STATE OF MICHIGAN

COURT OF APPEALS

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MARGARET JENKINS, Personal Representative of the Estate of MATTIE HOWARD, Deceased, Plaintiff-Appellee, v JAYESH KUMAR PATEL and COMPREHENSIVE HEALTH SERVICES, d/b/a THE WELLNESS PLAN, Defendants-Appellants.	No. 233116 Wayne Circuit Court LC No. 98-808834-NH Updated Copy May 23, 2003

Before: Cooper, P.J., and Murphy and Kelly, JJ.

MURPHY, J.

Defendants Jayesh K. Patel and Comprehensive Health Services appeal as of right from a judgment entered pursuant to a jury verdict that awarded plaintiff Margaret Jenkins, personal representative of the estate of Mattie Howard, $10 million in damages in this wrongful-death, medical-malpractice action. On the basis of our resolution of this appeal, it is necessary to address only two central issues. First, we must determine whether Michigan's wrongful-death act (WDA), MCL 600.2922, governs the award of noneconomic damages arising out of a death caused by medical-malpractice, thereby precluding the application of the medical-malpractice cap on noneconomic damages found in MCL 600.1483 (damages cap). We hold that the WDA controls an award of damages where a plaintiff pursues a wrongful-death action predicated on medical malpractice. Therefore, the damages cap is inapplicable and does not limit the noneconomic damages recoverable by plaintiff. The second issue is whether the trial court erred in denying defendants' motion for remittitur or new trial. We hold that the trial court erred in failing to determine a remittitur amount after concluding that the damage award was excessive, where the court also did not grant a new trial.

I. UNDERLYING FACTS

Plaintiff brought this wrongful-death action in March 1998, seeking to recover damages for the death of her mother, Mattie Howard. The complaint alleged that Ms. Howard's death was caused by defendants' medical malpractice. Ms. Howard began treating with defendant Dr. Patel in May 1992, shortly after being hospitalized for a stroke. Ms. Howard had a ten- to fifteen-year

history of hypertension. She also suffered from heart disease and had lost a significant amount of her kidney function. Additionally, her stroke had caused some damage to the vessels in her brain. Dr. Patel monitored Ms. Howard's blood pressure and prescribed various medications to treat her hypertension. Dr. Patel referred Ms. Howard to a nephrologist in late 1993, after tests he ordered showed decreased kidney function. She began dialysis treatment in May 1994. In November 1995, Ms. Howard was admitted to Sinai Hospital, where her condition deteriorated and she died. Plaintiff contended that Dr. Patel negligently managed Ms. Howard's renal disease and hypertension, which ultimately led to her death. Plaintiff's expert testified in detail concerning how Dr. Patel breached the standard of care that was required of him in treating Ms. Howard and how this led to her demise. Plaintiff sought damages for the loss of society and companionship sustained by Ms. Howard's seven children and seven siblings. The jury found in favor of plaintiff and awarded $10 million in noneconomic damages.

Defendants filed a motion for remittitur or new trial, arguing that the damages cap required a reduction in the damage award, and, in the alternative, that the award was excessive. The judge who presided over the jury trial accepted a position on the federal bench, and was no longer on the bench at the time the motion for remittitur or new trial was heard; therefore, the judge who heard the motion relied on the trial transcript in order to render a ruling.[1] The trial court ruled that the WDA controlled and that the damages cap therefore was inapplicable. With respect to the alleged excessiveness of the damage award, the trial court agreed on the record that the award was excessive; however, the court failed to set a remittitur amount because it found it too difficult to determine an appropriate amount of damages in light of the fact that the court was not personally present to hear the testimony of witnesses and judge their credibility. The trial court also refused to grant defendants a new trial.

II. WRONGFUL-DEATH ACT VERSUS THE MEDICAL-MALPRACTICE DAMAGES CAP

A. Standard of Review

We are asked to determine whether the WDA governs an award of damages with respect to noneconomic losses suffered in wrongful-death actions predicated on medical malpractice. This issue involves statutory interpretation, which is a question of law that this Court reviews de novo. *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

B. The Parties' Appellate Arguments

Defendants argue that the damages cap clearly states that it applies to any action alleging medical malpractice. They contend that the trial court committed error in refusing to apply the cap. Defendants assert that the fact that plaintiff used the WDA to bring the lawsuit did not change the underlying character of the lawsuit, which sounded in medical malpractice. According to defendants, the damages cap applies even though there is no specific reference to it in the WDA. Moreover, it is argued that the specific and more recently enacted damages cap

[1] For purposes of this opinion, reference to the "trial court" shall relate to the succeeding judge who heard and ruled on the motion for remittitur or new trial.

superseded any inconsistent language in the WDA. Additionally, defendants maintain that the legislative history of the damages cap confirms that that cap now applies in wrongful-death actions, where, in 1993, the Legislature eliminated death as an exception to the cap, thereby providing for a cap on all medical-malpractice actions, including those where death resulted from the malpractice.

