

STATE OF MICHIGAN
COURT OF APPEALS

HEATHER LYNN HANNAY,

Plaintiff/Appellee/Cross-Appellant,

v

DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant/Cross-
Appellee.

FOR PUBLICATION

January 17, 2013

9:00 a.m.

No. 307616

Court of Claims

LC No. 09-000116-MZ

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

In this personal injury case, defendant, Department of Transportation, appeals as of right and plaintiff, Heather Lynn Hannay, cross-appeals the Court of Claims' judgment following a bench trial. Defendant argues that the Court of Claims erred by awarding economic damages to plaintiff, and alternatively, that the Court of Claims' damage calculation was clearly erroneous. Plaintiff argues that the Court of Claims clearly erred by calculating her work loss damages based on part-time employment. Because we conclude that defendant was liable for the economic damages awarded to plaintiff by the Court of Claims, and because the calculation of plaintiff's damages by the Court of Claims was not clearly erroneous, we affirm.

On February 13, 2007, plaintiff was involved in a car accident with a salt truck owned by the State of Michigan and driven by Brian Silcox, an employee of defendant. Silcox failed to heed a stop sign and struck plaintiff's 1994 Oldsmobile. As a result of the accident, plaintiff sustained injuries to her right shoulder and underwent four surgeries; a fifth surgery was recommended at the time of the bench trial. Plaintiff suffers from chronic pain that causes fatigue, anxiety, mood disorder, and she also requires assistance with normal daily activities. Plaintiff filed a complaint against both defendant and Silcox on October 1, 2009; however, plaintiff agreed to dismiss her complaint against Silcox before trial. In regard to defendant, plaintiff alleged that defendant owned the truck that failed to stop at a stop sign and struck her vehicle resulting in a serious impairment of bodily function.

The case proceeded to a bench trial, and after plaintiff rested, defendant made a motion to dismiss pursuant to MCR 2.504(B)(2).¹ Defendant argued that the state is only liable for damages arising from bodily injury or property damage, and that accordingly, damages for work loss are not recoverable because those damages are barred by the Government Tort Liability Act (GTLA), MCL 691.1401 *et seq.* Defendant summed up its argument by stating that its view was “that the court should dismiss the damages portion of the claim which relates to the alleged loss of earning capacity, and the claims for non-pathological injuries.”

The trial court took the motion to dismiss under advisement and asked the parties to proceed with closing arguments. Plaintiff argued that the evidence demonstrated that plaintiff suffered from a serious impairment of bodily function. Plaintiff reviewed the testimony of the numerous medical professionals who testified during the trial. Plaintiff also made arguments regarding the extent of damages, noting all the limitations that plaintiff faces as a result of the accident. In its closing, defendant did not contest its liability; however, it did not concede that plaintiff suffered a serious impairment of bodily function or the amount of damages.

On November 18, 2011, the trial court issued its opinion. First, the trial court concluded that the proofs demonstrated that plaintiff suffered a serious impairment of bodily function, and that accordingly, plaintiff was entitled to noneconomic damages. The trial court balanced plaintiff’s age and vibrancy with the fact that she will likely always have limited use of her shoulder and arm and will always suffer from chronic pain to conclude that plaintiff was entitled to a total award of \$474,904 in noneconomic damages.² The trial court also concluded that plaintiff was entitled to economic damages pursuant to MCL 500.3135(3), a section of the no-fault act, MCL 500.3101 *et seq.*, which specifically permits the award of damages for “allowable expenses, work loss, and survivor’s loss.” The trial court awarded plaintiff \$767,076 in work loss benefits and \$153,872 in allowable expenses for ordinary and necessary services. Defendant now appeals as of right.

On appeal, defendant first argues that the trial court erred by awarding plaintiff economic damages for wage loss and loss of services because only damages for “bodily injury” or

¹ MCR 2.504(B)(2) provides in pertinent part:

(2) In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff’s evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant’s right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence.

² On appeal, defendant does not challenge the trial court’s conclusion that plaintiff suffered a serious impairment of bodily function, nor does defendant challenge the trial court’s award of noneconomic damages.

“property damage” are recoverable under the motor vehicle exception to governmental immunity, MCL 691.1405.

The issues in this case require us to interpret the GTLA and the no-fault act. Issues of statutory interpretation are questions of law that we review *de novo*. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). The goal of statutory interpretation is to discern the intent of the Legislature by examining the plain language of the statute. *Id.* at 246-247. “When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted.” *Id.* at 247.

Here, plaintiff alleged that defendant acted negligently. The elements of a negligence claim are duty, breach, causation, and damages. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). However, the GTLA provides that governmental agencies are “immune from tort liability” when “engaged in the exercise or discharge of a governmental function,” unless a specific exception to governmental immunity is applicable. MCL 691.1407(1); *Bennett v Detroit Police Chief*, 274 Mich App 307, 315; 732 NW2d 164 (2007). Thus, the general purpose of the act was to abolish tort liability for governmental entities, even if a plaintiff is able to establish the elements of a tort claim.

