STATE OF MICHIGAN

COURT OF APPEALS

MARIE MARQUIS,

Plaintiff-Appellant/
Cross-Appellee,

v

HARTFORD ACCIDENT AND INDEMNITY,

Defendant-Appellee/
Cross-Appellant.

August 3, 1992
9:30 a.m.

No. 133472

PUBLISHED

Before: Holbrook, Jr., P.J., and Griffin and Marilyn Kelly, JJ.

MARILYN KELLY, J.

This matter is before us on remand from the Supreme Court for consideration as on leave granted. Plaintiff appeals and defendant cross appeals from an order of the St. Clair Circuit Court which affirmed in part and reversed in part the judgment of the district court.

Plaintiff argues that the circuit court erred by denying no-fault automobile insurance work-loss benefits to her after she voluntarily quit her job. In its cross appeal, defendant argues that the court erred in allowing plaintiff work-loss benefits after she resumed employment. We reverse that portion of the circuit court order denying plaintiff all work-loss benefits after she became voluntarily unemployed and affirm the remainder of the order.

On November 16, 1985, plaintiff was injured in an automobile accident which disabled her from her employment. When she was medically released to return to work on March 6, 1986, a permanent replacement had filled her position with her original employer. Plaintiff received no-fault work-loss benefits until she began work for a new employer on September 1, 1986. Her wages in the new position were, on average, $233.60 lower per week than those paid by her former employer. Within two months, plaintiff became dissatisfied with her new job and voluntarily resigned.

Plaintiff argued below that defendant, the no-fault insurance carrier, was liable for eighty-five percent of her wage differential. The differential is the spread between her earnings at her former employment and those at her new employment the two months she worked there and while she was voluntarily unemployed. See MCL 500.3107(b); MSA 24.13107(b). The district court ruled that defendant was responsible for no work-loss benefits after plaintiff commenced her second job. The circuit court reversed and held defendant responsible for eighty-five percent of the wage differential after plaintiff returned to work. We affirm that ruling. However, the circuit court went on to refuse to make defendant responsible for any work-loss benefits after plaintiff became voluntarily unemployed. With that holding, we disagree.

The question here is not whether plaintiff should have the same work-loss benefits after she voluntarily quit her new job as she received before she began it. She should not. At issue is whether plaintiff should have the same benefits after she quit as she was entitled to while working the second job. Those benefits are based solely on the difference between what plaintiff was paid before the accident and what she was paid in her new job.

The no-fault insurance act defines "work loss" personal protection insurance as:

> 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; MSA 24.13107]

"Work loss" includes actual loss of income. It does not include loss of earning capacity. Ouellette v Kencaly, 424 Mich 83; 378 NW2d 470 (1985). Here, the circuit court ruled that after plaintiff chose to become voluntarily unemployed, her "work-loss" claim was for loss of earning capacity rather than for loss of actual earnings. We disagree. Ouellette quite clearly distinguishes the earning capacity loss involved there with a wage loss, which is what plaintiff suffered in the case before us.

Work-loss benefits are payable only for loss of actual income caused by automobile accident injuries. We recognize that subsequent events which are independent and intervening may break the necessary chain of causation. See Smith v League General Ins Co, 143 Mich App 112; 371 NW2d 491 (1985), rev'd 424 Mich 893 (1986); MacDonald v State Farm Ins Co, 419 Mich 146; 350 NW2d 233 (1984); Luberda v Farm Bureau General Ins Co, 163 Mich App 457; 415 NW2d 245 (1987); Coates v Michigan Mutual Ins Co, 105 Mich App 290; 306 NW2d 484 (1981).

In this case, unlike MacDonald, Smith and Luberda, no independent and intervening event broke the chain of causation. By contrast, in MacDonald, the plaintiff had a heart attack which was unrelated to the accident-related injuries. In Smith and Luberda, it was the plaintiffs' subsequent incarcerations that prevented them from working. In each of these cases, the plaintiffs would have earned no wages after the intervening events, even had the automobile accidents and resultant injuries never occurred. See Ouellette, supra.

