

STATE OF MICHIGAN
COURT OF APPEALS

LORI CICHEWICZ,

Plaintiff-Appellant,

v

MICHAEL S. SALESIN, M.D., and MICHAEL S.
SALESIN, M.D., PLC,

Defendants-Appellees.

UNPUBLISHED

June 21, 2016

No. 330301

Oakland Circuit Court

LC No. 2011-120900-NH

Before: BOONSTRA, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In this wrongful-conception case, plaintiff appeals by leave granted¹ the trial court's order granting defendants' motion in limine precluding testimony or evidence regarding her claim for emotional distress damages arising from her knowledge that her child would be born with Down Syndrome. We reverse and remand.

This Court issued an opinion in a prior appeal, finding that although plaintiff could not seek damages for raising the child, she was entitled to recover traditional medical-malpractice damages related to the alleged wrongful conception. *Cichewicz v Salesin*, 306 Mich App 14, 33; 854 NW2d 901 (2014). Plaintiff contends that the damages she currently seeks fall within the prior ruling, and we agree.

This Court reviews preserved issues pertaining to the admissibility of evidence for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). An abuse of discretion occurs when the court's decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "[W]hen the trial court's decision to admit evidence involves a preliminary question of law, the issue is reviewed de novo, and admitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion." *Barnett*, 478 Mich at 159. "This Court reviews de novo the determination whether the law of the case doctrine applies and to what extent it applies." *Augustine v Allstate*

¹ *Cichewicz v Salesin*, unpublished order of the Court of Appeals, entered November 25, 2015 (Docket No. 330301).

Ins Co, 292 Mich App 408, 424; 807 NW2d 77 (2011). Issues of statutory interpretation also comprise questions of law that this Court reviews de novo. *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012).

MCL 600.2971 states:

(1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.

(2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.

(3) *A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.*

(4) *The prohibition stated in subsection (1), (2), or (3) applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition. The prohibition stated in subsection (1), (2), or (3) does not apply to a civil action for damages for an intentional or grossly negligent act or omission, including, but not limited to, an act or omission that violates the Michigan penal code, 1931 PA 328, MCL 750.1 to 750.568. [Emphasis added.]*

As recognized by this Court, while wrongful-conception cases “have consistently been permitted in Michigan,” issues have arisen regarding “the types of damages recoverable[.]” *Cichewicz*, 306 Mich App at 23. Citing various cases issued before the enactment of MCL 600.2971, this Court recognized a history of permitting recovery in wrongful-conception cases for “the pain and anxiety of pregnancy and child birth, lost wages, [and] medical and hospital expenses,” along with mental distress damages. *Cichewicz*, 306 Mich App at 23. Historically, costs associated with raising the child were not permissible. *Id.* at 24. The Court recognized that with the enactment of MCL 600.2971, a plaintiff is still precluded in a claim of wrongful conception premised on negligence from recovery of “damages ‘for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority[.]’ ” *Id.* at 27, quoting MCL 600.2971(3). However, a plaintiff can “recover such damages for a wrongful-conception claim premised on an intentional or grossly negligent act,” leading the Court to conclude that “the types of damages recoverable in a wrongful-conception claim depend on whether the defendant’s act or omission was merely negligent, or whether it was intentional or grossly negligent.” *Id.*

This Court has already determined that plaintiff’s claim of defendants’ gross negligence is not viable, stating:

On the basis of the evidence presented to the trial court, we hold that no reasonable juror could conclude that Salesin's conduct was so reckless that it demonstrated a substantial lack of concern for whether plaintiff would get pregnant as a consequence of his advice regarding the need for contraception and his failure to prescribe birth control pills. [*Cichewicz*, 306 Mich App at 31-32.]

This Court also confirmed "that a plaintiff in a wrongful-conception action is entitled to recover traditional damages" *Id.* at 33. The Court ruled:

While MCL 600.2971(3) expressly limits a plaintiff's right to recover the expenses related to raising a child to the age of majority in a wrongful-conception medical malpractice action premised on negligence, listing these expenses in detail, the statute includes no language limiting a plaintiff's ability to recover traditional medical malpractice damages. Had our Legislature intended to restrict recovery for any and all damages in a wrongful-conception action, the Legislature could have done so, as it did in wrongful-life and wrongful-birth actions. See MCL 600.2971(1) and (2). The Legislature's language demonstrates an intention to limit recovery in a wrongful-conception action premised on negligence only to the extent that a plaintiff seeks damages related to the cost of raising the child to the age of majority. See MCL 600.2971(3). [*Id.* at 33-34.]

