STATE OF MICHIGAN

COURT OF APPEALS

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.	FOR PUBLICATION April 1, 2003 9:15 a.m. No. 233116 Wayne Circuit Court LC No. 98-808834-NH Updated Copy May 23, 2003

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

KELLY, J. *(concurring).*

I concur in the result reached by the majority, but write separately to underscore that in my estimation, the plain language of the wrongful death act (WDA), MCL 600.2922, precludes the application of MCL 600.1483 (damages cap) in the instant case.

I. Statutory Construction

If the language of a statute is clear, no further analysis is necessary or allowed to expand what the Legislature clearly intended to cover. *Miller v Mercy Mem Hosp,* 466 Mich 196, 201; 644 NW2d 730 (2002). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Nicholas v Meridian Charter Twp Bd,* 239 Mich App 525, 530; 609 NW2d 574 (2000). "The first criterion in determining intent is the specific language of the statute." *Id.* The Legislature is presumed to have intended the meaning plainly expressed. *Id.*

II. Exclusive Remedy

As noted by the majority, the WDA provides the *exclusive* remedy for wrongful-death cases. MCL 600.2921 provides in relevant part:

> Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person *except pursuant to the next section.* If an action is pending at the time of death the claims may be amended to bring it under

> the next section. A failure to so amend will amount to a waiver of the claim for *additional* damages resulting from death. [Emphasis added.]

Here, plaintiff sought damages for losses sustained by decedent's seven children and seven siblings. Because any underlying malpractice action brought on behalf of decedent had she been alive would not have survived her death, plaintiff had no other recourse than to file suit pursuant to the WDA. The WDA contains the substance, procedures, and the exclusive measure of damages in an action brought against one whose action or inaction has caused the death of another. The WDA was not amended by tort-reform legislation,[1] and it does not include a statutory cap on damages. MCL 600.2922(6) provides:

> 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 reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Thus, considering the plain meaning and purpose of the statute, it is clear that plaintiff 's action is governed by the specific provisions of the WDA. Those provisions set no limit on noneconomic damages arising from wrongful-death claims.

Additionally, the damages cap does not list damages specific to wrongful-death claims. MCL 600.1483(3) defines noneconomic damages as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other non-economic loss." Other than the general term "other non-economic loss," the list specifies only damages that are sustained by an injured person, not an estate or survivors of a deceased. It also makes no reference to estates or decedents' survivors because obviously an estate could not bring an action for damages under the damages cap. I agree with the majority's analysis under the doctrine of ejusdem generis, but would also apply that of *expressio unius est exclusio alterius.* According to this doctrine, the express mention in a statute of one thing implies the exclusion of other similar things. *Hoste v Shanty Creek Mgt, Inc,* 459 Mich 561, 572 n 8; 592 NW2d 360 (1999); *Bradley v Saranac Community Schools Bd of Ed,* 455 Mich 285, 298; 565 NW2d 650 (1997). Thus, the Legislature's express mention of injuries of varied severity, specific to claims brought by living medical-malpractice claimants precludes the conclusion that the general term "other non-economic loss" includes losses attributable to a different and discrete set of wrongful-death claimants.[2]

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[1] The most recent legislative amendment to the WDA occurred in 2000.

[2] In contrast, the WDA specifically lists damages specific to wrongful-death claims:

> [R]easonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening

(continued…)

III. Reference to Other Statutory Provisions

In further support of the conclusion that the damages cap is not applicable to actions brought under the WDA, I would note that the Legislature has knowledge of existing laws and is presumed to have considered the effect of new laws on *all* existing laws. *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993). In light of the fact that the Legislature is presumed to have knowledge that the WDA provides for additional damages in wrongful-death claims and the fact that it rejected the opportunity to list death as an injury subject to the damages cap, the inescapable conclusion is that the damages cap does not apply in wrongful-death cases arising from underlying medical-malpractice claims. This conclusion is buttressed by reference to the product liability cap act (PLCA), MCL 600.2946a. In the PLCA, a statute analogous to the damages cap, the Legislature not only specifically addressed death, but identified death as one of the two injuries that results in the second-tier cap:

> In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, *unless the defect in the product caused either the person's death* or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00. [MCL 600.2946a(1) (emphasis added).]

Thus, while the Legislature was clearly aware that death is a possible injury in medical-malpractice claims just as in products-liability claims, it chose not to identify it as an injury subject to the damages cap.

