 2005 amendment of MCL 600.2922 incorporates the exceptions to recovery contained at MCL 600.2922a(2)”, but ultimately found it unnecessary to address the issue when it found the amendment was not retroactive. *Johnson, supra*, 491 Mich at 420 n 1. The Court of Appeals’ decision has resolved this question in the negative. That is, the Court of Appeals concluded that, other than “the death of an embryo or fetus”, no other portion of MCL 600.2922a was incorporated into the wrongful death act. The court so stated in its opinion:

There is no ambiguity; the “death as described in section 2922a” is the death of an embryo or fetus. No other “death” is described in § 2922a. The statutory language is not equally susceptible to more than this single meaning. The amendatory language merely differentiates between the death of “a person” as construed under MCL 600.2922 and the deaths of an embryo or fetus. According to the 2005 amendment, the first requirement for a wrongful-death action—that there be a death—is satisfied when the death is of an embryo or fetus. And that is the extent of the impact this amendment had on the wrongful death statute; it merely expanded the scope of actionable deaths to include the death of an embryo or fetus. [Exhibit 1, *Simpson v Pickens*, slip op at p 5, citation omitted.]

* * *

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. [Exhibit 1, *Simpson v Pickens*, slip op at p 6.]

The Court of Appeals’ interpretation of MCL 600.2922 and MCL 600.2922a renders the other restrictions and/or immunity provisions in MCL 600.2922a (including those in subsection (2)) without effect, thereby expanding potential liability for deaths involving pre-viable embryos or fetuses to individuals who were intended to be completely protected. Specifically, to accept the Court of Appeals’ conclusion, i.e., that the incorporation of MCL 600.2922a into MCL 600.2922 incorporated *only* “the death of an embryo or fetus” and no other provisions of MCL 600.2922a, would be to completely eviscerate MCL 600.2922a, including the exceptions to liability in subsection (2).

That is, by concluding that no portion of MCL 600.2922a was incorporated into MCL 600.2922, the Court of Appeals has rendered the other restrictions contained in MCL 600.2922a without effect. In particular, in subsection (2)(a), MCL 600.2922a contains a provision providing that the statute does not apply to “[a]n act committed by the pregnant individual.” Pursuant to the Court of Appeals decision, where only “the death of an embryo or fetus” was incorporated into the wrongful death act, a wrongful death action can now be maintained against a pregnant woman who loses her pregnancy (at any stage of viability).

Such a claim could be premised, for example, on the pregnant woman’s negligent failure in a high risk pregnancy to follow physician instructions, such as recommendations for bedrest and/or weight lifting restrictions during her pregnancy, allegedly resulting in a miscarriage, stillbirth, or the death of the embryo or fetus. Such a claim could also be premised on a pregnant woman’s negligent use of alcohol, tobacco, or narcotics, if such use allegedly results in a miscarriage, stillbirth, or the

death of the embryo or fetus. Or if a pregnant woman fails to wear a seatbelt and is involved in an automobile accident that results in a miscarriage, stillbirth, or the death of the embryo or fetus, a claim could be maintained against the pregnant woman for her negligent failure to wear a seatbelt. See MCL 257.710e(7) (“Failure to wear a safety belt in violation of this section may be considered evidence of negligence . . .”). There are endless possibilities where a pregnant woman could arguably be at “fault” for a miscarriage or stillbirth. Plaintiff’s argument exposes these women to a civil action for damages if a miscarriage or stillbirth should occur, in direct opposition to the immunity explicitly stated in MCL 600.2922a(2)(a).

Further, it should be noted that, since the Court of Appeals’ decision also found that a wrongful death action based on the death of a pre-viable fetus could be based on alleged negligent acts *or* omissions, potential claims against pregnant women who experience a miscarriage or stillbirth can also now be based on alleged negligent acts *or* omissions. Therefore, applying the Court of Appeals decision, any qualified interested party can be appointed personal representative of the estate of the deceased embryo or fetus and commence an action for damages against a woman who has lost her pregnancy.