However, as noted, the GTLA provides for certain exceptions to the otherwise general grant of immunity awarded to governmental entities. Plaintiff’s action in this case was brought pursuant to the motor vehicle exception to governmental immunity. The motor vehicle exception to governmental immunity provides that “[g]overnmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner” MCL 691.1405. Under this exception, a defendant may be liable to a plaintiff for its negligent operation of a motor vehicle under the GTLA.

However, the fact that a tort action arising from a motor vehicle accident may be pursued against a governmental entity does not except the action from the application of the no-fault act. See *Hardy v Oakland Co*, 461 Mich 561; 607 NW2d 718 (2000). One of the areas regulated by the no-fault act is the scope of recoverable damages in a negligence action involving a motor vehicle. MCL 500.3135. The no-fault act addresses recoverable damages by specifically setting forth the circumstances when tort liability arising out of the use of a motor vehicle is recognized. *Id.* The first two subsections of MCL 500.3135 cover noneconomic damages. The third section, MCL 500.3135(3), provides: “Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle . . . is abolished except as to” Thereafter the provision lists the specific instances where tort liability is not abolished. MCL 500.3135(3)(c) specifically provides that liability for damages for work loss benefits exceeding the three-year limitation placed on personal protection insurance benefits and for benefits exceeding the three-year limitation and daily maximum rate for obtaining ordinary and necessary services for the benefit of the injured person are allowed. MCL 500.3135(3)(c).³

³ MCL 500.3135(3)(c) provides:

Thus, the no-fault act clearly permits the economic damages awarded by the trial court in this case, and there is no reason that the clear expression of recoverable damages set forth in the no-fault act is inapplicable to the government.

Here, defendant does not dispute that the no-fault act provides for the award of economic damages. Rather, now after more than 48 years since the enactment of the GTLA,⁴ during which time economic damages have presumably been routinely awarded, defendant argues that the language of the motor vehicle exception precludes awarding economic damages as provided pursuant to MCL 500.3135(3)(c) because the damages recoverable pursuant to the motor vehicle exception are for the treatment of the bodily injury itself, but not the broader damages associated with the bodily injury.

The only precedential authority that defendant cites that would suggest such a momentous change in the law is the definition of “bodily injury” as a physical or corporeal injury to the body that was announced in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 85; 746 NW2d 847 (2008). Applying this definition of bodily injury, defendant argues that the economic damages for work loss and loss of services are not recoverable because the GTLA’s motor vehicle exception, MCL 691.1405, waives liability only in regard to bodily injury or property damage as defined in *Wesche*. We conclude that defendant’s reliance on *Wesche* in support of its position is misplaced.

The issue in *Wesche* was whether loss of consortium is recoverable against a governmental entity under the motor vehicle exception. *Wesche*, 480 Mich at 79. Applying a definition of bodily injury as being “a physical or corporeal injury to the body,” the Court held that a loss of consortium claim is not recoverable because a plaintiff bringing a loss of consortium cause of action does not suffer a physical injury to the body nor is loss of consortium an item of damages derivative from the underlying bodily injury because loss of consortium has long been recognized as a separate, independent cause of action. *Id.* at 85.

Here, it is clear, and defendant does not argue otherwise, that damages for wage loss and loss of services are not independent causes of action, but are merely types or items of damages that may be recovered because of the bodily injury sustained by plaintiff. Further, there is no dispute that plaintiff in this case sustained a bodily injury. Consequently, the holdings in *Wesche* are inapplicable to the issue in this case.

Plaintiff relies on, and defendant seeks to distinguish, this Court’s recent unpublished decision in *Jago v Dep’t of State Police*, unpublished opinion per curiam of the Court of

Damages for allowable expenses, work loss, and survivor’s loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

⁴ The GTLA was enacted in 1964 and became effective on July 1, 1965.

Appeals, issued August 2, 2011 (Docket No. 297880).⁵ *Jago* was a wrongful death action premised on an automobile accident caused by an employee of the defendant. *Id.* at slip op 1. At issue in *Jago* was the plaintiff's recovery of survivor's loss damages. *Id.* Like defendant in this case, the defendant in *Jago* argued based on the *Wesche* definition of bodily injury that survivor's loss benefits were not recoverable under the GTLA because the GTLA permits only recovery for bodily injury or property damage. *Id.* at slip op 3. This Court disagreed and held that survivor's loss benefits are damages for the bodily injury suffered by the person that died in the motor vehicle accident. *Id.* at slip op 8. Thus, this Court concluded that survivor's loss damages are an item of damages for the bodily injury suffered by the deceased injured person, and the waiver of immunity in the motor vehicle exception applies to claims for excess survivor's loss benefits. *Id.*

Similarly, in this case, work loss and loss of services damages are items of damages that arise from the bodily injuries suffered by plaintiff. To hold otherwise would conflate the actual bodily injury requirement to maintain a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury. To the contrary, we hold that the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. Accordingly, work loss benefits and ordinary and necessary service benefits that exceed the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) are awardable against governmental entities, and the trial court did not err by awarding those economic damages to plaintiff in this case.