IV. Judicial Construction

The parties agree that, standing alone, the language of the damages cap and the WDA is clear. However, the parties argue that when the damages cap and the WDA are read together, the provisions become ambiguous and require judicial construction. Although judicial construction is appropriate if a statute is ambiguous, i.e., if reasonable minds could differ with respect to its meaning, *Heinz v Chicago Rd Investment Co,* 216 Mich App 289, 295; 549 NW2d 47 (1996), this Court is not obliged to agree that the statutes should be read together or accept as true the suggestion that there is ambiguity in these statutes. The mere fact that members of the bar hotly contest this issue does not require this Court to conclude that there is ambiguity.

Furthermore, I note that no argument was presented below, and the majority does not address, why these statues should be read in pari materia. Rather, it has simply been assumed that the statutes must be read in such a way because we are considering their application to wrongful-death actions based on a theory of medical malpractice. It is instructive to turn to the definition and explanation of the rule. "In pari materia" means "of the same matter; on the same subject." Blacks Law Dictionary (5th ed, 1979). Two statutes that relate to the same subject or

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> between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [MCL 600.2922(6).]

share a common purpose are in pari materia and must 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 (2002).

> Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. [*Detroit v Michigan Bell Tele Co*, 374 Mich 543, 558; 132 NW2d 660 (1965).]

A statute is not in pari materia even if it incidentally refers to the same subject if its scope and aim are distinct and unconnected. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 360; 459 NW2d 279 (1990); *Palmer v State Land Office Bd*, 304 Mich 628, 636; 8 NW2d 664 (1943). Here, as discussed above, the damages cap relates to noneconomic damages attributable to injuries suffered by living medical-malpractice claimants. The purpose of the damages cap was discussed recently by another panel of this Court:

> The 1993 legislation that created the current finite limitation scheme was prompted by the Legislature's concern over the effect of medical liability on the availability and affordability of health care in the state. See House Legislative Analysis, SB 270 and HB 4033, 4403, and 4404, April 20, 1993, pp 1-2. The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs. *Id*. [*Zdrojewski v Murphy*, 254 Mich App 50, 80; 657 NW2d 721 (2002).]

On the other hand, the WDA relates to claims brought by a decedent's estate and survivors. "The obvious purpose of the [WDA], originally enacted as PA 1848, No 38, is to provide an action for wrongful death whenever, *if death had not ensued*, there would have been an action for damages." *O'Neill v Morse*, 385 Mich 130, 133; 188 NW2d 785 (1971). Thus, the scope and aim of these statutes are distinct and unconnected. The fact that we have the occasion to consider both of these statutes and their application to a discrete type of claim, namely that involving a wrongful-death action arising from a medical-malpractice cause of action, is not the same as concluding that we must consider the two statutes in pari materia. Aside from the controversy concerning this issue, apparently occasioned more by something other than genuine legal inquiry, there would likely be no reason to consider these statutes together.[3]

In addition, reading the damages cap to apply to wrongful-death claims would improperly render parts of the WDA nugatory, a result I cannot countenance. This Court should presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage. *Hoste*, *supra* at 574. As far as possible, effect should be given to every

[3] Because the statutes should not be read in pari materia, the two rules of statutory construction advanced in defendants' argument do not apply.

sentence, phrase, clause, and word. *Pohutski v Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002). Because the WDA lists damages specific to wrongful-death claims, applying the damages cap to wrongful-death damages would render MCL 600.2922(6) nugatory. The effect of such an impermissible judicial fiat would be to draw a line through most of MCL 600.2922(6). On the other hand, reading the WDA to apply to wrongful-death actions arising from an underlying medical-malpractice cause of action does not render the plain language of the damages cap nugatory. Although the damages cap applies "[i]n an action for damages alleging malpractice," our conclusion that the WDA applies in wrongful-death claims does not rob this language of its full force. The damages cap still applies "[i]n an action for damages alleging malpractice" in which the injuries and damages are those listed in the statute.

I also decline to accept defendants' argument that because death is no longer included as an exception to the damages, the Legislature must have intended the statute to apply to death claims. This argument must be rejected because it circumvents the plain meaning of a statute that is clear and unambiguous. It could just as well be argued that the Legislature eliminated the death exception because it was already provided for under the WDA, thus rendering a death exception redundant. Our guess regarding what the Legislature had in mind when it omitted death from the damages cap would be impermissible speculation. Additionally, it is contrary to the rule that the Legislature is charged with knowledge of all existing laws. *Walen, supra* at 248.

/s/ Kirsten Frank Kelly