

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

ROY E. CLARK and RITA CLARK,

Plaintiffs-Appellants,

v

No. 83106

KARL ANTHONY BREWER and CAROL
BREWER,

Defendants-Appellees.

Before: MacKenzie, P.J., and McDonald and R. Robinson,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from trial court orders dated February 9 and 25, 1987, granting defendants' motions for summary disposition in this no-fault automobile action. We reverse in part and affirm in part.

Plaintiff, Roy Clark, lost his employment with Haggin Ford on March 5, 1982, due to excessive tardiness and poor workmanship, and applied for unemployment benefits on March 11, 1982. Plaintiff was temporarily employed part time from March 1982 until April 7, 1982. He contacted six different companies in search of employment and had arranged a job interview which was to take place after the accident that gives rise to the instant action.

Plaintiff was injured in early 1982 when his automobile was struck in the rear by a pickup truck owned by defendant, Carol Brewer, and driven by defendant, Karl Brewer. Plaintiff allegedly hit his head on the roof of the car during the accident and developed pain in his neck, spine and arms. His movement in his neck was reduced to fifty percent. He visited various doctors who made many diagnoses including muscle spasms, pinched nerves, strain on neck, spinal rotation, and disc wedging. Clark v Auto Club Ins Ass'n, 150 Mich App 546; 389 NW2d 718 (1986).

*Former circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff then brought suit against Auto Club Insurance Association and the instant defendants. The cause against Auto Club Association was dismissed per stipulation. Clark, supra. Defendants moved for summary judgment on the issue of serious impairment of body function. The trial court found as a matter of law that plaintiff did not have a serious body impairment. Plaintiffs appealed. This Court affirmed. Clark, supra.

After the Michigan Supreme Court adopted the new standard for serious body impairment in DiFranco v Picard, 427 Mich 32; 398 NW2d 896 (1986), plaintiff visited an orthopedic surgeon, on October 8, 1986, to again discover what was causing his neck and arm pain. Following unsuccessful physical therapy, the doctor performed a CT scan on December 18, 1986, which revealed a herniated disc. Plaintiff was then referred to a neurosurgeon, who again found no neurological damage. The neurosurgeon performed a myelogram and discovered plaintiff had a ruptured disc. The disc was surgically removed on January 8, 1987. Thereafter plaintiff attempted to amend his complaint in the trial court based on DiFranco, supra. Plaintiff claimed he could not have known of the herniated disc, or serious body impairment, prior to the time he moved for amendment. The trial court denied plaintiff Roy Clark's request to amend his complaint and dismissed the plaintiffs' action.

On appeal plaintiffs first argue the trial court erred in denying plaintiff work loss benefits because he was not actually employed at the time of the accident. We agree. The no-fault insurance act allows recovery for income because an injured person cannot work. The statute provides: "(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 had not been injured . . ." MCL 500.3107(b); MSA 24.13107(b). In addition, MCL 500.3107(a); MSA 24.13107(1) provides:

"Subject to the provisions of section 3107(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident."

Our review of the record indicates the plaintiff was "temporarily unemployed" at the time of the accident, and is therefore entitled to work loss benefits under the above quoted statutes. Szabo v Daie, 136 Mich App 9; 355 NW2d 619 (1983).

Plaintiffs next claim the trial court erred in failing to allow the filing of an amended complaint to assert a serious impairment of body function based on the December 18, 1986, discovery of the herniated disc. We find no error. DiFranco is limited to cases pending before this Court in which the issue of serious body impairment had been raised and preserved. Thus, the DiFranco decision lends no support to plaintiffs' request to file an amended complaint. Moreover, this issue has been fully litigated and the outcome affirmed by this Court. The doctrine of res judicata bars plaintiffs from filing an amended complaint based on an action already decided on the merits. Sherell v Bugaski, 169 Mich App 10; ___ NW2d ___ (1988).

Lastly, plaintiffs claim the trial court erred in dismissing plaintiff, Rita Clark's, claim for loss of consortium. However, both parties agree that Mrs. Clark's claim is derivative of Roy Clark's noneconomic claim. Thus, as Roy Clark's noneconomic claim was properly dismissed, so too is Mrs. Clark's.

Affirmed in part and reversed in part.

/s/Barbara B. MacKenzie
/s/Gary R. McDonald
/s/Richard Robinson