Plaintiff maintains on appeal that the damages cap is inapplicable because: (1) the WDA is the exclusive remedy in wrongful-death cases such as this one, (2) the WDA is the more specific statute and takes precedence over the damages cap, and (3) in examining relevant statutory provisions, the Legislature obviously did not intend for the cap to apply in wrongful-death cases.

C. Guiding Principles of Statutory Construction and Analysis

In *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 63; 642 NW2d 663 (2002), the Michigan Supreme Court, reviewing principles of statutory construction, stated:

> An 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, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [Citations omitted.]

Every word or phrase contained in a statute should be accorded its plain and ordinary meaning. *Slater v Ann Arbor Pub Schools Bd of Ed,* 250 Mich App 419, 428-429; 648 NW2d 205 (2002). Moreover, we presume that every word in a statute has some meaning, and this Court should avoid any construction that would render any part of a statute surplusage or nugatory. *Karpinski v St John Hosp-Macomb Ctr Corp,* 238 Mich App 539, 543; 606 NW2d 45 (1999).

If reasonable minds can differ concerning the meaning of a statute, judicial construction is appropriate. *Slater, supra* at 428. "Where ambiguity exists in a statute, a court may refer to the history of the legislation in order to determine the underlying intent of the Legislature." *Luttrell v Dep't of Corrections,* 421 Mich 93, 103; 365 NW2d 74 (1984). Courts may take cognizance of facts and events surrounding the passage and purpose of the legislation. *Id.*

We commence our analysis by closely examining the language contained in the relevant statutes, beginning with the WDA. Plaintiff's action was brought under the WDA, MCL 600.2922, which provides, in pertinent part:

> (1) Whenever the death of a person or injuries resulting in death 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, and although the death was caused under circumstances that constitute a felony.
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> (2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person. . . .
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> * * *
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> (6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including . . . damages for the loss of financial support and the loss of the society and companionship of the deceased. . . .

MCL 600.2921 provides, in part, that "[a]ctions on claims for injuries which result in death *shall not* be prosecuted after the death of the injured person except pursuant to [MCL 600.2922]." (Emphasis added.) There having been no common-law right of recovery in the survivors of a person wrongfully killed, the sole source of rights in such a case is the WDA. *Courtney v Apple*, 345 Mich 223, 228; 76 NW2d 80 (1956); *Crystal v Hubbard*, 92 Mich App 240, 243; 285 NW2d 66 (1979), rev'd on other grounds 414 Mich 297 (1982). Our Supreme Court in *Courtney, supra* at 228, stated that "[t]he remedy under the death act[2] . . . is exclusive, and the recovery of damages is necessarily limited to those specified by the [L]egislature and sustained by proofs." Thus, plaintiff was statutorily required to proceed with this action for wrongful-death damages pursuant to the WDA.

Examining the language of MCL 600.2922(1), it is beyond dispute that the WDA applies in the context of an action for medical malpractice, where, as here, a death was caused by the negligent act of another as found by the trier of fact. See *Miller v Mercy Mem Hosp*, 466 Mich 196; 644 NW2d 730 (2002). Moreover, the WDA addresses an award of damages and directs a court or jury in "*every action*" to "award damages as the court or jury shall consider fair and equitable . . . ." MCL 600.2922(6) (emphasis added). Additionally, with respect to the nature of the damage claim, the WDA specifically encompasses "loss of the society and companionship of the deceased." MCL 600.2922(6). Therefore, standing alone, the WDA mandates recovery in any amount, limited only by the requirement that the amount be fair and equitable, for noneconomic losses, including those for loss of society and companionship. Without taking into consideration the damages cap, and applying the rules of statutory construction enunciated in *Roberts, supra* at 63, the WDA clearly and unambiguously governs a medical-malpractice action involving death and the accompanying request for damages. This was clearly the Legislature's intent in enacting the WDA. Tort-reform legislation, which included the damages cap, did not result in any amendment of the WDA.

