

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

DAVID LUBERDA,

Plaintiff-Appellant

v

No. 95418

FARM BUREAU GENERAL
INSURANCE,

Defendant-Appellee.

BEFORE: R.J. Danhof, C.J., MacKenzie, and J.P. Swallow*, JJ.

SWALLOW, J.

Plaintiff appeals an order of summary disposition by the Arenac Circuit Court, finding that plaintiff's auto insurer, the defendant here, properly suspended no-fault work-loss benefits upon plaintiff's incarceration in the county jail.

On November 25, 1985, plaintiff was involved in a single-car automobile accident. Plaintiff was seriously injured and his passenger was killed. Initially, defendant paid plaintiff work-loss benefits and other benefits due under plaintiff's auto insurance policy with defendant. However, when plaintiff was incarcerated in June of 1986 on a charge of negligent homicide, defendant suspended work-loss payments. The negligent homicide charge was brought as a result of the passenger's death. Plaintiff's term of incarceration was six months.

On July 24, 1986, plaintiff filed the instant action in an attempt to force defendant to resume work-loss payments. Both parties filed motions for summary disposition. Plaintiff attached to his motion an affidavit by James Mosciski, the sheriff of Arenac County. In the affidavit, Sheriff Mosciski averred that, if plaintiff had been able to work, he would have released plaintiff on a work-release program for the entire duration of his jail sentence.

*Circuit Judge, sitting on the Court of Appeals by assignment.

The trial court granted defendant's motion for summary disposition, finding the instant case was controlled by Smith v League General Insurance Co, 424 Mich 893; 382 NW2d 168, reversing 143 Mich App 112; 371 NW2d 491 (1985).

On appeal, plaintiff argues that Smith is distinguishable. In Smith, the plaintiff was incarcerated on an offense unrelated to the accident which caused his disabling injuries. In the instant case, plaintiff's injuries and his conviction stem from the same accident. Plaintiff also argues that the sheriff's affidavit was sufficient proof that he would have been available for work but for the accident to withstand a motion under MCR 2.116(C)(10).

In Smith, the Supreme Court summarily reversed this Court's decision at 143 Mich App 112; 371 NW2d 491 (1985). This Court had held that despite the insured's incarceration, he was still entitled to receive work-loss benefits. The Supreme Court explained its reversal by a simple citation to its decision in McDonald v State Farm Mutual Ins Co, 419 Mich 146; 350 NW2d 233 (1984). In McDonald, the Court held that a disabling heart attack, which occurred two weeks after the insured sustained disabling injuries in an automobile accident, relieved the insurer from further obligation to pay work-loss benefits. The court found that the heart attack was an independent intervening cause of disability which would have prevented the plaintiff in that case from earning wages even if the accident-related injuries had not occurred.

We believe plaintiff's arrest and conviction, resulting in incarceration is a similarly independent intervening event preventing plaintiff's gainful employment. We reach this conclusion despite the fact that plaintiff's disabling injuries and his incarceration arose from the same event, the automobile accident. The statute provides that benefits be paid for loss of income for work an insured would have performed "if he had not been injured." In contrast, plaintiff seeks work-loss benefits for work he would have performed if he had not been involved in

the accident. However, the statute clearly indicates that the cause of the work loss must be the accident-related injuries, not the accident itself. Plaintiff's incarceration is clearly unrelated to the injuries he sustained.

Plaintiff points to McDonald, supra, at 152 where the Supreme Court stated:

"Work-loss benefits are available to compensate only for that amount that the injured person would have received had the automobile accident not occurred." (Emphasis added).

In McDonald, the Supreme Court was faced with a situation of two independent disabling injuries, one which was accident related and one which was not. McDonald did not purport to decide, as is the issue here, whether the cause of the work loss must be the injuries sustained in the accident or the accident itself. The context of the above language appears to indicate that the court used the phrase "automobile accident" as a synonym for "accident-related injuries." Again, the statute specifically provides that the cause of work loss must be the injuries sustained by the insured. We are not convinced the Supreme Court intended the above-quoted language to have the import plaintiff advances.

As to plaintiff's claim that he sufficiently demonstrated that his incarceration would not have barred him from continuing gainful employment if his injuries had not prevented him from doing so, we find the affidavit of Sheriff Mosciski to be lacking. MCL 801.251; MSA 28.1747(1) requires that a jail inmate petition the circuit court for the privilege of participating in a work-release program. The statute does not indicate that a sheriff has any authority to make such a decision. Thus, plaintiff's showing was no greater than the showing in Smith, where this Court stated:

"If plaintiff had not been physically disabled from the automobile accident, perhaps he would have qualified for a work-release program." 143 Mich App 114.

Since the Supreme Court summarily reversed this Court's decision in Smith, it must be concluded that a possibility that an inmate might have been released for work is an insufficient

demonstration that the insured would have received income from employment "if he had not been injured."

Affirmed.

/s/ Robert J. Danhof
/s/ Barbara B. MacKenzie
/s/ Joseph P. Swallow