Similarly, MCL 600.2922a(2)(b) and (c) contain additional exceptions to the application of the statute for medical procedures performed by licensed health care professionals with the consent of the pregnant individual and for the “lawful dispensation, administration, or prescription of medication.” This Court in *Johnson, supra*, 491 Mich at 437-438, held that these provisions provided an exemption for liability within the parameters of the exception:

MCL 600.2922a exempts healthcare professionals from liability for medical procedures performed either with consent or under emergency circumstances, and from liability for lawfully dispensing

and prescribing medication. It would be incongruous to read the statute as providing liability for negligent omissions when it specifically exempts healthcare professionals from liability for their affirmative acts of commission performed within the scope of their practice under MCL 600.2922a(2)(b).

Yet, again, the impact of the Court of Appeals decision is that these provisions are now without meaning and a civil action for damages can be pursued against the health care provider pursuant to MCL 600.2922 if a miscarriage, stillbirth or the death of an embryo or fetus occurs as the result of a medical procedure or the prescription of medication. The exceptions in subsections (2)(b) and (c) of MCL 600.2922a would most obviously apply in the context of abortion providers and, under MCL 600.2922a, appear to be intended, in part, to immunize abortion providers from a civil suit for damages where an abortion is performed with the consent of the pregnant individual.¹³ However, applying the Court of Appeals' decision, where an abortion is performed, again, any interested party can be appointed personal representative of the estate of the deceased embryo or fetus and commence an action for damages against the abortion provider, arguing that the abortion was "wrongfully" provided.

The Court of Appeals directly held that MCL 600.2922a has no application in the context of a wrongful death action brought on behalf of an embryo or fetus. Thus, lawsuits against pregnant women who experience a miscarriage or stillbirth at any stage of viability and against health care providers are now permitted (with the above examples providing only a few of the possible factual

¹³ Before the trial court, defendants also argued that the provisions in MCL 600.2922a(2)(b) and (c) applied to immunize the health care providers in this case from liability (see Exhibit 4, defendants' motion, p 17). While defendants do not abandon these arguments, it was not necessary to address this additional/alternative basis for the trial court's decision since plaintiff conceded on appeal that, if MCL 600.2922a applies in this case, plaintiff "has no basis for recovery under that statute" (see plaintiff's Court of Appeals brief on appeal, p 9 n 3).

scenarios in which such liability might arise). Since the Court of Appeals decision has rendered a large portion of MCL 600.2922a nugatory, as well as contrary to the statute's explicit provisions, leave should be granted by this Court and such interpretation should be rejected.

H. If there is any ambiguity in the statutes, rules of statutory construction compel an interpretation that incorporation of MCL 600.2922a into MCL 600.2922 did not eliminate the exceptions contained in MCL 600.2922a.

The plain language of the statutes controls the outcome of this case. However, to the extent that there is any perceived ambiguity or conflict between MCL 600.2922 or MCL 600.2922a, additional rules of statutory construction support a finding that MCL 600.2922a controls this claim and, thus, plaintiff must prove “an affirmative or positive act” to proceed. See also MCL 8.3 (“[i]n the construction of the statutes of this state, the rules stated in sections 3a to 3w [MCL 8.3a to MCL 8.3w] shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature”).

1. To allow recovery for alleged negligent omissions renders MCL 600.2922a nugatory.

“Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory.” *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). “A statutory provision is rendered nugatory when an interpretation fails to give the provision meaning or effect.” *Empson-Laviolette v Crago*, 280 Mich App 620, 630; 760 NW2d 793 (2008). The Court of Appeals’ interpretation of the statutes at issue here allows plaintiff to avoid the limitations imposed by MCL 600.2922a, instead allowing plaintiff to proceed with a claim based merely on the alleged “wrongful act, neglect, or fault of another”, rendering the requirements of MCL 600.2922a completely nugatory.

