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MICHIGAN SUPREME COURT LIMITS WRONGFUL DEATH CLAIMS FOR MOTOR VEHICLE ACCIDENTS INVOLVING GOVERNMENT VEHICLES

Sean Fosmire[1] – Contributor

In the combined cases of *Wesche v Mecosta County Road Commission*, and *Kik v Sbraccia, et al*, decided on April 3, 2008, the Michigan Supreme Court has ruled that:

- the motor vehicle exception to governmental immunity does not authorize claims for loss of consortium brought by the spouse of an injured plaintiff and
- it also does not permit a parent's claims for loss of society and companionship in wrongful death cases against the governmental agency arising from motor vehicle accidents.

The *Wesche* litigation involved a personal injury claim brought by Daniel Wesche, who was injured when he was rear-ended by an excavator operated by an employee of the Mecosta County Road Commission. The plaintiff's wife, Beverly, joined with a claim based on loss of consortium arising from his injuries.

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The *Kik* case arose from an accident involving an ambulance owned by Kinross Charter Township, in which a pregnant patient, Rebecca Kik, was being transported. Ms. Kik was injured when the ambulance went off the road. She went into premature labor and delivered her infant, Sharon Kik, who died the same day. This claim was filed for the injuries sustained by the mother, loss of consortium on the part of the father, and a wrongful death claim on behalf of the estate of the infant for the parents' loss of society and companionship for the viable fetus.

DECISION AND BASIS

Applying its plain-text approach to statutory interpretation, the four-member majority ruled that neither claims for loss of consortium brought by the non-injured spouses nor claims for the loss of society and companionship arising from the death could be compensable as against governmental agencies.

MCL 691.1407 confers immunity from tort liability to governmental agencies engaged in the exercise or discharge of governmental functions. One of the recognized exceptions to the governmental immunity rule is the motor vehicle exception, found at MCL 691.1405. This provides that governmental agencies may be held liable "for bodily injury and property damage" resulting from the negligent operation of a motor vehicle owned by a governmental agency and operated by an employee of the governmental agency. The Court held that that exception did not extend to loss of consortium claims:

> "Because loss of consortium is a nonphysical injury, it does not fall within the categories of damage for which the motor vehicle exception waives immunity."

The Court rejected the plaintiffs' argument that loss of consortium is one of the permissible elements of damages that can be awarded once a bodily injury is found. It noted that the courts in Michigan had recognized in many cases that loss of consortium is an independent cause of action, although it is derivative of the underlying injury.

The conflict panel of the Court of Appeals in the *Kik* case had ruled that the motor vehicle exception creates a "threshold for liability", and permits the recovery of all damages flowing from the accident once that threshold is met. The Court disagreed, stating that "the legislature knows how to create a statutory threshold when it wishes to do so", and that it had not done so in this case.

The Supreme Court also rejected the analysis found in previous cases that suggested that the language of the statute should be interpreted broadly in light of ambiguity or uncertainty in language, declaring succinctly that the statutory language in question "is not ambiguous".

Because the *Kik* case involved a wrongful death claim, the Court had to address an additional argument on the part of the plaintiff, to the effect that the express definition of permitted damages

under the wrongful death statute should be interpreted as an expansion of the damages recoverable under the motor vehicle exception to the governmental immunity statute. The plaintiffs had argued that definition of damages section under the wrongful death statute, MCL 600.2922(6), specifically authorized the award of damages for:

- Reasonable medical expenses
- Funeral and burial expenses
- Conscious pain and suffering by the deceased
- Loss of financial support
- Loss of society and companionship of the deceased

The Court, however, noted that §2922(1), permits a wrongful death claim in the following circumstances:

> "Whenever the death of a person . . . shall be caused by wrongful act . . . and the act . . . is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who . . . would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of a person injured. . . "

This language evidences a legislative intent, the Court said, that the persons for whom the estate may assert a claim for damages under the Wrongful Death Act should be limited to those who could have made a claim if the victim had not been killed in the accident.[2] The recovery of damages under §2922(6), it said, is contingent upon the right of the person for whose benefit the estate is making the claim being able to assert a claim if the death had not occurred. The Act did not abolish any limits that would apply to the underlying claim. Since the Court had already determined that "loss of consortium" is not recoverable by a non-injured plaintiff in a claim against a governmental agency, it held that the element of loss of society and companionship could also not be claimed against a governmental defendant under the Wrongful Death Act. The other language of the Act, defining the damages that can be recovered, was not intended to expand the scope of the motor vehicle exception, it held.

