STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE SWARTOUT,

NOV 18 1986

Plaintiff-Appellant,

v NO. 86547

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

Before: T.M. Burns, P.J., and J.H. Gillis and M.J. Kelly, JJ.

M. J. Kelly, J.

Plaintiff appeals from the circuit court's order summarily dismissing her claim for work loss benefits under the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq. We reverse.

Plaintiff was injured in an automobile accident that occurred on April 2, 1981. At that time, plaintiff was enrolled as a nursing student at Bay de Noc Community College and was to graduate in June of 1981, with a degree qualifying her as a licensed practical nurse. Because of her injuries, plaintiff was unable to complete the semester. She did, however, return to Bay de Noc the following year and graduated in June of 1982. Plaintiff then obtained employment with the Dickinson County Memorial Hospital.

Plaintiff filed a complaint against the defendant, which had issued an automobile insurance policy to her father, covering work loss benefits pursuant to MCL 500.3107(b); MSA 24.13107(b). Plaintiff then moved for summary judgment pursuant to GCR 1963, 117.2(2), submitting an affidavit from Bay de Noc Community College alleging that, if she had not been forced to withdraw from school due to the accident, plaintiff would have graduated in June of 1981. Plaintiff also submitted an affidavit from the Dickinson County Memorial Hospital stating that

plaintiff would have been employed by the hospital no later than July 27, 1981, had she received her LPN degree by that time. The rate of pay to which plaintiff would have been entitled was identified. Defendant responded with its own motion for summary judgment based on GCR 1963, 117.2(1). In an opinion and order dated July 9, 1985, the trial court ruled in favor of the defendant.

Pursuant to §3107(b), a no-fault insurer is obligated to pay benefits for work loss, defined as "loss of income from work an injured person would have performed during the first three years after the date of the accident". An insurer, however, is obligated only to pay benefits for actual loss of income and not for a loss of earning capacity. Ouellette v Kenealy, 424 Mich 83; 378 NW2d 470 (1984). The dispositive issue, therefore, is whether plaintiff's complaint stated a cause of action for loss of actual income rather than loss of earning capacity.

The majority of this panel believes that the plaintiff has stated an actionable claim and that it is now a question for the trier of fact to determine whether plaintiff would have received income through employment as a nurse during any of the time she lost as a result of the accident. It is also a matter for the trier of fact to determine the amount of lost income attributable to plaintiff's injuries as opposed to the amount of lost income attributable to other factors, if any, such as the scheduling of the academic year.

We find support for our decision in two cases involving facts similar to the ones presented here. In Gerardi v Buckeye Union Ins Co, 89 Mich App 90; 279 NW2d 588 (1979), plaintiff was a full-time nursing student when she was injured in an automobile accident. As in the present case, the injuries suffered by plaintiff in Gerardi caused her to delay her studies, prompting her to file an action against her no-fault insurer for income

lost as a result of the delay. This Court rejected plaintiff's claim in Gerardi, on the ground that plaintiff was seeking "a loss of wages she could have earned in the future as a registered nurse, but for delay in her studies", which loss was characterized as a loss of earning capacity. In reaching its decision, the Court in Gerardi reasoned:

> "At the time of her injury the plaintiff still had one year remaining before completion of her nursing studies. Obviously, plaintiff would not have been able to work as a registered nurse prior to her accident; she thus has no previous earnings as a nurse upon which work loss may be calculated. Neither can plaintiff demonstrate that during the year lost as a result of the accident, she would have received income working as a regsitered nurse. Presumably, plaintiff would have spent that year completing the necessary academic requirements."

In contrast, plaintiff in the instant case has alleged facts which, if believed, would establish the source of her employment, the exact date of employment and the exact wages that would have been received between July of 1981 and June of 1982. In other words, plaintiff has stated a claim for wages that would, rather than could, have been earned but for her injuries. We therefore conclude that plaintiff should have survived defendant's motion for summary disposition.

In Gobler v Auto-Owners Insurance Co., 139 Mich App 768; 362 NW2d 881 (1984), lv grtd, 424 Mich 876 (1986), plaintiff sought to recover surviver's benefits under §3108, rather than work-loss benefits under §3107. Plaintiff's decedent had taken his last examination as a Michigan State University student on the day of his automobile accident and death. Plaintiff claimed that defendant would have been employed by the United States Forestry Service after graduation and that as his wife, she would have been entitled to support from that income. The case went to trial and plaintiff presented evidence from a staff specialist of the U. S. Forestry Service. Plaintiff obtained a judgment and defendant appealed.

This Court analogized claims for recovery of work loss benefits and claims for recovery of survivor's benefits, holding

that plaintiff was entitled to wages that her decedent "would have received" but for his untimely death. All members of the panel in Gobler agreed that whether the decedent would have received wages was a question of fact. The panel disagreed only as to whether the trial court's factual findings were supported by the record.[1]

We conclude that as in Gobler, the question of whether plaintiff would have received income but for her injuries should be left to the trier of fact.

