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MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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## “Bodily Injury” Damages Include Excess Wage Loss And Allowable Expenses, Court Of Appeals Says

By Sidney A. Klingler

In a published decision issued on January 17, 2013 the Michigan Court of Appeals held that excess economic damages available under MCL 500.3135(3)(c) of the No-Fault Act are compensable under the motor vehicle exception to governmental immunity, even though the latter action is statutorily limited to liability for “bodily injury and property damage . . .” In *Hannay v Dep’t of Transportation*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2013), Plaintiff was involved in an accident in which a salt truck owned by the State of Michigan failed to stop at a stop sign and struck the Plaintiff’s vehicle, causing injuries to Plaintiff’s shoulder.

Plaintiff’s action against the Department of Transportation was brought under the motor vehicle exception to the Government Tort Liability Act (GTLA), which 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. In addition to noneconomic damages, the trial court concluded that Plaintiff was entitled to recover excess wage loss and allowable expenses under MCL 500.3135(3), a section of the No-Fault Act providing for recovery in tort actions for “allowable expenses, work loss, and survivor’s loss...in excess of the daily, monthly, and three-year limitations [of the Act].” MCL 500.3135(3)(c).

Defendant appealed, asserting that the trial court erred by awarding excess economic damages because the GTLA only allows a plaintiff to recover “bodily injury and property damage . . . .” Defendant relied not only on the plain language of the motor vehicle exception to the GTLA, but also on the Supreme Court’s decision in *Wesche v Mecosta Co Rd Comm*, 480 Mich 75; 746 NW2d 847 (2008). In *Wesche*, the Supreme Court considered the meaning of “bodily injury” as used in the motor vehicle exception, and concluded that “bodily injury” means “a physical or corporeal injury to the body.” 480 Mich at 85. The Supreme Court found that a claim for loss of consortium (a spouse’s derivative claim) could not be maintained under the motor vehicle exception, “because loss of consortium is a nonphysical injury . . . .” *Id.* Moreover, the Court noted that loss of consortium is not merely an item of damages, but an independent cause of action. Although excess wage loss and allowable expenses are likewise nonphysical injuries, the appellate panel in *Hannay* found *Wesche* inapplicable, reasoning 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 the plaintiff.” Slip op, p 4.

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The Court in this case opined without citation that economic damages “have presumably been routinely awarded” under the Government Tort Liability Act in the 48 years since its enactment. This issue may wind up in the Michigan Supreme Court, as the decision in *Hannay* appears to extend the damages awardable under the motor vehicle exception to the Government Tort Liability Act beyond those expressly denoted in MCL 691.1405, that is, “bodily injury and property damage . . . .”

## CONTINUED...

Having dispensed with apparently applicable Supreme Court authority, the panel proceeded to rely on an unpublished, and therefore non-precedential case, *Jago v Dep't of State Police*, unpublished per curiam decision of the Court of Appeals, issued August 2, 2011 (Docket No. 297880), in which the Court held that survivors loss damages “are an item of damages for the bodily injury suffered by the deceased injured person” which could be recovered under the motor vehicle exception to the GTLA.

Thus, the Court concluded that in the case before it, “work loss and loss of services damages are items of damage that arise from the bodily injuries suffered by plaintiff.” Slip op, p 5. In *Hannay*, the panel appeared to broaden the plain language of the motor vehicle exception to governmental immunity, which provides that “governmental agencies shall be liable for bodily injury . . .”, to instead provide that governmental agencies are now liable for bodily injury *and other economic damages arising from such bodily injury*. In doing so it relied on an unpublished decision, while finding the Supreme Court’s decision in *Wesche* defining bodily injury as “a physical or corporeal injury to the body” inapplicable.

In addition, when addressing the Department’s GTLA argument the Court also stated that excess “ordinary and necessary service benefits” (i.e. replacement services) are also awardable under § 3135(3)(c). However, this part of the Court’s decision is contrary to the Michigan Supreme Court’s recent decision in *Johnson v Recca*, 492 Mich 169 (July 30, 2012). In *Johnson*, the Court held that because replacement services are not among the categories listed in § 3135(3)(c), a plaintiff cannot recover them as part of an excess economic damages claim. The *Johnson* decision was issued around the same time that the briefs in *Hannay* were filed, so it is likely that its relevance to the case was never considered.

In the alternative, Defendant also argued that the trial court’s award of excess wage loss benefits was based on speculation and conjecture because it was calculated using what Plaintiff might have earned as a dental hygienist as opposed to what she was earning as a dental assistant when the accident occurred. However, the Court disagreed and held that Plaintiff had presented ample evidence and testimony (including testimony from her prospective employer) that had she graduated from the dental hygienist program (although she had not yet been accepted), she would have worked for a specific employer and earned a specific wage, and thus the claim was not speculative.

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