This "contingency" analysis may lead to unexpected results in other cases in the future.

The Court's second ruling, this time unanimous, was that loss of consortium and loss of society and companionship are fully recoverable in a claim against the individual government employee himself, since the limiting language of MCL 691.1405 does not apply. (The claim against the employee, however, requires a heightened showing of gross negligence on the part of the

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[2] For some reason, the Court itself had previously been unable to perceive that intent in cases such as *Smith v City of Detroit*, 388 Mich 637; 202 NW2d 300 (1972), even though the Legislature had just amended the statute the previous year.

employee and that that negligence be proven to be "the proximate cause" of the injury. MCL 691.1407(2))

ANALYSIS

A claim for "loss of consortium" has long been recognized under Michigan law as a separate but derivative claim by a non-injured spouse arising from the physical injuries that his spouse has incurred in an accident. The typical approach by most attorneys in addressing loss of consortium issues is to focus on the diminution or loss of sexual activity between a couple, and the normal household services provided by one spouse to another and that cannot be provided by virtue of the physical injury. The phrase "loss of consortium", however, can be understood to include the loss of society and companionship of one spouse to another arising from the limitations caused by a physical injury.

Many attorneys tend to regard the "loss of society and companionship" under the Wrongful Death Act as being wider in scope than the damages that are characterized as "loss of consortium" in a personal injury claim involving a surviving victim. Attorneys and claim representatives have considered the "loss of society and companionship" to extend to any family member who is eligible to bring a claim under the Wrongful Death Act.

The Supreme Court in *Wesche* seemed to use the terms interchangeably. It found no reason to recognize a different rule for loss of society and companionship in the wrongful death context. Thus, for both spouses of injured persons, and for certain family members of persons killed in motor vehicle accidents to which the motor vehicle exception applies, damages for loss of consortium / loss of society and companionship are not recoverable.

UNINTENDED CONSEQUENCES?

The effect of the Supreme Court's decision in this case potentially goes beyond the context of the governmental immunity exceptions. The Court's "contingency" analysis of the wrongful death statute could be read to preclude recovery of damages for loss of society and companionship for certain family members in all death cases.

Michigan law recognizes the right of a child to make a claim, similar to loss of consortium, for the loss of services and the loss of society and companionship sustained by a child whose parent is injured, although it does not recognize such a claim by a parent when the child has been injured. This right was established by the Michigan Supreme Court in the case of *Berger v Weber*, 411 Mich 1 (1981), as an expansion of Michigan's common law.

But in *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988), the same Court declined to fashion a similar rule permitting a claim by a parent for the loss of society and companionship occasioned by an injury to the child.

The Court's contingency analysis – its use of section 1 to limit the claims that can be made under section 6 of the Wrongful Death Act – suggests that it would allow damages in wrongful death

cases only when that claim for damages would have been permitted if the decedent had not died. But if the common law of this State does not allow a parent to make a claim for the loss of society and companionship of her child if the child survives, wouldn't this analysis lead to the conclusion that the claim likewise is barred in the event the injury leads to the child's death?

This result is all the more imponderable in light of the reality that in the majority of cases, the only viable claims under the wrongful death statute for a parent who has lost a child, of whatever age, are those for the loss of the child's society and companionship. Most parents are not financially dependent on their children, and thus cannot claim any economic loss as a result of the child's death. Further, most family relationships do not involve a significant level of household services provided by a child to the parent. As the Court noted in its 1972 *Smith* decision, the reality of any strictly pecuniary analysis in modern times is that children are a net financial liability to their parents.

The language used by the Court used in *Wesche* and its restriction of the claims allowed under the wrongful death statute could be regarded as eviscerating it entirely as it pertains to parents' claims for the deaths of their children.

PRIORITY DISPUTE WITH HEALTH INSURER RESULTS IN PIP PENALTY INTEREST AND ATTORNEY FEE ASSESSMENT

Ladd Culbertson[3] – Contributor

In a recent unpublished decision, the Court of Appeals confirmed prior cases finding that delays in the payment of PIP benefits by no fault insurers in priority disputes entitle Plaintiffs to awards of attorney fees and penalty interest. In *Spectrum Health v Titan Ins Co*, Unpublished Opinion *per curiam* of the Court of Appeals, decided April 8, 2008, (Docket No. 275341), Titan Insurance Company was assigned PIP claims by the Assigned Claims Facility for Keely Gutierrez-Baca, and her two minor children. Shortly after receiving the files, Titan independently determined that both children were eligible to receive PIP benefits.

