

STATE OF MICHIGAN
COURT OF APPEALS

DWIGHT FLOYD and VIVIAN MASTERSON,
Personal Representatives of the Estate of
SHARON FLOYD, Deceased,

UNPUBLISHED
May 10, 2002

Plaintiffs-Appellants,

v

CITY OF DETROIT,

No. 229006
Wayne Circuit Court
LC No. 99-923119-NZ

Defendant-Appellee.

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

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

Plaintiffs' decedent was killed as a result of an automobile accident. The complaint alleged that the decedent was operating her motor vehicle northbound on Rangoon Street near the intersection of Tireman in the city of Detroit on November 1, 1998. The decedent stopped, as required by a posted stop sign, before proceeding into the intersection. Detroit Police Officer Robert Gadwell was traveling eastbound on Tireman. It was alleged that the officer was traveling at a high rate of speed without using his flashing overhead lights and siren. The decedent allegedly could not observe eastbound traffic due to buildings located near the southwest corner of the intersection and vehicles parked on the south side of Tireman. The vehicles collided in the intersection, causing the death of the decedent. The decedent did not maintain motor vehicle insurance as required by MCL 500.3101.

Plaintiffs, as representatives of the estate of the decedent, filed a wrongful death complaint premised on two theories of liability, negligent operation of a motor vehicle by Officer Gadwell and defective highway. Damages on behalf of decedent and decedent's next of kin were requested. In its answer to plaintiffs' complaint, defendant alleged that plaintiffs could not maintain a claim for non-economic loss because the decedent was not insured as required by Michigan law, MCL 500.3135(2)(c). Plaintiffs moved for summary disposition of this defense, alleging that the statute was unconstitutional and did not apply to damage claims raised by next of kin. Plaintiffs also asserted that the statute had no impact on the defective highway claim. Defendant filed a countermotion for summary disposition, alleging that, because the decedent was precluded from recovering damages, the wrongful death action was also barred. Prior to a

decision by the trial court, this Court concluded that MCL 500.3135(2)(c) did not violate the equal protection and due process guarantees of the Michigan Constitution, Const 1963, art 1, § 2 and 17. *Stevenson v Reese*, 239 Mich App 513, 519-520; 609 NW2d 195 (2000). The trial court, relying on *Stevenson*, concluded that the statute was constitutional and granted defendant's motion for dismissal of the claim for non-economic loss damages.¹

Plaintiffs allege that the dismissal of the claim for non-economic damages by next of kin was improper. We disagree. Issues of statutory construction present questions of law and receive review de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This determination is accomplished by reviewing the plain language of the statute itself. *Id.* If the statutory language is unambiguous, it is presumed that the Legislature intended the clearly expressed meaning, and judicial construction is neither required nor permitted. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). The Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). The omission of a provision from one part of a statute that is included in another part of a statute must be construed as intentional. That is, we "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Two statutes that relate to the same subject or share a common purpose are in pari materia and must be read together. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The goal of the in pari material rule is to give effect to the legislative purpose found in the harmonious statutes. *Id.* When two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.*

MCL 500.3135 provides, in relevant part:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all of the following apply:

* * *

(c) Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 [MCL 500.3101] at the time the injury occurred.

¹ The trial court also concluded that plaintiffs could maintain a claim for non-economic loss based on the defective highway theory. However, the parties stipulated to dismiss the defective highway claim.

Thus, pursuant to MCL 500.3135(2)(c), the decedent, by failing to maintain motor vehicle security as required by MCL 500.3101 was precluded from recovering noneconomic loss damages.

Despite this provision precluding recovery of noneconomic loss, plaintiffs allege that the wrongful death statute allows for damage recovery, such as loss of society and companionship, for next of kin. MCL 600.2922(6). While the wrongful death act does specify the type of damages arising from a wrongful death action including benefits for next of kin, MCL 600.2922(6), the act also provides, in relevant 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. [MCL 600.2922(1)]

Review of the plain language of the statute reveals that the liability of a defendant in a wrongful death action is contingent on whether the party injured could have maintained an action and sought recovery of damages. *In re MCI Telecommunications Complaint, supra*. In the present case, the decedent could not have maintained an action for noneconomic loss due to her failure to insure her vehicle.