Plaintiff's claim here is for the death of a nonviable fetus at 18.2 weeks gestation. Prior to the enactment of MCL 600.2922a, there was no common law or statutory right in Michigan for a cause of action for the death of a nonviable fetus. See *Toth v Goree*, 65 Mich App 296, 302; 237 NW2d 297 (1975) and *McClain v University of Michigan Board of Regents*, 256 Mich App 492; 665 NW2d 484 (2003). The new cause of action created by MCL 600.2922a to allow certain claims on behalf of a nonviable fetus has explicitly defined parameters, including a requirement that a plaintiff show "an affirmative or positive act." If plaintiff is permitted to disregard those requirements, MCL 600.2922a is rendered completely without effect in the context of the very reason why this statute was created – to provide a cause of action under certain circumstances for the injury or death of a nonviable fetus. See *Johnson, supra*, 491 Mich at 422-423.

An interpretation of MCL 600.2922 and MCL 600.2922a that allows a wrongful death action for a nonviable fetus to proceed based simply on the alleged "wrongful act, neglect, or fault of another" gives no effect to the requirements of MCL 600.2922a. Indeed, the Court of Appeals specifically held that "[t]his action was not brought pursuant to MCL 600.2922a." *Simpson v Pickens, supra*, slip op at p 6 (Exhibit 1). As MCL 600.2922a is rendered completely nugatory by the Court of Appeals' interpretation, it must be avoided.

2. Defendants' interpretation of MCL 600.2922 and MCL 600.2922a provides a harmonious reading of both statutes.

It is a standard rule of statutory construction that statutes should be interpreted harmoniously, particularly statutes within the same act, and defendants' interpretation of MCL 600.2922 and MCL 600.2922a gives a harmonious reading to the provisions of both statutes. This Court emphasized the goal of a harmonious interpretation in *International Business Machines Corp v Dep't of Treasury*,

496 Mich 642, 652; 852 NW2d 865 (2014):

In attempting to find a harmonious construction of the statutes, we “will regard all statutes upon the same general subject-matter as part of one system...” Further, “[s]tatutes *in pari materia*, although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each....”

See also, *Great Lakes Division of National Steel Corp v City of Ecorse*, 227 Mich App 379, 431; 576 NW2d 667 (1998) (“it is a rule of statutory construction that an entire act must be read as a whole, and the interpretation to be given to a particular word in one section should be arrived at after due consideration of every other section so as to produce, if possible, an harmonious and consistent enactment as a whole”).

The trial court’s interpretation of MCL 600.2922 and MCL 600.2922a, as advocated by defendants, gives harmonious effect to each statute and each provision. In contrast, plaintiff’s interpretation, which was accepted by the Court of Appeals, results in a conflict between MCL 600.2922 and MCL 600.2922a. That is, on appeal, plaintiff made no attempt to argue that the interpretation advocated by plaintiff harmonized the two statutes. And, indeed, plaintiff argued instead that “it is far more logical to conclude that the limitations imposed on the type of §2922a, *i.e.* only affirmative acts of negligence, should give way to the more expansive definition of fault in §2922” (plaintiff’s Court of Appeals brief, p 13 n 4). Thus, instead of adopting a harmonious interpretation, by adopting the plaintiff’s interpretation of these statutes, the Court of Appeals has endorsed a conflicting interpretation where MCL 600.2922a is rendered meaningless.

3. MCL 600.2922a, as the more specific statute, controls over MCL 600.2922, the more general statute.

The result endorsed by the Court of Appeals, where MCL 600.2922 controls to the exclusion

of MCL 600.2922a, directly violates another standard rule of statutory construction. It is well established that, when two statutory provisions conflict, the specific statute controls over the more general statute. This Court so noted in *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994), stating that “where a statute contains a general provision and a specific provision, the specific provision controls.” See also *Cyrus v Calhoun County Sheriff*, 85 Mich App 397, 400; 271 NW2d 249 (1978) (“[i]t is an established rule of statutory construction that a specific statute takes precedence over a general one and is viewed as an exception thereto”) and *Brown v Townsend*, 229 Mich App 496, 501; 582 NW2d 530 (1998) (“when two statutory provisions conflict and one is specific while the other is only generally applicable, the specific provision prevails”).