However, upon receiving billing and medical records for each child from the Plaintiff, Spectrum Health, Titan learned that Blue Cross Blue Shield had insured Ms. Gutierrez-Baca under an employer-funded ERISA health plan. When Titan had not paid its claims, Spectrum filed suit against Titan two days before the one-year anniversary of the accident. Two weeks later, after receiving a summary of the BCBS health plan confirming that Titan was primarily for the payment of medical expenses, Titan paid Spectrum's claims in full. Claiming that these benefits had been

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overdue, and that Titan had unreasonably denied Spectrum's claims, the plaintiff demanded the payment of no fault penalty interest and attorney fees.

Titan argued that the PIP benefits had not been overdue, and that it did not unreasonably delay in paying the medical benefits, because it had promptly paid the benefits after receiving proof that it was primarily liable for those claims, rather than BCBS. However, the Court stated that any uncertainty Titan may have had with respect to the priority between it and BCBS was not relevant to whether PIP benefits were overdue under MCLA 500.3142(2), or whether the award of penalty interest was required. Section 3142(2) of the Michigan Automobile No Fault Insurance Act provides in pertinent part that "[p]ersonal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact of the amount of loss sustained".

The Court of Appeals pointed out that "it is proof of the fact of the amount of 'loss sustained' by the claimant that determines when PIP benefits become overdue", not proof relating to priority. It was not relevant to determining whether the PIP benefits were "overdue" that Titan had not received proof that it had priority over BCBS for the payment of those benefits. The Court noted that "penalty interest must be assessed against a no fault insurer if the insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits" (quoting *Davis v Citizens Ins Co of America*, 195 Mich App 323 (1992)).

The Court next turned to whether Titan was liable for the payment of attorney fees, under MCLA 500.3148(1). This section allows a claimant to recover attorney fees, where an insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment". Quoting another prior decision by the Court of Appeals in *Shanafelt v Allstate Ins Co*, 217 Mich App 625 (1996), the Court noted that the relevant inquiry was "not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable". The Court held that it had been unreasonable for Titan to delay in the payment of benefits where it thought there may have been another insurer in higher order of priority. "When the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits." (*quoting Regents of the Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719 (2002)).

The Court noted that is the purpose of the No Fault Act to provide accident victims with assured, adequate, and prompt payment of claims. *Williams v AAA Michigan*, 250 Mich App 249, 267 (2002). Because Titan knew that it had a place in the chain of priority and that the plaintiff was entitled to payment from someone within that chain, it was unreasonable for Titan to delay making that payment. *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 13 (1985).

MICHIGAN SUPREME COURT ANALYZES "COMMON WORK AREA" DOCTRINE ELEMENT OF "READILY OBSERVABLE AND AVOIDABLE DANGERS"

Aaron Belville[4] – Contributor

The common-work-area doctrine was established by the Michigan Supreme Court in the case of *Funk v Gen Motors Corp*, 392 Mich 91 (1974). *Funk* created an exception to the general rule that, "in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee and that the immediate employer of a construction worker is responsible for the worker's job safety". Under this exception, a general contractor can be held liable under a negligence theory, if the plaintiff can establish: 1) that the general contractor failed to take reasonable steps within its supervisory and coordinating authority, 2) to guard against readily observable and avoidable dangers, 3) that created a high degree of risk to a significant number of workers, 4) in a common work area. The reasoning behind this theory of liability is that "in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors". *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005).

The second element of the common-work-area doctrine, i.e. "readily observable and avoidable dangers", was the central issue of the recent Michigan Supreme Court opinion of *Latham v Barton Malow Co*, ___ Mich ___ (2008), which was issued on April 14, 2008. In *Latham*, the injured worker was a carpenter employed by a subcontractor on the construction of a new school building. The general contractor, the Barton Malow Company, managed the entire project. The plaintiff was injured when he fell roughly 15 feet from a mezzanine level of the project to the ground floor. At the time of the fall, the plaintiff, along with a coworker, was moving sheets of drywall from a scissors lift. The plaintiff was not wearing a fall-protection harness, even though the job site rules clearly stated that fall-protection harnesses were required. It was undisputed that the plaintiff knew of the job site rules and would not have been injured had he been wearing the harness.

The general contractor moved for summary disposition, which was denied by the trial court, under the determination that there was no dispute that a fall was readily avoidable had personal fall protection been used. On appeal, the Court of Appeals affirmed the trial court, citing the fact that the plaintiff had to work on an elevated platform without permanent perimeter protection and concluding that an observable and avoidable danger existed. Both courts determined that, because a large number of workers worked at elevated heights, the elevated work area was the danger to be avoided, or at least protected against.

