

20070296

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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Supreme Court No. 20070296

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**FILED**  
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Darla Weigel, Melody Frieson,  
Diana Seney and Lorna Strand  
Appellants

DEC 03 2007

STATE OF NORTH DAKOTA

v.

Lane Lee, D.O.  
and  
Trinity Health  
Appellees

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**APPEAL FROM THE JUDGMENT ENTERED ON AUGUST 27, 2007,  
DISMISSING APPELLANTS' WRONGFUL DEATH CLAIMS  
AGAINST THE APPELLEES  
OF THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,  
WARD COUNTY, NORTH DAKOTA  
THE HON. WILLIAM W. MCLEES, PRESIDING**

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**REPLY BRIEF OF APPELLANTS**

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## ARGUMENT

### Introduction

This Reply Brief is intended to briefly address two arguments advanced by the Appellees. First, that wrongful death actions are somehow controlled by the laws which apply to personal injury actions and, secondly, that this Court has somehow conceded that children have no claim for non-economic damages for the wrongful death of a parent and that any such argument otherwise should be left to the legislature. Both arguments are misguided and legally flawed.

### Argument

The Appellees appear to be trying to place the law of both wrongful death claims and personal injury claims into a blender, and turning it on “puree.” In doing so, Appellees are attempting produce a “unified theory” where this court’s rulings regarding claims and damages in personal injury actions somehow trump the separate and distinct laws governing wrongful death actions. It can’t be done because wrongful death actions are unique creatures of statute, not recognized by the common law. The Legislature specifically enacted legislation to provide that consortium and other non-economic damages are permitted in wrongful death actions. Furthermore, the legislature has also provided that children are a specific and identifiable class of persons entitled to make such claims and recover damages for the wrongful death of a parent. On the other hand, recovery of personal injuries under tort law is “common law” jurisprudence.

Appellees also advance the proposition that “to argue that every class of plaintiff listed in Sec. 32-21-03 is entitled to every damage listed in Sec. 32-03.2-04 would extend recovery of loss of consortium to surviving children, surviving grandparents, an estate’s

personal representative and any person who has had primary custody of the decedent before the wrongful death.” (Appellee brief p. 8) They suggest that “no one would seriously argue this position.” Appellee is wrong. That is exactly the position being taken by the Appellants. More importantly, it is exactly what the legislature did in enacting N.D.C.C. 32-21-03. It’s the plain language of the statute. N.D.C.C. 32-21-02 provides that the jury shall “give such damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery.” Granted, a person having “primary physical custody” might receive much less than a surviving spouse or child might recover, yet they, nevertheless, are authorized by statute to bring the action and recover such damages a jury finds proportionate to their injury. That might only be nominal damages but it is a valid claim under the plain language of the statute.

The Appellees turn on the blender again to address the opinions of this court as well. Appellees state that any claim for loss of consortium should be addressed by the legislature. They then quote this court’s decision in Morgel v. Winger, 290 N.W.2d 266 (N.D. 1980), stating: “because we believe that the question is one of policy, we conclude that the birth of the child’s cause of action for loss of parental consortium should be attended to by the legislature as its obstetrician.” Morgel addressed children’s claims for loss of consortium on account of personal injury. It was not a wrongful death claim. Similarly, the Appellees cite Butz v. Worldwide, 492 N.W.2d 88 (N.D. 1992). Butz addressed consortium claims by children for personal injuries to a parent. It was not a wrongful death case. Finally, Appellants quote Justice VandeWalde’s concurring opinion in Hopkins v. McBane, 427 N.W.2d 85 (N.D. 1988), for the proposition that if the legislature should disagree with this court’s decision in Hopkins, then perhaps the

legislature should address it. Justice VandeWalde did not dissent from the majority, he simply invited the legislature to address the issue, should they wish to do so. That was 20 years ago. The legislature has not done so.

### CONCLUSION

Wrongful death claims are a separate and distinct action governed by its own special set of laws. The trial court erred in concluding that personal injury law controls wrongful death law. The laws remain today as opposite as apples and oranges. This court should reverse the Judgment of dismissal and remand the matter for trial.

Respectfully submitted this 3<sup>rd</sup> day of December, 2007.

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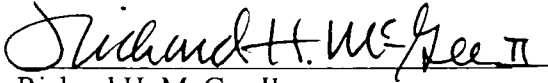
CERTIFICATE OF SERVICE

I certify that on the 31<sup>st</sup> day of December, 2007, I mailed a true and correct

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