

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS E. BASSETT,

Plaintiff-Appellant,

v

CHRYSLER, L.L.C., and JAMES P. BROWN,

Defendants-Appellees.

UNPUBLISHED
September 22, 2011

No. 298616
Macomb Circuit Court
LC No. 2009-002046-NI

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals by right the circuit court's grant of summary disposition in favor of defendant James P. Brown (defendant) pursuant to MCR 2.116(C)(10). We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I

On August 18, 2008, plaintiff was a passenger in a vehicle that was driven by Alexandra Emmett. Emmett was driving northbound on Dequindre Road when she slowed down to make a right turn into a parking lot. As Emmett slowed down, a vehicle driven by defendant struck her vehicle in the rear.¹

Plaintiff commenced this action on May 4, 2009, alleging that defendant had negligently struck Emmett's vehicle. Plaintiff contended that he had sustained a closed head injury, spinal injuries, and various head, neck, and shoulder injuries as a result of the collision. Plaintiff alleged that, after the accident, he was unable to perform many work-related and other tasks that he had been able to perform before the collision. Plaintiff claimed that his injuries constituted a serious impairment of body function under MCL 500.3135(7), and sought noneconomic damages

¹ The vehicle driven by defendant was owned by defendant Chrysler. On July 17, 2009, the circuit court dismissed without prejudice all claims against Chrysler on the basis of an automatic bankruptcy stay.

under MCL 500.3135(1) and (3)(b). Plaintiff also sought excess work-loss damages under MCL 500.3135(3)(c).

With respect to plaintiff's claim for noneconomic damages, the circuit court first ruled that the documentary evidence did not establish that plaintiff's closed head injury constituted a "serious neurological injury" under the closed-head-injury provision of MCL 500.3135(2)(a)(ii). *Churchman v Rickerson*, 240 Mich App 223, 230-232; 611 NW2d 333 (2000). Accordingly, the circuit court went on to consider whether the documentary evidence nonetheless created a question of fact precluding summary disposition under the broader language set forth in MCL 500.3135(2)(a)(i) and (2)(a)(ii). See *Churchman*, 240 Mich App at 232. During this inquiry, the circuit court relied exclusively on the reasoning of *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180 (2010), and determined that plaintiff had failed to establish that his injuries affected his general ability to lead his normal life. Thus, under the reasoning of *Kreiner*, the court ruled that it was beyond genuine factual dispute that plaintiff had not sustained a serious impairment of body function and granted summary disposition in favor of defendant with regard to the claim for noneconomic damages.

With respect to plaintiff's claim for excess work-loss damages under MCL 500.3135(3)(c), the circuit court ruled that plaintiff had failed to establish that he suffered an actual loss of earnings as a result of the accident. Accordingly, the court granted summary disposition in favor of defendant on the issue of excess work-loss damages as well.

II

We review de novo the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The pleadings, affidavits, depositions, admissions, and other admissible documentary evidence then submitted in the case must be considered in the light most favorable to the nonmoving party. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy*, 274 Mich App at 712.

III

"Damage[s] for work loss . . . in excess of the daily, monthly and three-year limitations are . . . recoverable in tort under the no-fault act without regard to whether the injured person suffered death, serious impairment of body function, or permanent serious disfigurement." *Ouellette v Kenealy*, 424 Mich 83, 85-86; 378 NW2d 470 (1985). However, "[w]ork loss' . . . is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984) (citation and quotation marks omitted). If a person is rendered unable to work following an automobile accident by a condition unrelated to the accident, that person is ineligible for work-loss benefits "because no income would have been earned even if the accident had not occurred." *Ouellette*, 424 Mich at 86. Indeed, work-loss damages "are recoverable in tort only . . . for 'actual' work loss—actual 'loss of income from work an injured person would have performed' if he had not been injured—when the loss of income exceeds the daily, monthly, and

three-year limitations.” *Id.* at 87 (citation omitted). Work-loss damages are not recoverable for a mere loss of earning capacity. *Id.* at 88. In all cases, the claimant bears the burden of proving actual loss of earnings. *Sullivan v North River Ins Co*, 238 Mich App 433, 437; 606 NW2d 383 (1999).

Turning to the present case, it is undisputed that plaintiff was unemployed at the time of the accident. He began working as a pizza cook in the deli department of Palms Liquor shortly after the accident, but was terminated from employment approximately three months later “because of his lack of good work ethic” and “laziness.” The manager of Palms Liquor further testified that plaintiff was fired because he was unreliable, lied to the management, and spent a great deal of time on the telephone when he should have been working. Moreover, plaintiff, himself, testified that he was never actually an employee of Palms Liquor. As plaintiff stated during his deposition, “I wasn’t really an employee. I was an independent contractor.” Plaintiff also testified that he was paid exclusively in cash. Plaintiff confirmed that he had not worked since being terminated by Palms Liquor.

As the documentary evidence in the present case made clear, the reasons for plaintiff’s termination from Palms Liquor were unrelated to the injuries that he allegedly sustained in the automobile accident. Thus, plaintiff was not eligible for work-loss benefits because no income would have been earned following plaintiff’s termination even if the accident had not occurred. *Ouellette*, 424 Mich at 86. Plaintiff failed to carry his burden of establishing a genuine issue of material fact concerning whether he was entitled to an award of excess work-loss damages in this case. See *Sullivan*, 238 Mich App at 437. We affirm the circuit court’s grant of summary disposition in favor of defendant with respect to plaintiff’s claim for excess work-loss damages.

IV

However, we vacate that portion of the circuit court’s order that granted summary disposition in favor of defendant with regard to plaintiff’s claim for noneconomic damages. As explained previously, when considering if there existed a genuine issue of material fact on the question whether plaintiff had sustained a serious impairment of body function, the circuit court relied exclusively on the framework of *Kreiner*. Indeed, the court engaged in a detailed comparison of plaintiff’s pre-accident life and post-accident life, ultimately concluding:

[P]laintiff has failed to show that the alleged injuries impacted his general ability to lead his normal life, which means that he did not satisfy the third *Kreiner* step. Inasmuch as he must fulfill all 3 *Kreiner* steps, he has not shown a serious impairment of body function under MCL 500.3135(1) [and] (7). [Defendant] is therefore entitled to summary disposition pursuant to MCR 2.116(C)(10).

At the time the circuit court rendered its decision in this case, the application of MCL 500.3135(1) and (7) was still controlled by *Kreiner*. However, in July 2010, our Supreme Court issued its opinion in *McCormick v Carrier*, 487 Mich 180; 795 NW2d 517 (2010), which overruled the *Kreiner* Court’s interpretation of MCL 500.3135. Under the *McCormick* decision, courts should focus on the extent to which an injury affects a person’s *ability* to live his or her life rather than on how much the injury affects the person’s life, itself. See *McCormick*, 487

Mich at 204. Because the circuit court utilized the now-overruled *Kreiner* standard, the grant of summary disposition in favor of defendant with regard to plaintiff's claim for noneconomic damages must be vacated and the case must be remanded for further proceedings in light of *McCormick*.²

V

We affirm the circuit court's grant of summary disposition in favor of defendant with regard to the issue of excess work-loss damages. However, we vacate the circuit court's grant of summary disposition in favor of defendant with regard to plaintiff's claim for noneconomic damages and remand the case for further proceedings on this issue in light of *McCormick*.

Given our conclusions in this case, we need not consider the remaining arguments raised by the parties on appeal.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

² We reject defendant's assertion that a remand is unnecessary under the reasoning of *Nelson v Dubose*, ___ Mich App ___; ___ NW2d ___ (2011). In *Nelson*, the issue of whether the plaintiff had sustained a serious impairment of body function was tried to a jury, which returned a verdict of no cause of action. The *Nelson* Court held that *McCormick* did not require it to vacate the jury's verdict because the circuit court in that case had instructed the jury exclusively on the basis of the statutory language, and had not included among the jury's instructions any references to the now-overruled reasoning of *Kreiner*. In contrast, the circuit court in the present case specifically relied on the reasoning of *Kreiner* to decide whether plaintiff had sustained a serious impairment of body function.