STATE OF MICHIGAN

COURT OF APPEALS

HANSEL L. ARTRIP and REBECCA ARTRIP,

Plaintiffs-Appellants,

v

HBIC ENTERPRISES, INC., d/b/a BURTON CITY TOWING & SERVICE, CONITA M. EZELL, d/b/a BURTON TOWING, and KRISTIAN COVERT,

Defendants-Appellees.

UNPUBLISHED
November 18, 2008

No. 277848
Genesee Circuit Court
LC No. 06-083143-NI

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Plaintiff[1] appeal by leave granted an interlocutory order granting partial summary disposition to defendants. We affirm in part, and reverse in part.

This third-party no-fault action arises out of an auto accident between plaintiff and defendant Kristian Covert. Plaintiff seeks recovery for non-economic damages and wage loss damages in excess of the three-year no-fault act limit on first-party recovery. Plaintiff argues on appeal that they raised a genuine issue of material fact in regard to whether he was temporarily unemployed, pursuant to MCL 500.3107a, at the time of the accident.[2] Although we agree with plaintiff that he raised a genuine issue of material fact in regard to whether he was "temporarily unemployed," we nonetheless conclude that plaintiff has failed to show "work loss," as defined in MCL 500.3107(b).

This Court reviews a decision to grant a motion for summary disposition de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in

[1] Because plaintiff Rebecca Altrip's claim is merely derivative, plaintiff shall refer only to plaintiff Hansel Altrip.

[2] In addressing this damage issue, this Court expresses no opinion in regard to the question whether plaintiff has met the third-party claim thresholds under MCL 500.3135.

the same manner as the trial court. *Id.* Any court considering such a motion must consider all the pleadings and the evidence in a light most favorable to the nonmoving party. *Id.* The motion tests where there exists a genuine issue of material fact. *Id.* "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown,* 478 Mich 545, 553; 739 NW2d 313 (2007). Statutory interpretation is an issue of law that is also reviewed de novo. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004).

MCL 500.3135(3)(c) allows third-party recovery for damages incurred from an auto accident for, inter alia, work loss "as defined in sections 3107 to 3110 in excess of daily, monthly, and 3-year limitations contained in those sections." *Ouellette v Kenealy*, 424 Mich 83, 85; 378 NW2d 470 (1985). MCL 500.3107(1)(b) allows recovery for "[w]ork loss consisting of loss of income from work an injured person would have performed." MCL 500.3107a states further, "[s]ubject to the provisions of section 3107(1)(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."

At oral argument and on appeal, defendants concede plaintiff was temporarily unemployed. Nonetheless, defendants argued that plaintiff must establish the measure of income he *would* have earned if not for the accident. *Ouellette, supra* at 83. The trial court held that it,

> "will take the position that being temporarily unemployed implies that a job is out there; that while not employed the plaintiff has something specific in the future, something definite in the future."
>
> And an example would be [plaintiffs' counsel's (sic)] General Motors employee. If they close down the plant here in Flint, their contract allows them to go on a work wait list; and when an opening comes up in Lake Orion, they're reemployed. That's a different situation because that's specificity. In this Mr. Altrip does not have a specific job availability. He may have capacity, but he does not have availability, and for that reason the [c]ourt grants defendant's motion.

In *Davis v State Farm Mut Auto Ins Co,* 159 MichApp 734, 738; 407 NW2d 1 (1987), this Court recognized that MCL 500.3107a "cannot be read in a vacuum. It provides that its provisions are '[s]ubject to the provisions of section [MCL 500.]3107(b),' where 'work loss' is defined as 'consisting of loss of income from work an injured person would have performed . . . if he had not been injured.'" This Court further explained that,

> [t]he work loss benefits section of the no-fault act insures that work loss benefits are available to compensate injured persons for the income they would have received but for their accidents. Accordingly, a party seeking work loss benefits under § 3107(b) must show actual loss; a mere loss of earning capacity is not sufficient. [*Davis, supra* citing *Struble v DAIIE,* 86 Mich App 245, 251, 255-256; 272 NW2d 617 (1978).]

Here, plaintiff was the president and chief executive officer of Sibley Shoes, which ceased business in 2004. Plaintiff's last day of employment with Sibley shoes was January 31,

2004, 54 days before the accident. Regardless whether plaintiff was "temporarily unemployed," under MCL 500.3107a, he must still show a "loss of income from work an injured person would have performed . . . if he had not been injured.'" In other words, plaintiff must show the automobile accident caused an actual loss of income. There is no evidence presented to conclude that but for the accident plaintiff would have performed work as president and chief executive officer of a retail chain. The record indicates that the discontinuation of Sibley Shoes, not the automobile accident, caused plaintiff not to be able to perform work as a president and chief executive officer. While plaintiff presented evidence that he interviewed for executive positions shortly before the accident, there is no evidence that but for the automobile accident he would have been offered a position or even accepted an offer. Thus, the trial court properly granted defendant summary disposition in regard to plaintiff's claim of excessive wage loss benefits as a president and chief executive officer.

However, as noted, plaintiff did present evidence that before the accident he sought employment and even turned down a job offer, believing the pay insufficient. There are also indications that plaintiff is currently employed. Thus, assuming plaintiff meets the third-party no-fault action threshold,[3] we conclude the trial court prematurely dismissed plaintiff's entire claim of work loss expenses simply because plaintiff did not establish actual wage loss as a president and chief executive officer but for the automobile accident.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

[3] *Infra*, at 1 n 2.