STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH SUTHERLAND, Personal Representative of the ESTATE OF MARYJANE PEARL SUTHERLAND,

Plaintiff-Appellant,

and

DANIEL SUTHERLAND,

Plaintiff,

v

JUDITH KLARR, M.D., S. DEVARAHALLY, M.D., CYNTHIA PRYCE, M.D., DAVID C. DEWAR, M.D., PAUL C. HOLTROP, M.D., FOZIA SALEEM-RASHEED, M.D., AMITAI KOHN, M.D., and ROBERTO MARTIN ESPINOSA, M.D.,

Defendants,

and

WILLIAM BEAUMONT HOSPITAL and BEAUMONT HEALTH,

Defendants-Appellees.

UNPUBLISHED
January 26, 2023

No. 360059
Oakland Circuit Court
LC No. 2018-165482-NH

Before: YATES, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of Maryjane Pearl Sutherland, appeals by leave granted[1] the trial court order granting defendants', William Beaumont Hospital and Beaumont Health, motion in limine to preclude claims for loss of earning capacity damages in this medical malpractice wrongful-death suit.[2] Plaintiff argues that the trial court erred in granting this motion because the Wrongful-Death Act (WDA), MCL 600.2922, allows the recovery of loss of earning capacity damages, plaintiff's claim for the infant's loss of earning capacity was not too speculative to allow for recovery, and plaintiff presented sufficient evidence to support this claim. We affirm.

I. FACTUAL BACKGROUND

Plaintiff gave birth to Maryjane on December 1, 2016, at Beaumont Hospital Royal Oak, preterm at 31 weeks. Maryjane weighed only two pounds, 5.1 ounces. Maryjane had hypoglycemia and difficulty feeding, so human milk fortifier (HMF) was added to breast milk, but she began spitting up. She was taken off HMF, but the hypoglycemia returned, so it was added again. Then she began having episodes of emesis (vomiting) and her abdomen became distended. On the morning of December 12, 2016, she had "large 'coffee ground' " emesis, was made "NPO" (nothing by mouth), an orogastric tube was placed, and abdominal x-rays were taken. The findings showed a possible developing bowel obstruction. She continued to have emesis, abdominal distention, and skin mottling throughout the day. X-rays were taken at 4:10 p.m. and 8:55 p.m., both indicating developing bowel obstruction or early NEC (necrotizing enterocolitis).

The next morning, December 13, 2016, an x-ray taken at 7:45 a.m. still demonstrated developing obstruction or NEC. At 10:40 a.m., an upper gastrointestinal (GI) study was performed and revealed a malrotation of the intestines with mid-gut volvulus. Pediatric surgery was consulted, and an emergency surgery was performed to twist Maryjane's bowel into the proper position, but ischemic and necrotic bowel were encountered, and surgery was scheduled for the next day. During the surgery on December 14, 2016, it was discovered that there was no viable small bowel remaining, and there was nothing left to do. Maryjane died that day.

II. PROCEDURAL HISTORY

Plaintiff was appointed personal representative of Maryjane's estate, and she filed suit against defendants and several physicians employed by Beaumont. Plaintiff alleged "professional/medical negligence/wrongful death," alleging that defendants were vicariously liable for the acts of the physicians under respondeat superior. Generally, plaintiff alleged that defendants were negligent, committed malpractice, and were liable for wrongful death for the failure to properly and timely treat Maryjane. Had the physicians acted within the standard of care, they would have timely diagnosed Maryjane's condition through an upper GI study and

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[1] *Estate of Sutherland v Klarr*, unpublished order of the Court of Appeals, entered April 28, 2022 (Docket No. 360059).

[2] Elizabeth and Daniel Sutherland, individually, as well as the individually named doctors were dismissed as parties by the trial court, and are not subject to this appeal.

surgical consultation shortly after the x-ray on December 12, 2016, at 4:10 p.m., which would have led to a quicker surgery and Maryjane would have survived.

Defendants denied liability, and moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff failed to create a genuine issue of material fact through qualified expert testimony supported by medical literature that the Beaumont doctors breached the standard of care in diagnosing Maryjane with early NEC, or that the doctors proximately caused Maryjane's death or an earlier diagnosis would have made any difference in the outcome. The trial court denied the motion, as well as defendants' motion for reconsideration of its decision. Defendants applied for leave to appeal this decision, which this Court denied. *Estate of Sutherland v Klarr*, unpublished order of the Court of Appeals, entered December 23, 2020 (Docket No. 355310).