Alternatively, defendant argues that the trial court clearly erred by basing its calculation of wage loss damages on what plaintiff might have earned as a dental hygienist instead of on the evidence of what plaintiff actually was earning at the time of her injury because it was not definite that plaintiff would ever work as a dental hygienist. Also, with regard to wage loss, on cross-appeal, plaintiff argues that the trial court erred by failing to calculate her lost earning capacity on the basis of full-time employment instead of on part-time employment because plaintiff testified that she was offered a full-time position upon graduation.

We review a trial court's determination of damages after a bench trial for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). The trial court's findings of fact are also reviewed for clear error. *Id.* at 512. "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "We will not set aside a nonjury award merely on the basis of a difference of opinion." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002) (quotation marks and citation omitted). Speculative damages based on conjecture are not recoverable; however, damages need not be determined with "mathematical

⁵ "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136 n 3; 783 NW2d 133 (2010).

certainty,” damages are “sufficient if a reasonable basis for computation exists.” *Chelsea Investment Group LLC v Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010).

At issue in this case are damages for lost wages in excess of the daily, monthly, and 3-year limitations contained in sections 3107 to 3110. These damages are governed by MCL 500.3135(3)(c), which provides that tort liability arising from the ownership, maintenance, or use of a motor vehicle remains in regard to “[d]amages for allowable expenses, work loss, and survivor’s loss” as defined in sections 3107 to 3110. MCL 500.3107 explains that personal protection insurance benefits are payable for “[w]ork loss consisting of loss income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.” See also *Copus v MEEMIC Ins Co*, 291 Mich App 593, 594-595; 805 NW2d 623 (2011).

The trial court specifically found that plaintiff was enrolled at Lansing Community College (LCC) and working toward her degree at the time of the accident. The trial court further found that plaintiff was already employed at a dental office as a dental assistant. Based on testimony regarding the admission standards for LCC’s dental hygienist program and plaintiff’s qualifications, the trial court concluded that plaintiff would have been admitted and would have successfully completed the dental hygienist program. Based on plaintiff’s testimony, and the testimony of the dentist plaintiff worked for and a dental hygienist employed in the same dental office, the trial court concluded that plaintiff would have received a part-time job as a dental hygienist. Plaintiff and the dentist with whom she was employed both testified to the hourly wage plaintiff would have been paid as a dental hygienist.

In *Swartout v State Farm Mut Auto Ins Co*, 156 Mich App 350; 401 NW2d 364 (1986), this Court reversed the trial court’s grant of summary disposition in favor of the defendant in regard to the issue of lost wages because the plaintiff, who was a nursing student, alleged facts demonstrating where she would be employed, the date her employment would begin, and the wages she would have received but for the accident. Similarly, in this case, plaintiff provided testimony to support a finding that, had she graduated from the dental hygienist program, she would have been employed by a specific dental office three days a week at the rate of \$25 an hour. The dentist who employed plaintiff testified that he pays his dental hygienists \$28 to \$31 an hour. An expert on financial modeling testified that the national average for a dental hygienist is \$28 an hour. The trial court found that, but for the accident, plaintiff would have been accepted into LCC’s dental hygienist program, would have graduated, and would have been employed, at least 60 percent of the time, by a specific dental office at a rate of \$28 an hour. The trial court’s findings are supported by the testimony of plaintiff, the dentist who owns the dental office, an expert on financial modeling, and a dental hygienist employed at the dental office, as well as evidence regarding plaintiff’s qualifications and LCC’s admission standards. Under these circumstances, we cannot conclude that the trial court’s damages award was purely speculative. Thus, we conclude that the trial court’s award for lost wages was not clearly erroneous.

In regard to plaintiff’s cross-appeal, plaintiff argues that her testimony that she was offered full-time employment was not contradicted and required the trial court to calculate her damages based on full-time employment. However, the trial court specifically explained its decision to award damages based only on part-time employment. The trial court noted that

plaintiff testified she was going to be hired to replace a specific dental hygienist, and that other testimony demonstrated that the dental hygienist she would replace worked only three days a week. Further, the trial court noted that the dentist who runs the office testified that all of his dental hygienists work part-time. Thus, the trial court concluded that plaintiff failed to meet the burden of demonstrating that she would have full-time employment.

We conclude that the trial court's factual findings in support of its decision to calculate plaintiff's wage loss award based on part-time employment only were not clearly erroneous. Plaintiff's position relies on the determination that her testimony regarding the offer of full-time employment was more credible than the testimony supporting the conclusion that she would only work part-time. "[W]e defer to the trial court's superior position to observe and evaluate witness credibility." *Marshall Lasser, PC*, 252 Mich App at 110. Thus, we conclude that the trial court did not clearly err by calculating plaintiff's lost wages based on part-time employment.

Affirmed. No costs pursuant to MCR7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering