STATE OF MICHIGAN

COURT OF APPEALS

JOANN SPARKS,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

UNPUBLISHED
May 25, 2010

No. 289395
Genesee Circuit Court
LC No. 07-087473

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order partially granting defendant's motion for summary disposition with respect to plaintiff's claim for excess work-loss benefits. This Court initially denied plaintiff's interlocutory application for leave to appeal, *Sparks v Citizens Ins Co of America*, unpublished order of the Court of Appeals, entered May 6, 2009 (Docket No. 289395), but our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court "for consideration as on leave granted." *Sparks v Citizens Ins Co of America*, 485 Mich 962; 774 NW2d 688 (2009). Because we conclude that there is a genuine issue of material fact whether plaintiff suffered an actual loss of earnings because of her injury, we reverse the trial court's order in part and remand for further proceedings.

We review a trial court's summary disposition decision de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendant moved for summary disposition of plaintiff's work-loss claim under both MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact). Although the trial court did not specify the subrule under which it granted defendant's motion, it accepted defendant's argument, which was based on evidence outside the pleadings. Therefore, the trial court's decision is appropriately reviewed under MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact and the moving party is entitled to judgment . . . as a matter of law." *Id.* at 555.

Section 3107 of the no-fault act, MCL 500.3107, provides, in relevant part:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

* * *

> (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 or she had not been injured.

It is well established that a claim for loss of earning capacity is not recoverable under the no-fault act. *Ouellette v Kenealy*, 424 Mich 83, 87-88; 378 NW2d 470 (1985). Only damages for "actual 'loss of income an injured person would have performed' if he had not been injured" are recoverable. *Id.* at 87.

A claim for work-loss benefits is based on a claimant's loss of income from work the claimant would have performed if she had not been injured. MCL 500.3107(1)(b); *Marquis v Hartford Accident & Indemity Co* (*After Remand*), 444 Mich 638, 647; 513 NW2d 799 (1994). Contrary to defendant's contention, a person who is unemployed at the time of an accident may be able to prove that she would have earned wages but for the injury. In *Marquis*, 444 Mich at 645, *Ouellette,* 424 Mich at 86-87, and *MacDonald v State Farm Mut Ins Co,* 419 Mich 146, 151; 350 NW2d 233 (1984), our Supreme Court quoted with approval the drafter's comments to the Uniform Motor Vehicle Accident Reparations Act on which this state's no-fault act is modeled. The Supreme Court's comments recognize that work loss "'covers only actual loss of earnings as contrasted to loss of earning capacity.'" *Ouellette,* 424 Mich at 86-87, quoting Drafters comments to § 1(a)(5) of the UMVARA. Moreover, the comments refer to examples involving unemployed individuals. See *id.* at 87. This Court's decisions similarly recognize that a claimant need not be employed at the time of an accident to be entitled to work-loss benefits under § 3107(1)(b). *Sullivan v North River Ins Co,* 238 Mich App 433, 435-436; 606 NW2d 383 (2000) ("[T]he question presented is whether plaintiff, who was unemployed at the time of her accident, may still be entitled to work-loss benefits under subsection 3107(1)(b). We hold that the answer is yes."); see also *Swartout v State Farm Mut Automobile Ins Co,* 156 Mich App 350, 353-354; 401 NW2d 364 (1986).

Here, the parties and the trial court primarily relied on *Swartout* as the basis for their analyses. In that case, the plaintiff was a nursing student who expected to graduate in June 1981. *Swartout*, 156 Mich App at 352. In April 1981, she was injured in an automobile accident. *Id.* She was unable to complete the semester, but returned to school the next year and graduated in June 1982. *Id*. To support her claim for work-loss benefits under former MCL 500.3107(b), now § 3107(1)(b), she presented an affidavit from the school stating that she would have graduated in June 1981. *Id*. More significantly, she presented an affidavit from a hospital stating that she would have been employed no later than July 27, 1981, if she had received her degree by that time, while also specifying the rate of pay. *Id*. This Court concluded that it was "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," *id*. at 353, stating that:

> [P]laintiff in the instant case has alleged facts, which, if believed, would establish the source of her 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. [*Id*. at 354.]

Similarly, this Court determined that the claimant in *Sullivan*, 238 Mich App at 433, might also be entitled to work-loss benefits under § 3107(1)(b), despite her unemployed status at the time of her accident. In that case, the plaintiff quit her job in April 1994 to care for her terminally ill son, but planned to move to her daughter's home in Michigan after his death to look for a new job. *Id.* at 434. While visiting her daughter, the plaintiff was injured in an automobile accident on June 27, 1994. A week later, her son died. The plaintiff moved to Michigan as planned, but claimed that her injuries prevented her from working. *Id*. at 434-435. The defendant insurer argued that she was not entitled to work-loss benefits because she was not employed at the time of the accident. This Court disagreed. Relying on *MacDonald*, 419 Mich at 151, this Court concluded that

> a claimant's entitlement to work-loss benefits is not dependent on being employed at the time of the accident, but rather whether the claimant can prove that, but for the accident, she would have been employed and, as a consequence, would have suffered actual loss of earnings. In all cases, the claimant bears the burden of proof of actual loss of earnings. [*Sullivan*, 238 Mich App at 437.]

Defendant's argument is essentially that plaintiff failed to meet her burden of proof under *Swartout*. Specifically, defendant contends that the plaintiff's claim in *Swartout* was actionable because the plaintiff there "provided evidence of (1) a source of employment; (2) an exact date of employment; and (3) the exact wages that would have been received . . . ." Although defendant's statement of the proofs presented in *Swartout* is correct, we do not agree that the exactness called for by defendant is required by our cases. Our decision in *Sullivan*, 238 Mich App at 437-438, is instructive, as this Court determined that there was a genuine issue of material fact with regard to whether the plaintiff would have returned to work had she not been injured, summarizing the evidence as follows:

> Here, plaintiff has presented evidence of an extensive work history, including various bookkeeping/comptroller positions dating from her husband's death in 1975 until 1991. In 1991, plaintiff went to work for her daughter-in-law in New York, but voluntarily left that position in April 1994 to care for her terminally ill son. According to plaintiff, she planned to move into an apartment in the home of her daughter in Michigan after her son's imminent death, and then "settle down and look for work." On June 27, 1994, while visiting her daughter in contemplation of moving to this state, plaintiff was injured in the automobile accident that brought about her claim for wage loss. After her son died on July 4, 1994, plaintiff relocated to Michigan. At deposition, plaintiff explained that she had not applied for any work in Michigan since the accident because her injuries had disabled her from writing, typing, and performing bookkeeping work. Since then, however, she had been helping her son-in-law, who is a real estate appraiser, with light office work, although she complained about having "pain all day and all night in my arm and neck, shoulder." According to an October 1995 letter from her treating physician, plaintiff should expect to suffer slight to moderate pain on a permanent basis. [*Id*.]

The plaintiff in *Sullivan* did not present proof of the exact date she would have been employed, nor did she present evidence that a particular employer was ready to hire her, or even that there were openings in her field in the area where she planned to move. Nor did she present evidence of a particular wage. Nevertheless, based primarily on her work history and stated plans, this Court determined that she demonstrated a genuine issue of material fact. *Id*. at 438.

In the present case, defendant argued, and the trial court evidently agreed, that defendant was entitled to summary disposition because unlike the plaintiff in *Swartout*, plaintiff here had not established the source of her employment, the date of her employment, and her exact wage. Although the plaintiff in *Swartout* presented that type of evidence, *Swartout* should not be understood as specifying a threshold level of evidence necessary to establish entitlement to work-loss benefits. Indeed, the specificity of proof that was available in *Swartout* was not deemed necessary in *Sullivan*.

Defendant contends that whether there was a source of employment for plaintiff at Dentistry, Etc., was speculative because the office manager, Jill Leach, was uncertain whether there was a job opening for plaintiff in the spring 2004. However, Leach's testimony indicates that plaintiff's skills as a hygienist were excellent. Leach described plaintiff as more qualified that the average hygienist, and "probably one of the best" she had seen in 27 years. Leach further stated that she was "hoping" to work plaintiff back into the schedule when she was ready. The evidence of plaintiff's ability to secure future employment is as strong as the evidence of the work history presented by the plaintiff bookkeeper/comptroller in *Sullivan*.

Defendant contends that Leach did not give a date when plaintiff could have resumed employment. Defendant also contends that plaintiff failed to present evidence of the exact wages she would have received because Leach believed plaintiff was earning $30 an hour and plaintiff indicated in her application for social security benefits that she was earning $34 an hour. As previously indicated, this Court's decision in *Sullivan* establishes that plaintiff's failure to present evidence of a specific date that she would have resumed employment and a particular wage is not fatal to her claim. Further, plaintiff did present evidence of her wage amount. The discrepancy between Leach's testimony and the amount listed in plaintiff's Social Security application presents a question of fact for the jury.

In summary, plaintiff demonstrated a genuine issue of material fact with regard to whether she would have returned to work but for the 2004 accident and thereby suffered an actual loss of earnings. The trial court erred in granting defendant summary disposition with respect to plaintiff's work-loss claim. Accordingly, we reverse that portion of the trial court's order and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Patrick M. Meter
/s/ Jane M. Beckering