Case law interpreting the wrongful death act supports this conclusion. In *Maiuri v Sinacola Construction Co*, 382 Mich 391, 394-396; 170 NW2d 27 (1969), the plaintiffs' decedent was killed while working for the defendant's construction company. Assuming that the plaintiffs had brought the action as personal representatives' of the decedent's estate, this Court concluded that the plaintiffs must satisfy the requirement that the action could have been brought if the decedent had survived:

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

* * *

Since the cause of action of a proper plaintiff under the wrongful death act is a derivative one in that the personal representative of the deceased stands in his shoes and is required to show that the deceased could have maintained the action if death had not ensued, and since, in this case, the decedent would have been barred from an action for injuries resulting in death because of the exclusive

remedy provisions of the workmen's compensation act, the trial court did not err in granting an accelerated judgment for the defendant. [*Id.* at 395-396.]

Plaintiffs contend that the *Maiuri* decision is limited to the context of workmen's compensation decisions. However, in *Toth v Goree*, 65 Mich App 296, 297; 237 NW2d 297 (1975), the plaintiff alleged that she suffered a miscarriage following an automobile accident. Although the ultimate issue in the case was whether a three-month-old fetus, not born alive, was a "person" for purposes of the wrongful death act, this Court reaffirmed the *Maiuri* Court's conclusion that the wrongful death action is nonetheless derivative:

Even though the wrongful death act is for the benefit of certain persons, the cause of action is a derivative one whereby the personal representative of the deceased stands in the latter's shoes. *Maiuri v Sinacola Construction Co*, 382 Mich 391, 395-396; 170 NW2d 27 (1969). The suit is brought on behalf of the deceased. The cause of action belongs to the deceased. When an action is brought under the wrongful death act for the death of a fetus, the rights alleged are those of the fetus. It is not a suit for injuries to the mother, either physical or mental, accompanying or resulting from the loss of the fetus. [*Id.* at 298.]

See also *In re Haque*, 237 Mich App 295, 297, 302; 602 NW2d 622 (1999) (concluding that action by the personal representative of the decedent for wrongful death was derivative where cause of death allegedly the result of medical malpractice).² The Legislature is presumed to act with knowledge of appellate court statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). Where legislative amendments fail to suggest an intention to modify or eliminate a judicial construction, the Legislature's silence is construed as an affirmance of the appellate court's interpretation. *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989). The language at issue was adopted by the Legislature in 1848 when the act was entitled "Lord Campbell's Act." *Lincoln v Detroit & M Ry Co*, 179 Mich 189, 198-199; 146 NW 405 (1914). Despite amendments in 1965, 1971, and 1985, the Legislature has not modified the language of the statute to alter the appellate interpretations. Therefore, the

² In *Barnes v Double Seal Glass Co, Inc, Plant 1*, 129 Mich App 66, 69; 341 NW2d 812 (1983), the plaintiffs' decedent, their sixteen-year-old son, was illegally employed without a work permit by the defendant. While loading glass onto a cart, an accident occurred that sheared off part of the decedent's skull, crushed his skull and tore major arteries. Employees did not act immediately to aid the decedent because they became violently ill. An ambulance was not called. Instead, employees put the decedent in the back of a pick up truck and told hospital employees that he was found at the side of the road. When the employees returned to the workplace, they cleaned the accident site to preclude an accurate and proper police investigation. This Court held that the wrongful death act was derivative and precluded the negligence claims because of the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA). *Id.* at 70-74. However, this Court also held that the plaintiffs' individual claims for intentional infliction of emotional distress were not derivative actions governed by the wrongful death act. *Id.* at 75-76. In the present case, plaintiffs have not alleged individual claims of intentional infliction of emotional distress and the facts alleged are insufficient as a matter of law to sustain such a claim. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582-583; 603 NW2d 816 (1999).

trial court properly dismissed the derivative wrongful death claim for non-economic damages. *Maiuri, supra*.

Plaintiffs next allege that the preclusion of noneconomic damages is unconstitutional as applied to their claims as next of kin.³ We disagree. In *Stevenson, supra*, this Court concluded that MCL 500.3135(2)(c) was constitutional. The objectives of the legislation are to promote fairness within the no-fault insurance system, reduce or restrain insurance premiums, and provide an incentive to comply with the insurance requirements of the no-fault act. *Stevenson, supra* at 520. These objectives are equally applicable to plaintiffs as next of kin.⁴

Affirmed.

/s/ Jessica R. Cooper

/s/ Harold Hood

/s/ Kirsten Frank Kelly

³ Although it is the interaction between MCL 500.3135(2)(c) of the no-fault act and MCL 600.2922(1) that bar plaintiffs' claim as next of kin, we nonetheless address this issue as raised by plaintiffs.

⁴ As previously noted, the trial court held that plaintiffs could pursue noneconomic damages with regard to the defective highway claim.