Defendants then filed a motion in limine requesting that the trial court strike or limit any claim for lost earnings or loss of earning capacity or loss of financial support because there was no viable claim for such under the WDA. Defendants argued that the current statute specifically provides for "loss of financial support," so future wage loss is excluded, and beneficiaries are limited to those "who suffer damages." Defendants argued that *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948), is binding, which disallows recovery of lost earning capacity. *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016), is distinguishable because it pertains to the highway exception for governmental immunity. Moreover, plaintiff's claims for Maryjane's future wage loss and loss of financial support are too speculative for recovery because Maryjane was an infant, and plaintiff produced no evidence as to what kind of wage-earning Maryjane was reasonably certain to obtain.

Plaintiff responded, specifying that she was not seeking damages for financial support, only loss of earning capacity, which was recoverable under the current version of the WDA; it was not limited to those damages suffered by survivors. *Denney* expressly provided for recovery of lost earnings under the WDA, and *Baker* lacked precedential effect because the Legislature has since changed the language of the WDA.

The trial court entered an order granting defendants' motion to preclude claims regarding loss of earning capacity, stating:

> The Court agrees with Defendants' analysis of the progression of the WDA and its implication on this case. Further, the Court concludes that under the doctrine of stare decisis, [*Baker*] is still controlling and is binding precedent on this issue. [*Baker*] permits a loss of support but does not permit loss of earning capacity. Although the WDA has been amended on several occasions, [*Baker*] has not been overruled. In addition, the alleged damages for loss of earning capacity are far too speculative and remote to be allowable, because the decedent was an infant. Last, because the alleged damages are so speculative, any recovery of those damages would not be equitable.

The trial court denied plaintiff's motion for stay of the proceedings and for reconsideration, and plaintiff now appeals.

III. STANDARD OF REVIEW

"We review a trial court's decision on a motion in limine for an abuse of discretion." *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). The interpretation and application of statutes is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

IV. ANALYSIS

The trial court erred in determining that plaintiff was not entitled to loss of earning capacity damages under the WDA; however, its conclusion that such damages are too speculative to be awarded for Maryjane, an infant, was proper.

The WDA provides that

> [w]henever the death of a person, injuries resulting in death, or death as described in [MCL 600.2922a] shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . . [MCL 600.2922(1).]

Such action shall be brought by the personal representative of the estate. MCL 600.2922(2). Regarding damages, the WDA provides:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. . . . [MCL 600.2922(2).]

Whether the WDA provides for loss of earning capacity damages was recently and squarely decided by this Court in *Estate of Vasquez v Nugent*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket Nos. 357511; 358134), and *Estate of Jumaa v Prime Healthcare Sys*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 358209). In *Estate of Vasquez*, ___ Mich App at ___; slip op at 2, the decedent, an infant twin, did not survive delivery. The plaintiff mother, as personal representative of the decedent, alleged medical malpractice under the WDA for the defendants' alleged delay in performing a Cesarean section and failure to properly monitor the plaintiff's progress. *Id*. at ___; slip op at 2. The plaintiff experienced excessive uterine tone, which complicated the delivery. *Id*. at ___; slip op at 2. The plaintiff sought recovery of the decedent's lost future earning potential. *Id*. at ___; slip op at 4.

This Court concluded that "pursuant to *Denney*, [the] plaintiff may recover damages for [the decedent's] lost future earnings to the same extent [the decedent] could have recovered those damages had she survived." *Id*. at ___; slip op at 6. The Court explained that in *Denney*, "this Court explained that although lost earnings are not explicitly specified in MCL 600.2922(6), the Legislature's use of the word 'including' meant that the enumerated list of kinds of damages available is not exhaustive; '[t]herefore, damages for lost earnings are allowed under the wrongful-death statute.' " *Id*. at ___; slip op at 5, quoting *Denney*, 317 Mich App at 731-732. This Court confirmed that *Denney* remained good law under MCR 7.215(J)(1), as it has not been overturned by the Michigan Supreme Court. *Estate of Vasquez*, ___ Mich App at ___; slip op at 5. Moreover, this Court concluded that *Baker*, which interpreted a previous version of the WDA which did not include the "including" language in the current statute, "has clearly been overruled or superseded, and it was no longer 'good law' long before this Court decided *Denney*." *Id*. at ___; slip op at 6.[3]

Therefore, the trial court abused its discretion when it relied on *Baker* and determined that the WDA does not allow for the recovery of loss of earning capacity damages. Plaintiff was entitled to recover damages for Maryjane's loss of earning capacity to the same extent that Maryjane could have recovered those damages had she survived. This, however, does not end the analysis. This Court "may affirm the trial court when it reached the right result, even if we differ on the reasoning underlying that result." *Bronson Health Care Group, Inc v State Auto Prop and Cas Ins Co*, 330 Mich App 338, 342 n 3; 948 NW2d 115 (2019). The trial court did not abuse its discretion in determining that plaintiff's claim for loss of earning capacity for Maryjane was too speculative to be recoverable.

