

SUPREME COURT NO: 20070296

Ward County No: 05-C-00485

**ORIGINAL**  
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20070296

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

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

**NOV 27 2007**

Darla Weigel, Melody Frieson,  
Diana Seney and Lorna Strand,

STATE OF NORTH DAKOTA

*Plaintiffs/Appellants,*

vs.

Lane Lee, D.O. and Trinity Health,

*Defendants/Appellees.*

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**BRIEF OF APPELLEES**

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**Appeal From The Judgment Of The District Court Entered on  
August 27, 2007, Dismissing Appellants' Wrongful Death Claims  
Against The Appellees, Northwest Judicial District, Ward County,  
North Dakota; The Hon. William W. McLees, Presiding.**

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## STATEMENT OF THE ISSUES

- I. Whether the Trial Court correctly held that North Dakota law does not recognize a child's claim for non-economic damages, including loss of parental consortium, in an action for the wrongful death of a parent
- II. Whether the Trial Court correctly held that because Plaintiffs could not recover non-economic damages in their wrongful death claim and Plaintiffs were not seeking economic damages, the only damages available to them were non-economic damages in a survival action

## STATEMENT OF THE CASE

[1] Plaintiffs in this wrongful death action are the adult children of Darlyne Rogers. Plaintiffs initiated this action on March 8, 2005, alleging medical negligence on the part of Defendants in the care of Darlyne Rogers, which they allege resulted in her death. (Complaint, generally; App. at p. 4.) Economic and non-economic wrongful death damages were requested in the Complaint. (Complaint at ¶ XI; App. at p. 4.) Plaintiffs alleged “to have been, and forever will be, profoundly affected by her untimely death,” to “have sustained mental and emotional anguish as a result of the Defendants’ negligence and their mother’s death,” and to “have been denied the society, comfort, counsel, and companionship of Darlyne Rogers.” (Complaint at ¶ XI; App. at p. 4.) Plaintiffs did not allege a claim for survival damages on behalf of the Estate of Darlyne Rogers. (Complaint, generally; App. at p. 4.)

[2] Defendants filed an Answer, denying all allegations of negligence or wrongdoing. (Answer, generally; App. at p. 9.) The matter came to trial before the Honorable William W. McLees on April 3, 2006. After both parties rested their cases, counsel and the Court convened to discuss jury instructions. Defendants had previously moved the Court for dismissal for failure to prove the essential elements of Plaintiffs' claim, including causation and damages, both at the close of Plaintiffs' case and following the resting of Defendants' own case.

[3] Plaintiffs had requested a jury instruction for loss of parental consortium. Based on North Dakota law, which does not recognize a child's claim for parental loss of consortium, the Court disallowed a loss of consortium instruction. As Plaintiffs did not introduce evidence of economic damages, Defendants moved for dismissal. After hearing arguments by both parties, the Court correctly granted Defendants' motion and dismissed the case. Subsequently Plaintiffs requested a written Order from the Court reflecting the Court's findings, analysis, and dismissal.

[4] On April 21, 2006, the Court issued a written Order, somewhat reversing itself. In its Order, the Court held that ". . . the Plaintiffs' loss of consortium and loss of society and companionship claims clearly are not viable claims under North Dakota law." (Order, April 21, 2006; App. at p.

15.) The Court based its holding on Butz v. World Wide, Inc., et al., 492 N.W.2d 88 (N.D. 1992). Id. However, upon further reflection the Court found that the claims of mental anguish and emotional distress were separate and should have been presented to the jury. Id. Consequently, the Court welcomed a motion for a new trial from Plaintiffs, which Plaintiffs served on April 26, 2006. After considering both parties' briefs and oral arguments regarding whether mental anguish and emotional distress were separate from loss of consortium damages, the Court revised its opinion again. The Court held that Plaintiffs should receive a new trial, but not on the issue of Plaintiffs' mental anguish and emotional distress damages in their wrongful death action. (Order for New Trial, September 6, 2006; App. at p. 21.) Instead, the Court held that the jury should "be allowed to consider awarding compensation for non-economic damages . . . allegedly sustained by the decedent herself, prior to her death." Id. The Court cited N.D.C.C. § 32-21-01 as the basis for its decision, stating:

"Darlyne Rogers' surviving heirs (i.e. her children) 'step into her shoes' in terms of the cause of action available against the Defendants in this matter and the damages recoverable therein. Had she survived Darlyne Rogers arguably could have brought an action against the Defendants, and, based upon the evidence presented at trial, possibly recovered non-economic damages arising from pain, suffering, mental anguish, emotional distress or humiliation."

Id.

[5] Plaintiffs subsequently moved the Trial Court for reconsideration of its September 6, 2006, Order, arguing that the Court had misconstrued North Dakota's wrongful death statute. Plaintiffs cited Hopkins v. McBane, 427 N.W.2d 85 (N.D. 1988) for the proposition that in a wrongful death action survivors are entitled to recover for loss of society, comfort, and companionship, and mental anguish. Defendants opposed Plaintiff's Motion, asserting that there are two separate causes of action that may arise in a claim alleging the decedent's death was caused by a wrongful act: (1) a wrongful death action brought by the heirs for their own damages; and (2) a survival action brought by the decedent's estate to recover the decedent's own damages. Although the Court used the term "wrongful death," the Trial Court's September 6, 2006, Order described compensation available in a survival action. (Order for New Trial, September 6, 2006; App. at p. 21.) However, Plaintiffs did not attempt to pursue survival damages. The only damages sought by Plaintiffs in their wrongful death action were their own non-economic damages. In its April 24, 2007, Memorandum and Order, the Trial Court reaffirmed its earlier decision that a new trial was in order but that the jury would "only be allowed to consider awarding the Plaintiffs compensation for non-economic damages arising from the pain, suffering, mental anguish, emotional distress and humiliation which Darlyne Rogers is

found to have experienced prior to her death.” (Memorandum and Order, April 24, 2007; App. at p. 24.)

[6] Since Plaintiffs’ claims against Defendants sought only non-economic damages for their own losses and did not seek recovery for any damages on behalf of Darlyne Rogers’ estate, the Court correctly dismissed Plaintiffs’ action on May 31, 2007. (Order Granting Defendants’ Motion to Dismiss, May 31, 2007; App. at p. 31.) Plaintiffs now appeal dismissal of their action.

### **STATEMENT OF THE FACTS**

[7] A brief recitation of facts will be made, as the facts of the lawsuit (other than establishing the claim to be one of wrongful death) are largely irrelevant to these proceedings. This lawsuit arises out of Darlyne Rogers’ treatment at Trinity Hospital in Minot, North Dakota, in May 2004. Ms. Rogers was admitted to Trinity Hospital at approximately 1:00 a.m. on May 7, 2004, after being transferred from St. Luke’s Hospital in Crosby, North Dakota, with a possible bowel obstruction. Ms. Rogers went into cardiorespiratory arrest at approximately 5:00 a.m. on May 7, 2007, and died twelve hours later.



[8] Ms. Rogers was not married at the time of her death. Her surviving non-dependent adult children initiated this lawsuit, alleging that the Defendants' negligence proximately caused Ms. Rogers' death. (Complaint, generally; App. at p. 4.) Plaintiffs' Complaint included a claim for economic and non-economic wrongful death damages allegedly suffered by Ms. Rogers' children, but did not include a claim for any damages suffered by Ms. Rogers herself prior to her death. (Complaint; App. at p. 4.)

### **LAW AND ARGUMENT**

[9] The Trial Court properly dismissed Plaintiffs' claims against Defendants. Plaintiffs' claims for loss of parental consortium are not recognized under North Dakota law. A trial court's conclusions of law are fully reviewable by the Supreme Court. Allard v. Johnson, 2006 ND 243 ¶ 5, 724 N.W.2d 331.

#### **I. WHETHER THE TRIAL COURT CORRECTLY HELD THAT NORTH DAKOTA LAW DOES NOT RECOGNIZE A CHILD'S CLAIM FOR NON-ECONOMIC DAMAGES, INCLUDING LOSS OF PARENTAL CONSORTIUM, IN AN ACTION FOR THE WRONGFUL DEATH OF A PARENT**

[10] The Trial Court correctly held that North Dakota law does not recognize a child's claim for non-economic damages, including loss of parental consortium, in an action for the wrongful death of a parent.

Although this Court has recognized a parent's action for loss of consortium damages for the death of a child, the Court has not allowed such damages for loss of parental consortium. Hopkins, 427 N.W.2d 85; Butz, 492 N.W.2d 88.