Although Coates involved a claim for work-loss benefits, it too is distinguishable from this case. Coates, 297-298. Coates held that work-loss benefits are for loss of income an injured person would have received but for the "injury" and not, as the plaintiff argued, but for the "accident." Id., 298. The plaintiff in Coates suffered loss of income because of damage to his truck caused by the accident, not because of injuries sustained.

Our decision in this case, to continue benefits based on the pay differential, does not reward plaintiff for quitting; it also does not reward defendant for the happenstance that plaintiff's new job did not work out. Furthermore, it implicitly recognizes that plaintiff was forced to take the new job because of accident-related injuries. The benefits which plaintiff is eligible for are those which resulted from wage loss due to her injuries and which continued regardless of whether she kept the new job.

We find no basis to deny plaintiff no-fault work-loss benefits for pay loss suffered because of her accident-related injuries, reduced by the wages she would have earned. Moreover, based on our analysis of this claim, we find no merit to defendant's cross appeal.

Affirmed in part, reversed in part.

/s/ Marilyn Kelly
/s/ Donald E. Holbrook, Jr.

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GRIFFIN, J. (dissenting).

I respectfully dissent. It is well settled that "work loss" as provided by the no-fault act refers to actual loss of income and not to loss of earning capacity. Ouellette v Kenealy, 424 Mich 83; 378 NW2d 470 (1985). The no-fault act defines work-loss personal protection insurance as follows:

> 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; MSA 24.13107. Emphasis added.]

In the present case, the majority has confused loss of earning capacity and loss of actual earnings. In Nawrocki v Hawkeye Security Ins, 83 Mich App 135, 141-142; 268 NW2d 317 (1978), Judge (now chief justice) Michael F. Cavanagh noted that the distinction between the loss of earning capacity and the loss of actual income is the difference between what a claimant "could have" earned and "would have" earned. Further, the no-fault act provides recovery for only the latter:

> First, we note that the cases which discuss earning capacity damages stress repeatedly that plaintiff's right is to recover not what he would have earned but what he could have earned. Prince v Lott, supra, 369 Mich at 610; 120 NW2d at 782, Lorenz v Sowle, supra, 360 Mich at 555; 104 NW2d at 349-350, Coger v Mackinaw Products Co, 48 Mich App 113, 125; 210 NW2d 124, 130 (1973). This contrasts sharply with the language of the statute before us: "benefits are payable for * * * loss of income from work an injured person would have performed * * *." Giving this language the plain meaning which we must, it seems evident to us that the statute is not an enactment of the common-law rule. [Emphasis in original.]

The circuit court ruled below that after plaintiff chose to become voluntarily unemployed[1], her work-loss claim was for loss of earning capacity rather than for loss of actual earnings. I agree and would hold that once plaintiff removed herself from the work force, the only damages she suffered were for loss of earning capacity. Consequently, because the no-fault act does not allow recovery of such damages, I would hold that a claimant is not entitled to no-fault work-loss benefits during time periods that the claimant voluntarily chooses not to work.

Our decisions have repeatedly held that work-loss benefits are payable only for loss of actual income caused by an automobile accident injury. Subsequent events that are independent and intervening may break the necessary chain of causation. In MacDonald v State Farm Ins Co, 419 Mich 146; 350 NW2d 233 (1984), our Supreme Court held that a claimant's unrelated heart attack was a subsequent and intervening event that

terminated the no-fault carrier's liability for work-loss benefits. The Supreme Court has summarized its holding in MacDonald as follows:

> In MacDonald v State Farm Mutual Ins Co, 419 Mich 146; 350 NW2d 233 (1984), this Court held that where a person suffers an unrelated injury, a heart attack, after an automobile accident and is rendered unable to work, eligibility for work-loss benefits ceases because no income would have been earned even if the accident had not occurred. [Ouellette, supra at 86. Emphasis added.]