In *Estate of Vasquez*, ___ Mich App at ___; slip op at 6-7, this Court explained:

> "The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Although "there is inherent uncertainty regarding what the future may hold," "the measure of damages attributable to the loss of future earnings is left to the sound judgment of the jury despite the time element being uncertain, and the jury's award will not be disturbed if reasonable and within the range of the testimony and proofs presented." *Id*. at 104, citing *Vink v House*, 336 Mich 292, 296-297; 57 NW2d 887 (1953). Recovery of damages is not precluded "for lack of precise proof," nor must a plaintiff provide "mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable, particularly in circumstances in which the defendant's actions created the uncertainty." *Hannay v Dep't of Transp*, 497 Mich 45, 79; 860 NW2d 67 (2014) (quotations omitted).
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> In an action for medical malpractice, an injured party may recover damages for future economic losses. MCL 600.1483(2); *Taylor v Kent Radiology*, 286 Mich App 490, 519; 780 NW2d 900 (2009). "Although economic losses are not defined under MCL 600.1483 or MCL 600.6305, this Court has turned to the definition

[3] This Court reached the same conclusion in *Estate of Jumaa*, ___ Mich App at ___; slip op at 2-4, which concerned a 13-year old decedent, *id*. at ___; slip op at 1.

> provided in MCL 600.2945(c) in order to determine whether a claim for damages in a medical malpractice action should be characterized as economic or noneconomic losses." *Taylor*, 286 Mich App at 519. Under MCL 600.2945(c), economic losses are defined as "objectively verifiable pecuniary damages arising from . . . loss of wages, loss of future earnings . . . or other objectively verifiable monetary losses." In *Hannay*, our Supreme Court explained that there was a difference between "work-loss damages" and "loss of earning capacity damages," the former being for income a person *would have* earned, and the latter being for income a person *could have* earned. *Hannay*, 497 Mich at 80-82. [Footnote omitted.]

The Court discussed caselaw from within and outside this jurisdiction dealing with a claim for a child decedent's lost wages or lost earning capacity, *Estate of Vasquez*, ___ Mich App at ___; slip op at 7-9, and when applied to the decedent infant twin, concluded as follows:

> We think the above cases establish that a child's expected future earning potential is not *inherently* too speculative to permit recovery. However, the record must permit some reasonable basis for personalizing an estimation specific to that particular child. In this case, tragically, there is simply no way to know anything about [the decedent's] interests, aspirations, personality, strengths and weaknesses, academic performance, or any other characteristic that could be extrapolated. [The decedent] was born prematurely and, implicitly, may have been conscious for two hours, if that. [The decedent] never had the chance to display any individual personality whatsoever, and we think it too speculative to extrapolate from her parents or sibling. Unfortunately, on these facts, we must agree with [the] defendants that there is no possible evidence of [*the decedent's*] potential for future earnings.
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> We are therefore constrained to conclude that defendants are entitled to summary disposition in their favor as to plaintiff's claims for lost future earning potential. [*Id*. at ___; slip op at 9.]

The facts of *Estate of Vasquez* are analogous to the facts of this case. Maryjane was born premature, and lived only 13 days. Thus, there is no way to know anything about her "interests, aspirations, personality, strengths and weaknesses, academic performance, or any other characteristic that could be extrapolated." *Id*. at ___; slip op at 9. Plaintiff offered the expert testimony of economist Nitin V. Paranjpe, Ph.D. as evidence to calculate Maryjane's loss of earning potential. However, his calculations were based on "the average earnings of Caucasian women with a high school level of education" and "the average earnings of Caucasian women with an associates level of education." When Paranjpe was asked at his deposition whether his calculations were specific to Maryjane, he testified that he considered Maryjane's birthday, gender, and race, and the education level of plaintiff. Besides the information in the complaint and in the parents' depositions, he was not familiar with Maryjane's prematurity or survivability. Thus, there was no evidence in the record to permit a reasonable basis for personalizing an estimation specific to Maryjane. Therefore, ultimately, the trial court did not abuse its discretion when it granted defendants' motion in limine to preclude plaintiff's claims for Maryjane's loss of earning capacity because as an infant decedent, the claim was too speculative.

Affirmed.

/s/ Christopher P. Yates
/s/ Kathleen Jansen
/s/ Deborah A. Servitto