Tort damages generally include the damages that naturally flow from the injury, which may include noneconomic damages, such as pain and suffering and mental and emotional distress damages. *Hannay v Dep't of Transp*, 497 Mich 45, 65; 860 NW2d 67 (2014). "Damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact . . ." *McManamon v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006). The burden of proving damages with reasonable certainty is upon the party asserting the claim. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 634; 769 NW2d 911 (2009). Noneconomic damages include "past and future disability and disfigurement, shame and mortification, mental pain, and anxiety, annoyance, discomfiture, and humiliation, denial of social pleasure and enjoyments, and fright and shock." *May v William Beaumont Hosp*, 180 Mich App 728, 758; 448 NW2d 497 (1989) (citations omitted). The Michigan Supreme Court has affirmed that "the tort-feasor is liable for all injuries resulting from his wrongful act, whether foreseeable or not, provided the *damages are the legal and natural consequences of the wrongful act*, and are such as, according to common experience and the usual course of events, might reasonably have been anticipated." *Hannay*, 497 Mich at 66-67 (citations and quotation marks omitted).

Historically, it has been recognized that "[a] plaintiff is not limited to recovery for physical pain and anguish, but, rather, is entitled to damages for mental pain and anxiety which naturally flow from the injury, i.e., for shame, mortification, and humiliation." *Ledbetter v Brown City Savings Bank*, 141 Mich App 692, 703; 368 NW2d 257 (1985). As discussed in *Veselenak v Smith*, 414 Mich 567, 576-577; 327 NW2d 261 (1982), "if the plaintiff is being compensated for *all* mental distress and anguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way in which the injury occurred."

In this case, defendants suggest that plaintiff's knowledge that she would give birth to a disabled child is irrelevant to her claim of emotional distress damages arising within her wrongful-conception claim. We do not agree. First, the inclusion of this knowledge as part of her damages for the unwanted and unanticipated pregnancy has no relationship to and does not arise from any claims raised on behalf of the child and do not serve to imply a diminution in the value of that child's life. Rather, the claim that plaintiff's knowledge of concerns pertaining to the child's health added to plaintiff's emotional distress resulting from the pregnancy is consistent with the recognition that such damages "naturally flow from the injury" *Ledbetter*, 141 Mich App at 703. Second, the emotional stress experienced by plaintiff stemming from her knowledge of the genetic anomalies complicating her pregnancy is simply concomitant to the stress of the unanticipated pregnancy and serves to exacerbate her concerns and fears.

In addition, the statutory language is not supportive of defendants' position. As is repeatedly acknowledged:

The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, [t]he words of a statute provide the most reliable evidence of its intent [*Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012) (citations and quotation marks omitted).

The relevant statutory language is encompassed in MCL 600.2971(3), which states:

A person shall not bring a civil action for damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority, on a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.

As recognized previously by this Court, the relevant statutory provision "demonstrates an intention to limit recovery in a wrongful-conception action premised on negligence only to the extent that a plaintiff seeks damages related to the cost of raising the child to the age of majority." *Cichewicz*, 306 Mich App at 33-34. The statutory provision "includes no language limiting a plaintiff's ability to recover traditional medical malpractice damages." *Id.* at 33. Thus, the damages at issue on appeal—which plaintiff describes as "emotional distress resulting from knowing that her child would be born with Down Syndrome"—are not precluded. Plaintiff's personal emotional distress claims seeking compensation for the stress associated with her unplanned pregnancy and the additional concerns inherent in her awareness of the genetic anomalies of the child to be born are separate and distinct from any claims to compensate for costs attributable following the birth of a disabled child. Contrary to the argument of defendants, the provision of *Taylor v Kurapati*, 236 Mich App 315, 334-335; 600 NW2d 670 (1999), regarding the inability to place a value on the life of a child is inapplicable here. Plaintiff is not

seeking compensation associated with the birth of a disabled child. Rather, she seeks damages for the emotional distress associated with her knowledge regarding the complications of her pregnancy.

Finally, as discussed in *Augustine*, 292 Mich App at 425:

Under the law-of-the case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals. On remand, the trial court may not take action . . . inconsistent with the judgment of this Court. [T]he trial court is bound to strictly comply with the law of the case, as established by [this Court], according to its true intent and meaning. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. This rule applies without regard to the correctness of the prior determination. Where the trial court misapprehends the law to be applied, an abuse of discretion occurs. [Citations and quotation marks omitted.]

This Court has previously determined that plaintiff had the "ability to recover traditional medical malpractice damages." *Cichewicz*, 306 Mich App at 33. Again,

caselaw collectively demonstrates the longstanding principle that tort damages generally include the damages that naturally flow from the injury, which may include both economic damages, such as damages incurred due to the loss of the ability to work and earn money, as well as noneconomic damages, such as pain and suffering and mental and emotional distress damages. [*Hannay*, 497 Mich at 67.]

While this Court did not delineate every possible element acceptable for plaintiff's claim of emotional distress in her wrongful-conception action, it did indicate that "traditional medical malpractice damages" were compensable. *Cichewicz*, 306 Mich App at 33. As such, the damages plaintiff seeks are allowable.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering