

STATE OF MICHIGAN
COURT OF APPEALS

DAWN MORISETTE, Personal Representative of
the ESTATE OF ZACHERY MORISETTE,

UNPUBLISHED
October 19, 2023

Plaintiff-Appellant,

v

No. 360671
Macomb Circuit Court
LC No. 2020-004074-NO

XPO LOGISTICS, INC., XPO LOGISTICS
EXPRESS, LLC, and MARTIN DWAYNE SMITH,

Defendants-Appellees.

Before: K. F. KELLY, P.J., and JANSEN and CAMERON, JJ.

PER CURIAM.

In this wrongful-death action, plaintiff, as personal representative of the Estate of Zachery Morisette, appeals by leave granted¹ the trial court’s order granting summary disposition in favor of defendants regarding plaintiff’s claims for loss of financial support, earning capacity, and accumulation of wealth. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Zachery Morisette (“decedent”) was part of a three-man crew with the Macomb County Department of Roads repairing and patching a broken basin cover on the right shoulder of eastbound I-94. As the crew members finished the repair, defendant Martin Dwayne Smith, driving a truck owned by defendants XPO Logistics, Inc. (“XPO”) and XPO Logistics Express, LLC (“XPO Logistics”), struck and ran over the decedent. Rather than stop and render assistance, Smith continued driving. The decedent was pronounced dead at the scene.

¹ *Estate of Zachery Morisette v XPO Logistics*, unpublished order of the Court of Appeals, entered August 17, 2022 (Docket No. 360671).

Plaintiff initiated the instant action, alleging in Count I negligence and gross negligence against Smith. In Count II, plaintiff asserted owner liability against XPO and XPO Logistics. And, in Count III, plaintiff alleged negligent hiring, training, and retention against XPO and XPO Logistics. Plaintiff asserted that as a direct and proximate cause of the collision, the decedent and his estate suffered: (a) wrongful death, (b) conscious pain and suffering, (c) mental, emotional, and psychological pain, fright, and fear of impending death, (d) loss of the decedent's financial support, earning capacity, and accumulation of wealth, (e) loss of the decedent's services, (f) loss of the decedent's love, society, and companionship, (g) funeral and burial expenses, and (h) other related damages.

Defendants moved for partial summary disposition under MCR 2.116(C)(10), requesting dismissal of plaintiff's claims for loss of financial support, earning capacity, and accumulation of wealth. Defendants asserted that actions under the wrongful-death statute, MCL 600.2922, such as plaintiff's, are subject to the limitations imposed by the underlying statute creating the cause of action—here, the no-fault act, MCL 500.3101 *et seq.* According to defendants, under the no-fault act, individual work-loss benefits terminate on death and can only become part of a claim for survivor's loss benefits where a decedent was financially supporting dependents at the time of death.

Plaintiff opposed the motion, arguing that under *Denney v Kent County Rd Comm'n*, 317 Mich App 727; 896 NW2d 808 (2016), damages for lost wages and earning capacity under the wrongful-death statute are not limited by the no-fault act. The trial court granted defendants' motion, stating the no-fault act "address[es] the issue as to when it is permissible to obtain wage loss benefits for a person who has become deceased as a result of the accident." This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a summary disposition. *Int'l Union UAW v Central Mich Univ Trustees*, 295 Mich App 486, 493; 815 NW2d 132 (2012).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The pleadings, affidavits, depositions, and other documentary evidence are reviewed in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists for the jury to decide. If reasonable minds could differ on an issue, a genuine issue of material fact exists. [*Bellmore v Friendly Oil Change, Inc*, 341 Mich App 514, 520-521; 991 NW2d 236 (2022) (citations omitted).]

Issues of statutory interpretation are also reviewed de novo. *State Farm Fire & Casualty Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

III. ANALYSIS

On appeal, plaintiff argues that the wrongful-death statute allows for damages in the form of lost earning capacity and wages because the statute does not limit or preclude the types of damages that could have been recovered by the person had the person survived the injury. Plaintiff also argues the no-fault act does not preclude the economic damages requested, because the "no

limitations” provisions of the wrongful-death statute cannot be limited by another legislative provision. We agree with plaintiff that the trial court erred when it granted summary disposition in defendants’ favor concerning plaintiff’s claim for work-loss benefits. In all other respects, we affirm.

“[T]he wrongful death act [WDA] provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death.” *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). However, “the WDA does not comprise an independent cause of action.” *Thorn v Mercy Mem'l Hosp Corp*, 281 Mich App 644, 658; 761 NW2d 414 (2008). Rather, “the wrongful-death act is essentially a filter through which the underlying claim may proceed.” *Denney*, 317 Mich App at 735 (quotation marks and citation omitted). Because the decedent’s death was caused by the operation of a motor vehicle, the underlying claim necessarily involves the no-fault act.

“MCL 600.2922(6) sets forth the damages available in wrongful-death actions.” *Denney*, 317 Mich App at 731, citing *Wesche v Mecosta County Rd Comm'n*, 480 Mich 75, 90; 746 NW2d 847 (2008). MCL 600.2922 states, in pertinent part:

(1) Whenever 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 or death as described in [MCL 600.]2922a, and although the death was caused under circumstances that constitute a felony.

* * *

(6) 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 600.6922(1), (6).]