**[11]** In 1987, the North Dakota Legislature codified existing case law defining the types of damages available in wrongful death and personal injury cases. Prior to the enactment of N.D.C.C. § 32-03.2-04, damages were identified as pecuniary or non-pecuniary losses. Section 32-03.2-04 states:

In any civil action for damages for wrongful death or injury to a person and whether arising out of breach of contract or tort, damages may be awarded by the trier of fact as follows:

1. Compensation for economic damages, which are damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income or support, burial costs, cost of substitute domestic services, loss of employment or business or employment opportunities and other monetary losses.
2. Compensation for non-economic damages, which are damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other non-pecuniary damage.

**[12]** Section 32-21-03 lists the classes of plaintiffs who may bring a wrongful death action. There is no requirement, or authority, that says every

class of plaintiff listed in § 32-21-03 is entitled to every type of damage listed in § 32-03.2-04. The facts of a case must still qualify for the types of damages claimed. To argue that every class of plaintiff listed in § 32-21-03 is entitled to every damage listed in § 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 physical custody of the decedent before the wrongful act. See N.D.C.C. § 32-21-03. No one would seriously argue this position.

[13] While the North Dakota Supreme Court has not addressed loss of parental consortium in a wrongful death case, the Court has stated specifically that these damages are prohibited in both wrongful death and personal injury cases. Butz, 492 N.W.2d at 92. The Butz Court referred to both types of actions when discussing its rationale for prohibiting loss of parental consortium, stating “McBane and its progeny did not expand the class of plaintiffs, it merely expanded the damages which could be recovered in wrongful death or personal injury cases.” Id. at 93 (emphasis added). See Jacobs v. Anderson Bldg. Co., 430 N.W.2d 558, 560 (N.D. 1988) (finding the personal injury case was “akin to a wrongful death claim”). Although the Butz case involved the injury of a parent, not the death of a parent, it is

clear the Court intended its prohibition on consortium damages to apply to both types of claims.

[14] In First Trust Co. of N.D. v. Scheels Hardware & Sports Shop, Inc., a case in which this Court held that a parent can recover for loss of child's society and companionship, this Court also addressed, in dicta, its treatment of a child's claim for loss of parental consortium. Scheels, 429 N.W.2d 5, fn. 5 (N.D. 1988). The Scheels Court noted Hastings v. James River Aerie No. 2337, 246 N.W.2d 747 (N.D. 1976) where it held that a child may not sue to recover for the loss of an injured parent's counsel and guidance. Id. The Scheels Court also reviewed Morgel v. Winger, 290 N.W.2d 266 (N.D. 1980), decided four years after Hastings, in which the Court held that a minor cannot recover for loss of parental consortium. Id. The Scheels Court recognized that there was at least one authority that concluded there is no justifiable distinction between a parent's loss of consortium claim for a child and a child's claim for a parent. Id. However, the Scheels Court refused to overrule the precedent set in Hastings and Morgel by extending the right to recover for loss of consortium to also include a child's claim for loss of parental consortium. Id.

[15] Plaintiffs' appellate brief cites the Hastings Court's statement "[w]hat we say here should not be construed to prohibit recovery where a parent dies

and recovery is allowed under the Wrongful Death Act, Ch. 32-21, N.D.C.C.” to support their position. However, Plaintiffs omitted the citation which followed that statement in Hastings, referring to Dahl v. North American Creameries, 61 N.W.2d 916 (N.D. 1953). The wrongful death damages allowed in Dahl were limited to a child’s pecuniary damages related to the death of the parent. Dahl, 61 N.W.2d at 922. Non-pecuniary damages for loss of affection and injured feelings were expressly not allowed in Dahl. Id.

[16] Plaintiffs urge the Court to distinguish between loss of consortium damages in personal injury and wrongful death actions. This distinction is not supported by North Dakota law. The rationale for prohibiting loss of parental consortium claims is the same whether the loss of consortium follows the injury or death of the parent. The ten reasons cited by the Butz court for denying loss of parental consortium claims are equally applicable in both circumstances. See Butz, 492 N.W.2d at 93. The cause of the loss of parental consortium – injury or death – does not impact the rationale behind prohibiting the action. Further, it makes no sense to argue that recovery is available if the parent dies, but is not available if the parent spends five years in a vegetative state. The anomaly the Hopkins Court sought to cure, the inequity in allowing non-economic damages to be

awarded in personal injury actions but not in wrongful death actions, would be created once again if the prohibition on loss of parental consortium damages is followed only in personal injury actions.

