

STATE OF MICHIGAN
COURT OF APPEALS

JULIANO EVOIA,

Plaintiff-Appellee,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

August 6, 1990

No. 113703

Before: Gribbs, P.J., and Michael J. Kelly and Shepherd, JJ.

SHEPHERD, J.

Defendant appeals by leave granted from the order of the Macomb County Circuit Court affirming the district court's order granting plaintiff's motion for summary disposition. Plaintiff brought suit in district court seeking to recover survivor's loss benefits under the No-Fault Act.

Plaintiff's wife was killed in an automobile accident while vacationing in California. At the time of his wife's death plaintiff and his wife had been separated for approximately four months. The couple had not been living together during the separation.

It is our opinion that the trial court erred in granting plaintiff's motion for summary disposition. A motion made pursuant to MCR 2.116(C)(10) tests the factual support for a claim. Kral v Patrico's Transit Co, 181 Mich App 226, 233; 448 NW2d 790 (1989). The party opposing the motion has the burden of proving that a genuine issue of material fact exists. Id. The trial court, giving the benefit of reasonable doubt to the nonmoving party, must determine whether a record might be developed which would leave open an issue upon which reasonable minds could differ. Id.

The pivotal issue in this case is whether plaintiff is a dependent of his wife within the meaning of the No-Fault Act. MCL 500.3110(1)(b); MSA 24.13110(1)(b) provides that a husband who is living with his wife at the time of her death is conclusively presumed to be a dependent of his wife. Where a person does not fit within the statutory presumption, the person's dependency and the extent of the dependency is to be resolved by looking to the facts as they existed at the time of death. MCL 500.3110(2); MSA 24.13110(2). It is our opinion that plaintiff, who admittedly was not living with his wife at the time of her death, is not conclusively presumed to be her dependent.

We agree with the trial court that the fact that plaintiff was separated from his wife at the time of her death does not automatically render him ineligible for no-fault benefits. Citizens Mutual Ins Co v Community Services Ins, 65 Mich App 731; 238 NW2d 182 (1975), lv den 396 Mich 834 (1976); Bierbusse v Farmers Insurance Group, 84 Mich App 34; 269 NW2d 297 (1978). However, we disagree with the finding of the trial court that, based upon his marital status alone, plaintiff can be found to be a dependent of his wife. In its findings the trial court appears to rely solely on the fact that the two were married in making the dependency determination. As such it appears that the court was applying the presumption of dependency even though plaintiff did not meet the statutory requirements.

Although we find that the trial court's application of the statutory presumption was erroneous, we also reject defendant's assertion that because plaintiff is not presumed to be a dependent he must be presumed not to be a dependent. The statute clearly states that when the presumption is not operative the dependency determination must be made upon the facts as they existed at the time of the death. Therefore, we reverse the

trial court's order granting summary disposition to plaintiff and remand for a determination of dependency, looking to the facts as they existed at the time of Nancy Evola's death.

Defendant next contends that plaintiff was not entitled to survivor's loss benefits under the No-Fault Act. Initially we note that the district court's order awarding benefits to plaintiff is unclear as to what section of the No-Fault Act the benefits were awarded under. To the extent that the benefits were awarded as work loss benefits under MCL 500.3107; MSA 24.13107, the award was erroneous. Work loss benefits may not be awarded for any loss occurring after the injured person dies. However, the trial court may have been awarding benefits under MCL 500.3108; MSA 24.13108. Under that section benefits may be awarded to a dependent for the loss of tangible things of economic value which they would have received from the deceased person had they not died and expenses incurred after the deceased's death for services rendered which the deceased would have performed had the death not occurred.

The trial court did not make any specific findings as to what the sum awarded represented. Because we have reversed and remanded this case for a redetermination of the dependency issue, we also reverse the award of benefits and remand to the trial court. If on remand the trial court finds that plaintiff was a dependent then it must determine whether and to what extent plaintiff is entitled to survivor's loss benefits under MCL 500.3108; MSA 24.13108.

Reversed, remanded. We do not retain jurisdiction.

/s/ John H. Shepherd
/s/ Roman S. Gibbs
/s/ Michael J. Kelly