Further, the incarceration of a claimant following a criminal conviction is also an independent and intervening event that breaks the causal connection necessary for the payment of no-fault work-loss benefits. Smith v League General Ins Co, 424 Mich 893; 382 NW2d 168 (1986); Luberda v Farm Bureau General Ins Co, 163 Mich App 457; 145 NW2d 245 (1987). Under such circumstances, the no-fault carrier is not responsible for work-loss benefits during the period of incarceration because an event unrelated to the automobile accident removed the claimant from the work force.

In the instant case, like Coates v Michigan Mutual Ins Co, 105 Mich App 290; 306 NW2d 484. (1981), a decision by the plaintiff, not the automobile accident injury, controls plaintiff's income level. Plaintiff's decision not to work is a cause independent and intervening from the accident. Under such circumstances, "[plaintiff's] eligibility for work-loss benefits ceases because no income would have been earned even if the accident had not occurred." MacDonald, supra at 86.

Finally, I note that such a construction of the no-fault statute is consistent with the judicially created favored work doctrine which we have repeatedly applied in the context of the Workers' Disability Compensation Act. In a factually similar case, Coon v Rycenga Homes, 146 Mich App 262; 146 NW2d 262 (1985), we held that a workers' compensation carrier is not liable for a wage differential during the time period that a partially disabled employee unreasonably refuses favored work. In Coon, we rejected the petitioner's argument that a carrier is responsible for the differential between the wage of his former employment and that of his favored work. Rather, we held that when favored work is unreasonably refused, "plaintiff has forfeited his entitlement to all workers' compensation benefits." Id. at 267. (Emphasis added.)

For these reasons, I respectfully dissent and would affirm.

/s/ Richard Allen Griffin

[1] Plaintiff's brief contains the following admission:

> Plaintiff-appellant's subsequent employment was for a period of approximately six weeks, when she voluntarily quit. Plaintiff-appellant admits that since she voluntarily quit her employment, she has failed to mitigate her damages.

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ule." Another result would be that more bands than should be present would r. There was no evidence of that occurere. Also, another expert testified that a positive" test result cannot be obtained. Ve conclude that the trial court did not y err in finding that the prosecution estab- that DNA identification testing is gener- ccepted in the scientific community as le. Given the overall acceptance of the ique in other jurisdictions, we hold that courts may take judicial notice of the ility of DNA identification testing. ... rtheless, before the trial court admits the esults into evidence, the prosecutor must lish in each particular case that the gener- ccepted laboratory procedures were fol- d. We are satisfied that [the laboratory] wed the generally accepted procedures in ase."

efendant claims the statistical analysis of NA identification testing is inadmissible. ndant claims the danger is that "'trial by ematics' will evolve." We disagree. One rt testified that the statistical probability of tch is one to four hundred million. The dation for this testimony was adequate. out statistical analysis, "identification test- would be a matter of speculation ...." Also, stical analysis "does not remove the issue Jentity from the jury, which is free to gard or discredit the evidence."

Defendant also claims the judge failed to ulate sufficient reasons for departing from sentencing guidelines. The guidelines rec- mended a minimum range of six to 15 years he kidnapping conviction. The court gave ndant a life sentence. The minimum range the first-degree criminal sexual conduct victions were eight to 20 years. The mini- m range for the armed robbery conviction five to 15 years. Defendant was sentenced 0 to 150 years for the remaining crimes. The rt failed to state the reasons for its depar- . Therefore, "we vacate defendant's entire tence and remand for resentencing."

Affirmed, but remanded for resentencing.

upon annulling a marriage or entering a judgment of divorce, the circuit court may enter orders that it considers just and proper regarding the care, custody, and support of the minor children of the parties." The wards are not plaintiff and defendant's children, therefore, the court did not have statutory authority to order support for the wards. However, there is support for plaintiff's position in *Nygard v. Nygard.* In *Nygard,* the plaintiff discovered that she was pregnant. Defendant, who was not the child's father, offered to marry her and support the child. The parties married and defendant had his name placed on the birth certificate as the child's father. When the parties divorced, the court held that defendant had essentially contracted to support the child.