[17] The determinative factor in a loss of consortium claim is the nature of the relationship of those involved, not the nature of the injury. This Court has unequivocally stated that a child has no cause of action for loss of parental consortium. *Id.* at 92. As the injury or death of a loved one causes sorrow to numerous people, the law must establish boundaries on who can claim damages for the loss of the relationship or the pool of people allowed to make the claim would be infinite. The Butz case re-emphasizes that boundary by clarifying for us that there is no loss of parental consortium claim in North Dakota. *Id.* In addition, N.D.C.C. § 32-03.2-04 is evidence of the legislature's intent to treat damages for wrongful death and personal injury in the same manner, expressly stating that the statute applies to both wrongful death and personal injury.

[18] Even though it has had the opportunity, this Court has refused to create a loss of parental consortium action, explicitly stating that the creation of such a cause of action should be asserted by the legislature. "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, 290 N.W.2d at 267. When confronted with the issue again, this Court has maintained its position that if a cause of action for loss of parental consortium is to be created, the Legislature is the proper body to do so. Justice VandeWalle wrote a special concurrence in the Hopkins decision and referred to it in his special concurrence in the Butz decision, saying as follows:

In Hopkins v. McBane, 427 N.W.2d 85, 95 (N.D.1988), in a special concurrence, I stated that “[o]rdinarily the Legislature should enact legislation if there is to be a substantial change in our law in order that the various consequences of such a change may be considered and discussed through the legislative study and hearing process and in order that the precipitous change resulting from a judicial decision in a particular case may be avoided.” Hopkins, supra, VandeWalle, J., concurring specially.

Consistent with that statement, I today agree with the majority that the Legislature should enact legislation establishing a child's cause of action for loss of parental consortium if such a cause of action is to be created.

Butz, 492 N.W.2d at 94.

**[19]** This Court has made it clear that the decision to create an action for loss of parental consortium lies with the Legislature. Since the Morgel case in 1980, the Legislature has been specifically invited to create such a cause of action several times, if that was the Legislature’s intent. For nearly 30 years they have not done so. Clearly this is evidence of legislative intent. A child’s claim for loss of parental consortium is not recognized in North

Dakota. The Trial Court's dismissal of Plaintiffs' loss of consortium claims is a correct interpretation of North Dakota law and legislative intent.

**II. WHETHER THE TRIAL COURT CORRECTLY HELD THAT BECAUSE PLAINTIFFS COULD NOT RECOVER NON-ECONOMIC DAMAGES IN THEIR WRONGFUL DEATH CLAIM AND PLAINTIFFS WERE NOT SEEKING ECONOMIC DAMAGES, THE ONLY DAMAGES AVAILABLE TO THEM WERE NON-ECONOMIC DAMAGES IN A SURVIVAL ACTION**

[20] The Trial Court's April 24, 2007, Order that the jury may only consider compensation for non-economic damages suffered by the decedent prior to her death is correct. There are two separate causes of action that may arise in a claim alleging the decedent's death was caused by a wrongful act: a wrongful death action and a survival action. Survival actions and wrongful death actions are separate and distinct. Sheets v. Graco, Inc., 292 N.W.2d 63, 66 (N.D. 1980).

[21] An action for wrongful death is created by N.D.C.C. § 32-21-01, which provides that when the death of a person is caused by a wrongful act that would have entitled the injured party, if he had lived, to recover damages against the tortfeasor, the tortfeasor is still liable for those damages even though the injured party died. "The wrongful death statute 'is not a survival statute intended to increase the estate of the deceased, but its purpose is to give a measure of protection to those persons within a fixed



degree of relationship to and dependency on the deceased because of actual injury sustained by them by reason of the wrongful killing of the deceased ...” Id. at 65 (citation omitted). Those who may recover damages for the wrongful death of another are limited by N.D.C.C. § 32-21-03. Any recovery of wrongful death damages inures only to the benefit of the decedent’s heirs and cannot be used to pay debts of the estate. N.D.C.C. § 32-21-04.

**[22]** Survival actions are created by N.D.C.C. § 28-01-26.1, which states that, with limited exceptions, a claim for relief survives the death of a party or a person who might have been a party if death had not occurred. A survival action is merely a continuation of a claim the deceased would have been entitled to bring, for his own damages, had he not died. Sheets, 292 N.W.2d at 67. “The representatives of the deceased merely step into his shoes and continue the cause of action on behalf of the deceased’s estate.” Id. (citation omitted).

**[23]** This Court has clearly distinguished between the two causes of action:

Conceptually, survival actions are quite different from wrongful death actions. Each provides a separate and distinct remedy for a different kind of loss. Wrongful death actions are intended to compensate the survivors of the deceased for the losses they have sustained as a result of a wrongful killing. Dependent upon the specific statutory language, losses recoverable by survivors in wrongful death actions often include the prospective loss of earnings and contribution; prospective

expenses; loss of services; loss of companionship, comfort, and consortium; and mental anguish and grief. Survival statutes, on the other hand, are remedial in nature, and are intended to permit recovery by the representatives of the deceased for damages the deceased could have recovered had he lived. A survival action merely continues in existence an injured person's claim after death as an asset of his estate, while a wrongful death action is an entirely new cause of action for the benefit of those persons who bear a close relationship to the deceased and who have suffered injury as a result of his wrongful death.

Id. at 66-67 (citations omitted).

[24] While the Trial Court in this case may have used “wrongful death” to describe survival damages, the Court’s holding regarding the availability of non-economic damages in a survival action is correct. The Trial Court’s September 6, 2006, Order described compensation available in a survival action: compensation for any non-economic damages allegedly suffered by the decedent before she died. These are the damages a decedent would have been able to collect, from the time of her alleged injury until her death, had she not died. Id. The survival action merely allows the decedent’s personal cause of action to continue after her death. Id. Unlike wrongful death damages, any compensation received under a survival action benefits the estate of the decedent, not the survivors directly. Id. In the instant case, a claim could have been made for any non-economic damages suffered by the decedent before her death. However, Plaintiffs did not pursue such a claim.

[25] Plaintiffs' only claims in this action are for their loss of consortium damages. Plaintiffs, as the decedent's surviving children, are among those entitled to bring a claim for wrongful death damages under N.D.C.C. § 32-21-03. However, the non-economic damages they seek are not available to them. While damages for wrongful death may include compensation for loss of consortium in some situations, this Court has clearly held that children have no recognizable claim for loss of parental consortium damages. See Butz, 492 N.W.2d at 93-94.

[26] Defendants agree that Hopkins, cited by Plaintiffs in support of their position, is still good law. However, Hopkins is not contrary to the position of this Court, as Plaintiffs assert. Plaintiffs cite Hopkins for the premise that wrongful death damages include: "loss of society, comfort and companionship and mental anguish." Hopkins is clearly distinguishable from the case at bar, as it involved only wrongful death damages awarded to a parent for the loss of a child, not to a child for the loss of a parent. The Hopkins rationale cannot be properly cited as support for the instant Plaintiffs' claims for loss of parental consortium. The Trial Court correctly held that those types of damages are simply not available to these particular plaintiffs.

## CONCLUSION

[27] The Trial Court correctly held that these Plaintiffs, as the surviving children of Darlyne Rogers, have no cause of action for loss of their mother's consortium. This Court has previously refused to recognize a cause of action for loss of parental consortium. Further, although the legislature has had ample opportunity to create a cause of action for loss of parental consortium, it has not done so. Therefore, the Trial Court correctly held that Plaintiffs' damages are limited to a claim brought by Ms. Rogers' estate for any non-economic damages she may have suffered prior to her death. Defendants respectfully request this Court to affirm the Trial Court's Order dismissing Plaintiffs' claims on their merits and with prejudice.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of November, 2007.

s/ Randall S. Hanson

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**SUPREME COURT NO: 20070296**  
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*Defendants/Appellees.*

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**CERTIFICATE OF SERVICE**

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I hereby certify that on November 28, 2007, the following documents:

**(corrected) Brief of Appellees**

were filed electronically with the North Dakota Supreme Court Clerk at:


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vs.

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*Defendants/Appellees.*

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**CERTIFICATE OF SERVICE**

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I hereby certify that on November 27, 2007, the following documents:

**Brief of Appellees**

were filed electronically with the North Dakota Supreme Court Clerk at:


**[SupClerkofCourt@ndcourts.gov](mailto:SupClerkofCourt@ndcourts.gov)**

and that counsel for Appellants were served electronically at:

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