

# no-fault newslines

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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## Shoulda, Coulda, Woulda: Michigan Court Of Appeals Upholds Speculative Excess Wage Loss Award

By Jason R. Church

The nature and degree of certainty required to support an award for wage loss benefits can be a contentious issue in both first and third-party no-fault litigation. Under the No-Fault Act defendants are generally afforded limited immunity from a plaintiff's claims for non-economic damages; however there is no such immunity for claims of excess economic loss. These "excess" economic damages include "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). This means that a negligent driver or vehicle owner remains liable for, among other things, a plaintiff's lost wages that exceed the monthly and three-year limitations set forth in MCL 500.3107(1)(b).

Excess work loss damages should be distinguished from *loss of earning capacity*, which is not compensable under the No-Fault Act. *Argenta v. Shaban*, 424 Mich 83 (1985). The distinction between *loss of earning capacity* and *excess work loss* was first recognized in the context of first party PIP claims. In PIP cases, wage loss benefits are compensable for lost income from work the plaintiff "would have performed" had he or she not been injured. MCL 500.3107(1)(b). In *Argenta, supra* the Michigan Supreme Court held that a plaintiff may not recover for loss of earning capacity in tort under § 3135(3)(c). Instead, the Court held that the same standard used in calculating wage loss benefits in PIP cases applies to recovering excess economic damages in tort cases. Thus, cases interpreting the scope of 3107(1)(b) on the issue of wage loss benefits are applicable to questions involving excess economic loss under MCL 500.3135(3)(c).

In *Hannay v Dep't of Trans.*, \_\_ Mich App \_\_ (2013), the Michigan Court of Appeals recently issued a published decision on the issue of excess economic loss damages in a case involving a college student who was injured in an accident with a salt truck owned by the Michigan Department of Transportation. She filed a tort suit against the Department in the Court of Claims claiming both noneconomic and excess economic damages under § 3135(3).

Sitting as the finder of fact, the trial court found Plaintiff was enrolled as a student at Lansing Community College (LCC) and working toward her degree. The court also found that she was employed as a dental assistant. Based on evidence regarding admission standards at LCC's dental hygiene program and Plaintiff's qualifications, the trial court concluded that she would have been admitted and would have completed the program. The court also found that the testimony from her employer established that she would have received a part time job as a dental hygienist with a specific hourly wage. Based on the foregoing, the trial court found that Plaintiff

### SECRET WARDLE NOTES:

**Excess economic damages should be distinguished from loss of earning capacity, which is not compensable under the No-Fault Act. In order for a plaintiff to base an excess wage loss claim on an amount more than what they were earning at the time of the accident, plaintiff must present ample evidence that establishes what he/she would have earned as opposed to could have earned. The excess wage loss claim cannot be based on speculation and conjecture. Nonetheless, *Hannay* somewhat loosens the burden of proof for plaintiffs in excess wage loss claims. Moreover, despite *dicta* in *Hannay*, a plaintiff cannot recover excess replacement services in a tort case because the decision in *Johnson, supra* takes precedence.**

## CONTINUED...

was entitled to excess economic damages in the amount of \$920,948, which included an award of \$767,076 in excess wage loss benefits and \$153,872 in lost household services. The award was based on future income she may have earned as a dental hygienist instead of her documented income as a dental assistant at the time of the accident.

On appeal the Department argued that the trial court erred by basing its calculation of excess wage loss damages on what Plaintiff might have earned as opposed to what she was earning at the time of the accident. However, the Court of Appeals affirmed the trial court's decision. In this regard, the Court held that because Plaintiff presented ample evidence and testimony (including testimony from her prospective employer) that had she graduated from the dental hygienist program, she would have worked for a specific employer and earned a specific wage, the claim was not speculative.

The Department also argued on appeal that excess economic damages are not compensable under the Government Tort Liability Act (GTLA, MCL 691.1401 et seq.) because the applicable section of the GTLA only allows damages for "bodily injury" or "property damage" and does not include damages for excess economic or wage loss. However, the Court rejected this argument stating that excess economic damages are items of damage that arise from the bodily injuries suffered by Plaintiff and thus are not excluded under the GTLA. 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.

Although Michigan courts have previously allowed plaintiffs to base wage loss damages on more than what they were earning at the time of the accident (e.g. scheduled pay increases, and pending job offers) those cases required that the evidence show with ample certainty what the plaintiff *would have earned* as opposed to what he or she *could have earned*. *Hannay, supra* is a departure from its predecessors due in part to sheer number of inferences the trial court was permitted to draw in calculating Plaintiff's damages for lost wages. Most notably being the fact that Plaintiff had not yet been accepted to the LCC dental hygiene program. Thus, although the Court did not adopt a pure earning capacity claim, *Hannay* broadens the scope of what can be compensable.

It will be interesting to see how the Michigan Supreme Court handles the GTLA and the earning capacity arguments if this case is appealed. Clearly, the part of the decision dealing with excess replacement services conflicts with the Supreme Court's decision in *Johnson, supra* and thus has no precedential value on that issue.

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