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[2] A wrongful-death action at the time *Courtney* was decided was controlled by MCL 691.581 *et seq.*, repealed by 1961 PA 236, and that act similarly directed the court or jury to award damages in an amount that was fair and just if liability was established, MCL 691.582(2). *Courtney, supra* at 228-229.

We now turn to the damages-cap statute, MCL 600.1483, which is applicable in medical-malpractice actions with respect to an award of noneconomic damages. The original, single-tiered damages cap, enacted in 1986, listed several exceptions to the cap, specifically including death, thereby precluding any limit on noneconomic damages if the exception applied. 1986 PA 178, MCL 600.1483(1)(a)-(g) before amendment by 1993 PA 78.[3] The original language of the damages cap provided, in pertinent part, as follows:

> (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
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> (a) There has been a death.
>
> (b) There has been an intentional tort.
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> (c) A foreign object was wrongfully left in the body of the patient.
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> (d) The injury involves the reproductive system of the patient.
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> (e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.
>
> (f) A limb or organ of the patient was wrongfully removed.
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> (g) The patient has lost a vital bodily function. [1986 PA 178, MCL 600.1483.]

MCL 600.1483 in its current version has a two-tiered damages cap. Section 1483 draws more narrow exceptions and imposes a ceiling on the recovery of noneconomic damages even for these exceptions. The Legislature did not amend the WDA in conjunction with the amendment of § 1483 in 1993. Relevant to our analysis is the Legislature's elimination of the reference to death. The statute now provides, in pertinent part:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

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[3] Thus, as originally enacted, the damages cap statute that exempted death from the cap was consistent with the WDA.

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

* * *

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss. [1993 PA 78, MCL 600.1483.]

We first acknowledge that § 1483 applies in an action for damages alleging medical malpractice, and that the case before us, with respect to the subject matter from which the negligence arose, is such an action. The question initially is whether the language contained in § 1483 clearly and unambiguously leads to the conclusion that it applies in a wrongful-death action; the answer affects whether we confine our determination of the Legislature's intent to the language as drafted or additionally consider the history of the statute. Because the term "death" is not specifically included in § 1483, it is necessary to discuss whether, by implication, the statute applies in a wrongful-death action, taking into consideration the actual words used and the context of that use. A cogent argument can be made that the lack of any reference to death in § 1483, in and of itself, leads to a conclusion that the statute is ambiguous or that it does not apply where death results from medical malpractice. That aside, it is not unreasonable to argue that the composition of § 1483, with its two-tiered cap, does not require any specific reference to death or any other injury not included as an exception, where there is reference to specific injuries in the exceptions, and where implicitly all other injuries arising from medical malpractice, including death, fall within the lower cap.

However, there is express language contained in § 1483 that indicates that it does not apply in wrongful-death actions. Noneconomic loss is defined in the statute as meaning "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." MCL 600.1483(3). Although the definition references "other noneconomic loss," it does not specifically touch on loss of society and companionship, which are unmistakenly associated with a wrongful-death action. MCL 600.2922(6); *McTaggart v Lindsey*, 202 Mich App 612, 616; 509 NW2d 881 (1993)(claims for loss of society and companionship address compensation for the destruction of family

relationships that results when one family member dies). Therefore, we must determine whether "other noneconomic loss" was meant to cover damages associated with loss of society and companionship, or in other words losses related to wrongful death.

Under the doctrine of statutory construction known as ejusdem generis, if a law contains general words that follow a designation of particular subjects, those general words are presumed to include only things of the same kind, class, character, or nature as the subjects enumerated. *Sands Appliance Services, Inc v Wilson,* 463 Mich 231, 242; 615 NW2d 241 (2000). The doctrine was recently explained in more detail by our Supreme Court in *Weakland v Toledo Engineering Co, Inc,* 467 Mich 344, 350 n 1; 656 NW2d 175 (2003), wherein the Court stated approvingly:

> In *A Matter of Interpretation* (Princeton, New Jersey: Princeton University Press, 1997), p 26, United States Supreme Court Justice Antonin Scalia explains that the ejusdem generis canon of statutory construction "stands for the proposition that when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort. For instance, if someone speaks of using 'tacks, staples, screws, nails, rivets, and other things,' the general term 'other things' surely refers to other fasteners."[4]

The Supreme Court noted that it has utilized this canon of statutory construction frequently in defining the scope of a broad term following a series of specific items. *Weakland, supra* at 349.

Here, damages or loss due to pain, suffering, inconvenience, physical impairment, and physical disfigurement clearly relate to damages sustained by an individual surviving plaintiff rather than damages sustained by next of kin in a wrongful-death action who are represented by the personal representative.[5] There is no specific mention of damages or losses unique to relatives of a person who has died, such as loss of society and companionship.[6] There are at least

[4] The *Weakland* Court addressed the language in MCL 418.315(1), which provides that "[t]he employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury." *Weakland, supra* at 348. The Court ruled, under the doctrine of ejusdem generis, that the phrase "other appliances" denoted other artificial adaptive aids that serve to directly ameliorate effects of a medical condition, and this did not include a van that the plaintiff sought to have covered through worker's compensation benefits. *Id.* at 350.

[5] Persons entitled to damages under the WDA include, in part, the "deceased's spouse, children, descendants, parents, grandparents, brothers and sisters[.]" MCL 600.2922(3).

[6] The Michigan Model Civil Jury Instruction concerning wrongful-death damages closely parallels the WDA and lists such items of damages as funeral and burial expenses, loss of financial support, loss of service, loss of gifts or other valuable gratuities, loss of parental training and guidance, as well as loss of society and companionship. M Civ JI 45.02. None of these is directly mentioned in § 1483. Pain and suffering are also mentioned, but they are expressly defined as conscious pain and suffering that occurred before death. M Civ JI 45.02(2).
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four other statutes that we are aware of in which our Legislature has defined noneconomic loss or damage as specifically including loss of society and companionship, MCL 600.2945, 600.2969, 600.2970 and 691.1416.[7] However, the Legislature has not done so here. Loss of society and companionship verbiage has been included in case law dating back as far as 1899. *Lafler v Fisher*, 121 Mich 60; 79 NW 934 (1899). We can only conclude that the examples of noneconomic losses specifically enumerated in § 1483 are not of the same kind, class, character, or nature as those associated with a wrongful-death action. Therefore, under the doctrine of ejusdem generis, "other noneconomic loss" as used in § 1483(3) does not refer to noneconomic losses related to wrongful-death actions.

Taking into consideration only the language of the statutes, we conclude that the Legislature intended the WDA to exclusively govern all areas of a wrongful-death action as expressed in its language, including the award of noneconomic damages, and that the Legislature did not intend the damages cap to limit those damages in a wrongful-death, medical-malpractice action.[8]

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On the other hand, damage instructions outside wrongful death list such damages as general pain and suffering, mental anguish, fright and shock, denial of social pleasure, embarrassment, humiliation, physical impairment, and physical disfigurement. M Civ JI 50.02 and 50.03.

[7] MCL 600.2945, which provides definitions related to products-liability actions, defines noneconomic loss as "any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, *loss of society and companionship*, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages." MCL 600.2945(f) (emphasis added). MCL 600.2969, repealed under its own provisions January 1, 2003, included definitions related to an action against financial institutions for computer-date failures, and it defined noneconomic damages as "pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, *loss of society and companionship*, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages caused by a computer date failure." MCL 600.2969(1)(l) (emphasis added). MCL 600.2970, repealed under its own provisions January 1, 2003, related to actions for computer-date failure and defined noneconomic damages identical to MCL 600.2969. MCL 600.2970(1)(j). MCL 691.1416, which relates to liability for sewage disposal systems, defines noneconomic damages comparable to the above statutes, specifically including loss of society and companionship. MCL 691.1416(f).

[8] Even if we were to find the damages cap ambiguous with regard to whether it was intended to apply in wrongful-death actions, the legislative history sheds no light on the issue. We first note, as stated above, that before the 1993 amendment, death was included as an exception and no cap was applicable. One could reason that the Legislature involved in enacting the original statute in 1986 did not believe that the WDA was controlling, thereby necessitating the specific reference to death in the statute. However, it does not necessarily follow that the Legislature in 1993 was acting under the same belief. The only legislative intent that is relevant in construing a statute is the intent of the Legislature that enacted the statute. See *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 686, n 9; 649 NW2d 760 (2002). Moreover, the inclusion of the specific reference to death in 1986 may have been part of an effort to clearly and definitively

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Moreover, it is a well-known principle that the Legislature is presumed to be aware of all existing statutes when enacting a new statute. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). The relevant portions of the WDA had long been established when the 1993 amendment was enacted. See *Courtney*, *supra* at 228-229; see also historical and statutory notes to § 2922. Presuming that the Legislature was aware of the damage-award provisions of the WDA, it was incumbent on the Legislature to include some language in § 1483 to specifically indicate its intent that the damages cap applied in wrongful-death actions in order to avoid any conflict. Keeping this presumption in mind, the failure to so indicate reasonably leads to the conclusion that the legislative intent was to exclude wrongful-death actions from the ceilings contained in § 1483, especially where no change was simultaneously made to the WDA to reflect a limit on damages. If we were to conclude that the damages cap controlled, it would result at best, from a plaintiff 's standpoint, in a recovery limited to $500,000; an amount equal to the limit on damages recoverable for some injuries short of death. Without specific direction from the Legislature, we are not prepared to say that the Legislature intended to place an equal or lesser value on a person's life.

After reviewing the plain language of § 1483 and considering the legislative history, it is clear to us that the Legislature did not intend a wrongful-death action to be governed by the damages cap.

Assuming that the WDA and the damages cap conflict in a manner that cannot be reconciled, the case law would still direct us to conclude that the WDA governs.[9] Where there is

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proclaim the Legislature's position that damages related to death would not be capped, accepting that the WDA was applicable, but merely reinforcing the position by referencing death. A review of the legislative analysis connected to the 1993 amendment has not revealed any information with respect to the Legislature's intention in deleting death from the statutory language. Defendants rely on Senate and House Journal entries that do in fact indicate multiple attempts to include death as an exception that would have resulted in a $500,000 cap on noneconomic damages related to wrongful-death. 1993 Journal of the Senate 274, 953, 993-994, 1007; 1995 Journal of the House 1061. However, contrary to defendants' argument that this established an intent to cap damages in wrongful-death actions and to cap them at the lower tier, the journal entries can be viewed in two distinct ways. The attempt to add death as an exception may have been part of an effort to place some limit on noneconomic wrongful-death damages, as opposed to no cap at all, assuming a belief by legislators that the WDA otherwise governed the situation, or it may have been part of an effort to avoid placement of a cap at the lower amount of $280,000. Either way, we would be speculating regarding the Legislature's intent.

[9] Two statutes that relate to the same subject or share a common purpose are in pari materia and should be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Jackson Community College v Dep't of Treasury*, 241 Mich App 673, 681; 621 NW2d 707 (2000), quoting *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). When two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.* Construction of two seemingly competing statutes should give effect to each without

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conflict between two statutes, one of which is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). At first glance it appears that both statutes are equally specific to different subject matters. A wrongful-death action specifically relates to a case where a person has died due to a wrongful act, while a medical-malpractice action could relate to a wide spectrum of possible harms. On the other hand, a medical-malpractice action specifically relates to negligence arising out of medical actions and inactions, while a wrongful-death action could relate to a setting involving medical malpractice, products liability, negligence, intentional torts, and so forth. However, in the context of the specific types of damages recoverable under each statute, we find the WDA to be superior because it more specifically denotes the type of damages to be considered by the trier of fact.[10] Ultimately, the focus needs to be on damages as opposed to the setting in which the negligent act occurred because the damage award is the central issue of debate. We affirm the trial court's ruling that the WDA governs the award of noneconomic damages.

III. MOTION FOR REMITTITUR OR NEW TRIAL

Having found that the WDA governs in this action, thereby removing any statutory ceiling on the amount of noneconomic damages plaintiff can recover, it is necessary to review defendants' argument that the trial court erred in failing to grant the motion for remittitur or new trial, where the court found the damage award to be excessive.

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repugnancy, absurdity, or unreasonableness. *Michigan Humane Society v Natural Resources Comm*, 158 Mich App 393, 401; 404 NW2d 757 (1987). Our Supreme Court in *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 231 (1991), stated:

> Statutes which may appear to conflict are to be read together and reconciled, if possible. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 65; 214 NW2d 803 (1974); *People v Buckley*, 302 Mich 12, 22; 4 NW2d 448 (1942). However, where two statutes actually conflict, both cannot stand as the law. *Winter v Royal Oak City Manager*, 317 Mich 259, 265; 26 NW2d 893 (1947); *Bd of Ed v Blondell*, 251 Mich 528, 531; 232 NW 375 (1930).