This case is essentially different than the *Nygard* decision. Neither parent is a biological parent of the wards. In fact, the wards' parents are still alive and have not had their parental rights terminated. "Under these circumstances, the ... court had no jurisdiction to resolve the issue of the [wards'] support...." We "hold that defendant is not obligated to support the children. The biological parents of a child are obligated to support and maintain that child."

The court's order is vacated.

Tilley v. Tilley. (Lawyers Weekly No. MA-5313 - 3 pages) (Murphy, J.).

Summary by KMP.

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No-Fault

Medical Benefits - Unlicensed Practitioner

Where plaintiff was receiving acupuncture from a nurse outside a physician's care, the acupuncture was not an "allowable expense" payable under the no-fault act.

Plaintiff was injured in a car accident and received no-fault benefits from defendant-in-

No-Fault

Personal Protection Benefits - Van Converted For Transportation

Where plaintiff was paralyzed in a car accident, she is entitled to the cost of a van converted for wheelchair use as a personal protection benefit under the no-fault law. She is also due mileage for trips to medical facilities and penalty interest against defendant-insurer for failure to pay for these benefits.

Plaintiff was paralyzed in an automobile accident and confined to a wheelchair. She had to visit medical personnel after the accident. Transportation services in her rural county were inadequate. Plaintiff asked defendant-insurer to pay the cost of a van converted to wheelchair use. Defendant refused, offering to renovate a van instead.

Plaintiff went ahead and bought a converted van for $24,527. She sued defendant for the cost plus mileage. She also sought penalty interest for defendant's refusal to pay those costs. The trial court awarded plaintiff the cost of the van and mileage but denied interest. The parties cross-appeal.

To qualify as an "allowable expense" under the no-fault act, an expense must be: 1) reasonable, 2) reasonably necessary and 3) actually incurred. All those requirements were satisfied. In addition, the van was a reasonable necessity. The lack of good transportation services in plaintiff's county made the van necessary.

Plaintiff may also receive mileage for travel to medical appointments, but not for personal use. Upon remand, the trial court must separate the two types of mileage. Finally, plaintiff is entitled to penalty interest for defendant's failure to pay the cost of the van and mileage, despite defendant's good faith in disputing the costs.

Davis v. Citizens Ins. Co. of Am. (Lawyers Weekly No. MA-5310 - 5 pages) (Holbrook, J.).

Summary by MJM.

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No-Fault

Work Loss Benefits - After New Job

Where plaintiff 1) took a new job at lower pay after her automobile accident and 2) then quit the new job, she is entitled to some work-loss benefits during her employment and unemployment.

Plaintiff was injured in a car accident. During recuperation, her employer replaced her. She took a new job at lower pay. After several weeks, plaintiff quit the new job. The court awarded plaintiff work-loss benefits for the period she spent at the new job. The award was based on the pay differential between her old and new jobs. However, the court denied benefits for the time she was unemployed after the new job. Both parties appeal.

The court correctly granted plaintiff work-loss benefits, based on the difference in pay between her old and new jobs. However, the court should have continued those benefits even after plaintiff quit her new job. This would recognize "that plaintiff was forced to take the new job because of accident-related injuries. The benefits which plaintiff is eligible for are those which resulted from wage loss due to her injuries and which continued regardless of whether she kept the new job."

Marquis v. Hartford Accident and Indemnity. (Lawyers Weekly No. MA-5315 - 4 pages) (Marilyn Kelly, J.) (Griffin, J., dissenting, disagrees with the award of benefits to plaintiff after she quit her new job. By awarding those benefits, the majority is compensating plaintiff for loss of earning capacity, not loss of income. This is impermissible under the no-fault law.).

Summary by MJM.

(See accompanying story on page one.)

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