In the instant case, to the extent that MCL 600.2922 and MCL 600.2922a conflict, the more specific provision must control. MCL 600.2922a, as a provision which applies only to potential claims of miscarriage, stillbirth, or the death of a fetus or embryo, is undeniably more specific than MCL 600.2922, which applies generally to all actions involving death. Further, a claim brought under MCL 600.2922a specifically requires “an affirmative or positive act” to state a claim, while MCL 600.2922 more generally requires that a claim be based on the alleged “wrongful act, neglect, or fault of another.” Thus, to the extent that MCL 600.2922a conflicts with MCL 600.2922, MCL 600.2922a must control as the more specific provision.

As applied to the instant case, since MCL 600.2922a controls as the more specific statute, plaintiff’s claim based on the alleged failure to perform a cerclage, an alleged negligent omission, cannot proceed. See *Johnson, supra*. The wrongful death claim on behalf of the estate of Antaun Simpson was properly dismissed. The Court of Appeals’ decision should be reversed and the trial court’s order of dismissal reinstated.

4. The Legislative history supports defendants' interpretation.

As set forth above, the plain statutory language supports the conclusion that all of MCL 600.2922a that serves to define, expand, or limit the deaths for which recovery is permitted in section 2922a was incorporated into MCL 600.2922. To the extent that there is any ambiguity, legislative history can be consulted to aid in interpretation. This Court explained the value of different types of legislative history in *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003):

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.

Here, the legislative history preceding the 2005 amendment to MCL 600.2922 indicates that, contrary to the Court of Appeals' conclusion, the incorporation of "death as described in section 2922a" into MCL 600.2922 was *not* intended to eviscerate MCL 600.2922a or render that statute meaningless.

a. MCL 600.2922a was enacted to provide a cause of action for certain prenatal torts.

As noted in the Michigan Bar Journal article, Marks and Marks, *Prenatal Torts in Michigan*,

83 MBJ 28 (June 2004), 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. As also described in that article, the language included in the 1998 version of MCL 600.2922a represented a compromise between pro-life and pro-choice advocates, primarily to address the concern that extending legal rights to the unborn may interfere with the pregnant individual's reproductive rights.¹⁴ 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.¹⁵

b. The wrongful death act was amended to assure that MCL 600.2922a was not overlooked.

Subsequently, in 2005, the wrongful death act, MCL 600.2922, was amended (to its current form) to explicitly reference MCL 600.2922a. 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." The 2005 amendment was in apparent response to the Court of Appeals decision in *McClain v University of Michigan Board of Regents*,

¹⁴ The compromise primarily involved removing language that defined the unborn embryo/fetus as an "individual."

¹⁵ 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.

supra, 256 Mich App at 495, 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.”

Legislative analyses relative to the 2005 amendment reflect a concern that MCL 600.2922a had not been recognized by the courts as permitting a cause of action in certain circumstances for the death of a pre-viable fetus. The first House Legislative Analysis, dated October 24, 2005, states that the proposed inclusion of MCL 600.2922a in MCL 600.2922 was simply intended to insure that MCL 600.2922a would not be “overlooked”:

The bill is needed to clarify that the intent of legislation enacted in 1998 and amended in 2002 (MCL 600.2922a) was to create a cause of action in which a person could recover damages if conduct of another against a pregnant woman (i.e., through assault, gross negligence, or drunk or reckless driving) caused a miscarriage or stillbirth or caused physical injury to or the death of the embryo or fetus. Over the past few years, several civil actions involving the death of a nonviable embryo or fetus have been dismissed by the courts for failing to present a case for which damages can be recovered. Apparently, the courts only looked at Section 2922 of the Revised Judicature Act, known as the wrongful death statute, which applies the provision to a “person”. Since a nonviable embryo or fetus is not considered to be a person, for purposes of a wrongful death, the suits were dismissed or the courts found in favor for the defendants. Had the courts examined Section 2922a, it should have been clear that depending on the particulars of a case, a person can be held liable for an act causing the death of a pregnant woman's fetus or embryo. Since the term “embryo” generally refers to the first weeks or months of a pregnancy, viability should not be an issue in determining if a cause of action exists.

The bill would address the problem by including in the wrongful death provision a reference to deaths described in Section 2922a. As a result, the two provisions would be clearly linked and Section 2922a less likely to be overlooked. [See Exhibit 4-D, emphasis added.]