Here, § 1483 can be read together and reconciled with the WDA; the damages cap being construed to apply in all medical-malpractice cases in which the plaintiff seeks noneconomic damages except for those cases seeking wrongful-death damages, in which case, the WDA would control. To rule otherwise would render nugatory that portion of the WDA requiring the trier of fact to determine the amount of damages in an amount that is fair and equitable. Our ruling leaves intact the general aim and purpose of each statute.

[10] Once again, this is assuming a direct conflict between the statutes, which necessarily would include a finding, which we have not made, that "other noneconomic loss" included loss of society and companionship and other standard, wrongful-death damages.

A ruling on a motion for remittitur or new trial premised on a claim that the damage award was excessive is reviewed for an abuse of discretion. *Palenkas v Beaumont Hosp,* 432 Mich 527, 531; 443 NW2d 354 (1989). MCR 2.611(A) provides:

> (1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
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> * * *
>
> (c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
>
> (d) A verdict clearly or grossly inadequate or excessive.

MCR 2.611(E)(1) provides that if a "court finds that the only error in the trial is the . . . excessiveness of the verdict, it may deny a motion for new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the . . . highest . . . amount the evidence will support."

The order that denied the motion for remittitur or new trial provided that the motion was denied for the reasons stated on the record. On the record, the trial court found that the verdict was excessive, but concluded that it could not set a remittitur amount; therefore, the motion was denied. Plaintiff has not filed a cross-appeal challenging the trial court's conclusion that the damage award was excessive, and defendants, the appellants here, merely agree with the court's conclusion that damages were excessive. To preserve an issue for review, an appellee must file a cross-appeal. MCR 7.207; *Barnell v Taubman Co, Inc,* 203 Mich App 110, 123; 512 NW2d 13 (1993). Therefore, the issue whether the damage award was excessive, or whether the trial court erred in finding the award to be excessive, is not properly before us.

However, we do note that the trial court's ruling from the bench that the damage award was excessive, when examined in context, could be interpreted as a non-definitive ruling on the issue of excessiveness, considering the judge's concern that he had not been present at trial and thus could not set a remittitur amount. As such, we leave open the opportunity for the trial court on remand to revisit the issue.

Treating the trial court's ruling as one finding the damage award to be excessive, and taking into consideration MCR 2.611(A)(1)(c)-(d) and (E), we hold that the trial court abused its discretion in failing to set a remittitur amount, where it did not order a new trial. Clearly, allowing an award that the trial court found excessive to stand, without any avenue of relief for the defendants, materially affects defendants' substantial rights. Were the trial court's ruling to stand, defendants would be obligated to pay a judgment that the court found to be unsupported by the evidence.

We are sympathetic to the trial court's plight; however, on remand the court is to make a concerted effort to set a remittitur amount under MCR 2.611(E). There is no court or judge in a

superior position to rule on this issue and set a remittitur amount; thus, we direct the trial court to render a decision and set the dollar amount. However, we do recognize that the trial court has the discretion and option to grant a new trial on damages only. MCR 2.611(A) and (E).

The trial court is to be guided by our Supreme Court's ruling in *Palenkas*, *supra* at 532-533, take into consideration any prejudice and passion of the jury that may have been involved and dollar awards in similar cases, and eventually determine a remittitur amount that reflects reasonable compensation for the losses incurred as judged by the evidence presented. A remittitur amount must be set at the highest amount the evidence will support. MCR 2.611(E)(1); *Palenkas*, *supra* at 531.

IV. CONCLUSION

We hold that the WDA controls where a death arises out of medical malpractice, and where a plaintiff seeks damages for wrongful death. Therefore, the damages cap is not implicated here and does not limit the noneconomic damages recoverable by plaintiff. Additionally, we hold that the trial court erred in failing to determine a remittitur amount after concluding that the damage award was excessive. We remand to the trial court for a determination of a remittitur amount, after which the parties may proceed accordingly pursuant to MCR 2.611(E), or, should the court decide to grant a new trial, for a trial on damages only. *Kellom v Ecorse*, 329 Mich 303, 310; 45 NW2d 293 (1951) ("If a retrial is had, each party may present testimony limited to such question of damages.").[11]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Cooper, P.J., concurred.

/s/ William B. Murphy
/s/ Jessica R. Cooper

[11] Once again, we allow the trial court to revisit the excessiveness issue should the court acknowledge that it never definitively ruled on the issue.