The Supreme Court reversed the lower courts' determinations that an observable and avoidable danger existed, concluding that both courts had improperly analyzed what danger had created the

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high degree of risk. While the two lower courts based their analysis on the understanding that working at dangerous heights was, in and of itself, the risk to be avoided, the Supreme Court stated that the avoidable risk was working at dangerous heights <u>without any protection from falls</u>. In reaching this conclusion, the Court stated that "because working at heights is generally an unavoidable condition of construction work, it cannot, by itself, be the avoidable danger. . ."

Thus the Court remanded the case to the trial court for a determination of whether a significant number of workers were required to work at elevated heights without fall protection, rather than whether a significant number of workers were required to work at elevated heights, period. While the *Latham* case essentially restates the essence of the law previously detailed in *Funk*, it certainly highlights the idea that not all construction workplace risks fall within the common-work-area theory of general contractor liability.

LAST CALL FOR THE GRAND RAPIDS BREAKFAST SEMINAR

The Firm is pleased to present its Annual Spring Breakfast Seminar on April 24, 2008 at the Frederik Meijer Gardens and Sculpture Park, located at 1000 East Beltline, NE in Grand Rapids [(616) 957-1580]. Comprehensive written materials will be distributed to all program attendees. After the seminar, feel free to enjoy all of the open indoor garden areas as our guest. The agenda for this event is as follows:

8:00 - 8:25 a.m.	Registration and Continental Breakfast
8:25 - 8:30 a.m.	Welcome and Introduction **Speaker: David N. Campos**
8:30 - 9:00 a.m.	Northern Michigan Recreational Accidents: An Overview of Civil Liability * General Liability Principles for Landowners & Participants; Governmental Immunity; Relationship with MVA Laws * Skiing * Off Road Vehicles * Snowmobiling * Hunting * Fishing * Equine Activities * Bicycling **Speaker: Peter B. Worden**
9:00 - 9:20 a.m.	Employment Law in Michigan *Litigation: Claims, Statutes, The Legal Process * Litigation Prevention: Handbooks, Policies & Record Keeping * Employee Wellness Programs **Speaker: Aaron L. Belville**
9:20 - 9:40 a.m.	Impact of Medicare, Medicaid & SCHIP Extension Act of 2007 on PIP Claims *Medicare Set-Aside Trusts: What Are They & When Are They Used? *MSAs for Workers Comp, General Liability and No Fault Claims **Speaker: Tara L. Velting**

9:40 - 10:15 a.m.	Michigan Third Party Automobile Liability Update *Non-Party At Fault Rule * Threshold Requirements * *Kreiner* and Its Progeny * Proposed Legislative Changes * Uninsured Motorist/Underinsured Motorist Coverage **Speaker: Christopher P. Jelinek**
10:15 - 10:30 a.m.	Break
10:30 - 11:15 a.m.	Michigan Auto No Fault First Party Update * "Constructive Ownership" & Responsibility to Insure (or not) a Motor Vehicle .3101 * Equitable Estoppel of One Year Statute of Limitations .3145 * No Fault Insurer's Right to IME .3151 & .3159 * Equitable Estoppel with Denial of Coverage Relative to Failure to Disclose .3163 * Tort Liability Exposure above PPI $1 million .3121 * Business Use Exclusions Enforceable with Auto, B.I. policy, *Bristol West v Butzbach* **Speaker: David N. Campos**
11:15 - 11:45 a.m.	Demonstration of an Orthopedic Exam **Speaker: Clifford M. Buchman, D.O.**
11:45 a.m. - Noon	Question and Answer Session

If you are able to attend this complimentary annual event, please register via email to: lbeatty@garanlucow.com or phone Lynn Beatty at (616) 742-5500 or (800) 494-6312 for reservations.

BASIC NO FAULT COURSE AT LTU

The Basic No Fault course will commence on Tuesday, May 13, 2008 and run through July 29, 2008. The classes will be at the Southfield campus of Lawrence Tech University. Please call Tim Meloche at (248) 204-4055 for additional information or to register for the course.

FALL BREAKFAST SEMINAR

The Firm's annual Fall Breakfast Seminar will be offered on Thursday, September 18, 2008 at the Troy Marriott. Please mark your calendar and, if you wish to do so, preregister with Beth Bezenah at bbezenah@garanlucow.com. This seminar will also be available by Webcast.