The Senate Fiscal Agency analysis, dated November 28, 2005, in describing the “rationale” for the amendment to MCL 600.2922, reveals similar concerns, specifically mentioning the *McClain* decision and the *Michigan Bar Journal* article:

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 4-E, p 1, emphasis added.]

These analyses reflect a concern that MCL 600.2922a had not been considered in the appropriate cases, such as *McClain*, and an intent to amend the wrongful death act in response to those decisions. In direct response to such decisions, the Legislature amended the wrongful death act to reference “death as described in section 2922a.” Conversely, this legislative history reveals no indication that the incorporation of MCL 600.2922a into MCL 600.2922 was intended to change or expand the essential nature of the underlying claim arising under MCL 600.2922a. As this Court has held, a valid claim under MCL 600.2922a requires an affirmative or positive act.

The legislative history supports the conclusion advanced by defendants. Specifically, that the amendment to MCL 600.2922 is exactly what it appears to be – an attempt by the Legislature to assure that MCL 600.2922a was no longer “overlooked.”

I. Conclusion.

The Court of Appeals decision in this case ignores and fails to give effect to the plain statutory language contained in the wrongful death act (MCL 600.2922) and in MCL 600.2922a. The Court of Appeals has essentially rendered MCL 600.2922a meaningless in the context for which this statute was enacted. That is, while MCL 600.2922a was created to give a cause of action for certain injuries to or death of a pre-viable fetus, the Court of Appeals in its decision has held that MCL 600.2922a has no application to wrongful death claims involving a pre-viable fetus. The language of the 2005 amendment to the wrongful death act, which inserted the phrase “death as described in section 2922a” evidences an intent to incorporate the terms, conditions, and limitations of MCL 600.2922a that serve to define the “deaths” described therein. In particular, this language incorporates the need to show an affirmative or positive act, consistent with this Court’s decision in *Johnson, supra*.

In addition, the Court of Appeals has ignored the legislative history of the relevant statutes and, in particular, the motivation for the 2005 amendment. While the legislative history indicates an intention to merely assure that MCL 600.2922a was no longer “overlooked”, the Court of Appeals has essentially held that the Legislature intended to greatly expand the potential bases for claims involving pre-viable embryos or fetuses to include alleged negligent acts or omissions. In addition, the Court of Appeals has held that the Legislature intended to remove the exemptions from liability in MCL 600.2922(2), exposing individuals to liability who were intended to be entirely protected

(including the pregnant woman herself).

The Court of Appeals erred in reversing the trial court's grant of summary disposition as to 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,

TANOURY, NAUTS, McKINNEY &
GARBARINO, P.L.L.C.

BY: /s/Anita Comorski

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Dated: July 23, 2015

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STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiff-Appellee,

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.

/

NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

TO: COUNSEL OF RECORD
CLERK OF THE COURT, MICHIGAN COURT OF APPEALS
CLERK OF THE COURT, WAYNE COUNTY CIRCUIT COURT

PLEASE TAKE NOTICE that on July 23, 2015, defendants-appellants filed their application
for leave to appeal in the Michigan Supreme Court.

Respectfully submitted,

TANOURY, NAUTS, McKINNEY &
GARBARINO, P.L.L.C.

BY: /s/Anita Comorski

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Dated: July 23, 2015

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STATE OF MICHIGAN
IN THE SUPREME COURT

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and

SHAKEETA SIMPSON,

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MEDICAL CENTER, ALEX PICKENS JR., M.D.,
and LINDA S. HARTMAN, P.A.,

Defendants-Appellants.

Supreme Court Case No.

Court of Appeals Case No. 320443

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

PROOF OF SERVICE

The undersigned states that she is employed with the firm of TANOURY, NAUTS,
MCKINNEY & GARBARINO, PLLC and that on July 23, 2015, she caused to be served:

NOTICE OF HEARING

DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

**NOTICE OF FILING OF DEFENDANTS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL**

EXHIBITS (BOUND SEPARATELY)

PROOF OF SERVICE

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/s/Jodie Henley