Reversed and remanded.

/s/ Thomas M. Burns
/s/ Michael J. Kelly

FOOTNOTE

[1] The dissent in a footnote suggests that we are unaware of the nonprecedential status of Gobler v Auto-Owners, 139 Mich App 768; 352 NW2d 881 (1984), lv grtd 424 Mich 876 (1986). Obviously quite the contrary is true as I wrote the dissent in Gobler and this majority opinion in Swartout tracks the spirit of that dissent. The dissent makes an analogy by positing two hypotheticals wherein plaintiff's injuries disable her for two months. We agree that if plaintiff's injuries are found by a trier of fact to disable her for two months, then that is the measure of her recovery of no-fault benefits, not the full extent of any academic calendar delay which might have ensued.

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J. H. GILLIS, J. (Dissenting)

Although the majority has cited the appropriate statute and case law, I disagree with the result it has reached.[1] I believe that the facts in this case are similar to those in Gerardi v Buckeye Union Ins Co, 89 Mich App 90; 279 NW2d 588 (1979). In that case, the plaintiff, a full-time nursing student, was injured in an automobile accident. The injuries suffered by the Gerardi plaintiff caused her to delay her studies by one year. She sued the defendant no-fault insurer for the income lost as a result of this delay. 89 Mich App 92.

In rejecting the plaintiff's position, this Court noted that in amending the work-loss provision to provide a method by which benefits could be computed for workers unemployed at the time of their injury, MCL 500.3107a; MSA 24.13107(1), the Legislature "emphasized that the thrust of the work-loss provision in all cases was to calculate loss based on actual earnings, not future possibilities". 89 Mich App 94. The Court concluded:

> "A fair reading of the complaint reveals that the plaintiff is in fact alleging a loss of wages she could have earned in the future as a registered nurse, but for the delay in her studies. As pointed out in Nawrocki, supra [Nawrocki v Hawkeye Security Ins Co, 83 Mich App 135; 268 NW2d 317 (1978)], such an allegation states a claim for recovery of loss of earning capacity, a tort recovery eliminated by the no-fault act." 89 Mich App 95.

Plaintiff here distinguishes Gerardi, supra, on two grounds. First, plaintiff claims the Gerardi plaintiff had one additional year of studies beyond the academic year, during which the accident occurred, before graduation. Second, unlike the claimant in Gerardi, plaintiff claims she has established that she would have received income working as a nurse for the period for which she argues that she is entitled to work-loss benefits. I agree that these facts prevent reliance upon Gerardi without further analysis; however, I believe the result reached by the majority is not mandated by these factual distinctions.

In this case, defendant argues that plaintiff cannot obtain work-loss benefits until she has actually engaged in employment and has received wages for which she now claims a loss. An expectation of employment, defendant argues, no matter how seemingly certain, is still nothing more than one's future earning capacity. I note that to construe § 3107(b) as suggested by defendant ensures that benefits will be paid only for that period of time during which a claimant is incapacitated by his or her injuries. For example, if plaintiff had been employed as a nurse at the time of her accident, and assuming her injuries would have required two months of recuperation, plaintiff would receive work loss benefits for only two months (i.e., the time which had lapsed before she regained her ability to earn wages).

However, a different result follows in the present case if plaintiff's analysis is used. Assuming again a two-month period of recovery, plaintiff would be physically capable of working in June 1981. But, because she had dropped out of school, she would not be able to obtain employment as a nurse until she received her degree. If the academic calendar requires her to wait until spring to take the necessary classes, plaintiff's receipt of her nursing degree is delayed almost one year. Thus, under plaintiff's proposed resolution of this issue, the defendant is required to pay work-loss benefits for

[1] The majority's reliance on Gobler v Auto-Owners Ins Co, 139 Mich App 768; 352 NW2d 881 (1984), lv gtd 424 Mich 876 (1986), is misplaced because that case lacks precedential value as our Supreme Court has granted leave to appeal. People v Phillips, 416 Mich 63, 74-75; 330 NW2d 366 (1982).

approximately one year when in fact the injury itself prevented plaintiff from working for only two months. Further, despite identical injuries and identical recuperation periods in the two hypotheticals, the benefits payable are dramatically different. The reason for this difference is that the claimant in the second hypothetical sought benefits not for a period during which her injury caused a direct loss of income from work, but rather for a period during which her ability to obtain nursing employment was delayed.

This distinction leads me to conclude that what plaintiff seeks to recover is not benefits for "actual" loss of income from work she would have performed had she not been injured, Ouellette v Kenealy, 424 Mich 83, 87; 378 NW2d 470 (1984), but rather for a "loss of wages she could have earned in the future" as a licensed practical nurse but for the delay in obtaining a degree necessitated by the injuries. Gerardi, p 95. Therefore, I conclude that plaintiff's claim is properly characterized as an attempt to recover for loss of future earning capacity, and on that basis I would affirm the decision of the trial court.

/s/ John H. Gillis