Thus, the WDA permits an array of damages. However, “ ‘because an underlying claim ‘survives by law’ and must be prosecuted under the wrongful-death act, . . . any statutory or common-law limitations on the underlying claim apply to a wrongful-death action.’ ” *Denney*, 317 Mich App at 731, quoting *Wesche*, 480 Mich at 89. This includes limitations on damages. *Thorn*, 281 Mich App at 659.

The trial court granted summary disposition in defendants’ favor of plaintiff’s claims for loss of financial support, earning capacity, and accumulation of wealth. MCL 500.3135 of the no-fault act addresses these types of damages:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person

has suffered death, serious impairment of body function, or permanent serious disfigurement.

* * *

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by [MCL 500.]3101(1) was in effect is abolished except as to:

* * *

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.]3107 to 3110, including all future allowable expenses and work loss, in excess of any applicable limit under [MCL 500.]3107c or the daily, monthly, and 3-year limitations contained in those sections, or without limit for allowable expenses if an election to not maintain that coverage was made under [MCL 500.]3107d or if an exclusion under [MCL 500.]3109a(2) applies. 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. [MCL 500.3135(1), (3)(c).]

Under MCL 500.3107, which a court must look to when considering damages for work loss under MCL 500.3135(3)(c), work loss consists of lost income an injured person would have performed. MCL 500.3107(1)(b). MCL 500.3107 excludes work-loss damages when a person has died, stating:

(1) Subject to the exceptions and limitations in this chapter, and subject to [MCL 500.3181 *et seq.*], personal protection insurance benefits are payable for the following:

* * *

(b) Work loss consisting of loss of 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. Work loss does not include any loss after the date on which the injured person dies. [MCL 500.3107(1)(b).]

Recently, in *Palomo Estate v Dean Transp, Inc*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 357285), slip op at 1, this Court addressed the same issue contested in this case, namely whether work-loss benefits are available when a plaintiff seeks those damages against a third party, as opposed to a first-party action against an insurer. In *Palomo Estate*, the decedent was struck by a bus while walking down a road. *Id.* at 1-2. The plaintiff brought an action against the bus company and the driver seeking, in relevant part, lost wages as an element of damages. *Id.* at 2. As in this case, the trial court granted summary disposition in favor of the defendants on the basis that the plaintiff was not entitled to work-loss benefits under the no-fault act. *Id.*

In reversing the trial court's order, we clarified that “[t]he limits that apply to a plaintiff in a first-party action against an insurer, including that work-loss benefits only continue until the injured person's death, do not apply when a plaintiff is seeking damages against a third party.” *Id.* at 2-3. The Court explained:

MCL 500.3107(1)(c) provides that work-loss does not include loss after the injured person dies when a person seeks personal protection insurance benefits. In this case, the estate is not seeking insurance benefits under MCL 500.3107; the estate is suing another driver for negligence and gross negligence and seeking damages for noneconomic losses where the injured person suffered death. MCL 500.3135(3)(c) allows a suit when the injured person has suffered death for work-loss damages amounts “in excess of any applicable limit.” The trial court erred by limiting plaintiff's work-loss damages after applying a statute applicable to first-party actions against insurers when this case is a third-party action against another driver. [*Id.* at 4.]

As in *Palomo Estate*, the claims in this case are not first-party claims against the decedent's insurer seeking personal protection insurance benefits, but rather are third-party tort claims against the individual who struck the decedent and that individual's employer. Accordingly, under *Palomo Estate*, this Court is obligated to reverse the trial court's order granting summary disposition in favor of defendants concerning plaintiff's claim for work-loss benefits. The issue is remanded to the trial court to determine “whether plaintiff is entitled to work-loss damages under the wrongful-death act, MCL 600.2922(6), under the limitations provided in third-party cases for noneconomic damages in MCL 500.3135” *Palomo Estate*, ___ Mich App at ___; slip op at 4-5.

Although we reverse the trial court's order concerning work-loss benefits, we agree with defendants that the trial court did not err when it granted them summary disposition concerning plaintiff's claim for loss of financial support. Under MCL 500.3108:

[P]ersonal protection insurance benefits are payable for a survivor's loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses, not exceeding \$20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if the deceased had not suffered the injury causing death. [MCL 500.3108(1).]

Under MCL 500.3110, persons conclusively presumed to be dependents of a deceased individual include husbands and wives with whom the individual is living at the time of their death, and children under the age of 18 or over, but physically or mentally incapacitated from earning. MCL 500.3110(1). “In all other cases, questions of dependency and the extent of dependency shall be determined in accordance with the facts as they exist at the time of death.” MCL 500.3110(2).

Plaintiff testified that the decedent was living at home with her, his father, and his brother at the time of his death. According to plaintiff, the decedent had no dependents, and no one was otherwise economically dependent on him. Additionally, the decedent did not claim dependents in his 2019 tax filings or his withholding elections when he began his employment. Plaintiff asserts the decedent regularly provided help and assistance to his father and argues the question of dependents should be decided by a jury. In the portions of the testimony cited, however, plaintiff stated the decedent worked for his father at his construction business before starting work for the Macomb County Road Commission. After his new job, the decedent would only help his father if he needed it. And, when asked if the decedent liked working on cars, plaintiff stated: “He liked to work with his hands. He didn’t really work on cars. But any time my husband was working on something, he was always right there to—providing help.” Viewing this evidence in a light most favorable to plaintiff, it fails to establish a genuine issue of material fact whether the decedent’s father was the decedent’s dependent or otherwise economically dependent on the decedent.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As neither party prevailed in full, no costs may be taxed. MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Thomas C. Cameron