STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

GEOFFREY B. and CARLENE PEREGRINE, husband and wife,

Plaintiffs,

vs

File No. 91-2881-NO
HON. PHILIP E. RODGERS, JR.

GILBERT H. WHELDEN, JR. and PAUL M. KIEREN, jointly and severally,

Defendants.
/

Mark Messing (P29745)
Attorney for Plaintiffs

Daniel A. Hubbell (P38704)
Attorney for Defendant Kieren

Randy H. Smith (P28901)
Attorney for Defendant Whelden

DECISION AND ORDER

The Defendant Whelden has submitted a Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(10) and the Michigan No-Fault Act seeking a determination, as a matter of law, that Plaintiffs are not entitled to economic damages. The motion was scheduled for hearing on May 4, 1992. Due to an inadvertent scheduling error, counsel for the Plaintiff did not appear and counsel for the Defendant agreed to waive oral argument and submit the matter to the Court for a written decision.

The Court has reviewed the parties' briefs and is fully advised in the premises. For reasons that will be set forth ahead, the Defendant's motion is granted.

Plaintiffs' complaint arises out of a motor vehicle accident which occurred on M-22 in Leelanau County on March 14, 1991. This is a third-party tort action wherein Plaintiffs seek an award of noneconomic and economic damages pursuant to the provisions of

Michigan's No-Fault Act, MCLA 500.3135. Defendant's motion for partial summary disposition is directed solely at the claims for economic loss.

The standard of review for a (C) (10) motion is set forth in Ashworth v Jefferson Screw 176 Mich App 737, 741 (1989).

> "A motion for summary disposition brought under MCR 2.116 (C) (10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G) (5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C) (10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW 2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G) (4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372."

Accepting Plaintiffs' well plead factual allegations as true and construing them in a light most favorable to Plaintiffs, the Court can reach no other conclusion than that Plaintiffs' complaint, to the extent it seeks an award of economic damages, must be dismissed as a matter of law.

In reaching this determination, the Court has also reviewed the Defendant's request for admissions and the Plaintiffs' response to those requests. MCR 2.312(D) provides that matters admitted pursuant to this court rule are conclusively established. Thus,

for purposes of this case, it is conclusively established that Plaintiff Geoffrey Peregrine was not employed at the time of his accident, was not temporarily unemployed and had no earned income during the 30 days preceding the accident. He did not make an application for, and did not receive, first-party No-Fault personal protection insurance benefits for work loss. See, Plaintiff's responses to Defendant's request to admit attached as Exhibit B to Defendant's motion.

The requests to admit and Plaintiffs' answers to them further establish that Plaintiffs did not seek any recovery for unreimbursed collision damages. Further, Plaintiff Carlene Peregrine testified at her deposition on October 22, 1991 that by July of 1991, her husband was sufficiently recovered that she could have returned to work full-time had she chosen to do so. Although Ms. Peregrine terminated her employment to assist her husband in his rehabilitation, she acknowledged in her deposition that this was not at the recommendation or suggestion of any treating physician and that she did not seek reimbursement for the provision of nursing or replacement services from their insurance carrier.

The controlling statutory provision regarding the entitlement to economic damages in a third-party No-Fault case, is found at MCLA 500.3135; MSA 24.13135. It reads as follows:

> "(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> (2) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3103(3) and (4) was in effect is abolished except as to:
>
> > (a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer such harm intentionally if he or she acts or refrains from acting for the purpose of

averting injury to any person, including himself or herself, or for the purpose of averting damages to tangible property.

(b) Damages for noneconomic loss as provided and limited in subsection (1).

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

(d) Damages up to $400.00 to motor vehicles, to the extent that the damages are not covered by insurance. An action for damages pursuant to this subdivision shall be conducted in compliance with subsection (3).

(3) In an action for damages pursuant to subsection (2)(d):

(a) Damage shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault.

(b) Liability shall not be a component of residual liability, as prescribed in section 3131, for which maintenance of security is required by this act.

(4) Actions under subsection (2)(d) shall be commenced, whenever legally possible, in the small claims division of the district court or the conciliation division of the common pleas court of the city of Detroit or the municipal court. If the defendant or plaintiff removes such an action to a higher court and does not prevail, the judge may assess costs.

(5) A decision of a court made pursuant to subsection (2)(d), shall not be res judicata in any proceeding to determine any other liability arising from the same circumstances as gave rise to the action brought pursuant to subsection (2)(d).

(6) Subsections (2)(d), (3), (4), and (5) shall take

effect July 1, 1980."

The principle focus of Defendant's motion regarding economic loss is directed at Plaintiff Geoffrey Peregrine's claim for work loss benefits beyond three years, the claim by Plaintiff Carlene Peregrine for loss of earnings and any claim for replacement services beyond three years. Addressing Plaintiff Geoffrey Peregrine's claim for excess work loss benefits first, the Court notes that work loss is generally compensable for that loss of income for work which an injured person would have performed had he or she not been injured. MCLA 500.3107(b); 500.3135(2)(c) and Oullette v Kenealy, 424 Mich 83, 86 (1985). In Kenealy, the Michigan Supreme Court clearly precluded a claim for loss of earnings capacity in a third-party tort action brought under the No-Fault Automobile Liability Act. Id. 84.

Here, Mr. Peregrine's claim for work loss is predicated upon his asserted inability to work as a self-employed author due to his inability to concentrate following the closed-head injury he received in this accident. Yet, no evidence has been provided to the Court which indicated that Plaintiff ever received any income from his work as an author. See, Plaintiffs' answers to Defendant's interrogatory number 23. Recognizing that damages for loss of earning capacity are not recoverable and that no evidence of earned income from free-lance writing has been provided, Plaintiff's claim is for loss of earning capacity and, therefore, precluded by statute. This issue was also addressed by the Michigan Supreme Court in Price v Lott, 369 Mich 606; 120 NW2d 780 (1963):

> "[L]oss of earning capacity are economic damages, are recoverable in tort only as provided in section 3107 and 3135 for 'actual' work loss--actual 'loss of income from work an injured person would have performed' if he had not been injured--when loss of income exceeds the daily, monthly and three year limitations." Id. ***.

Further, given the absence of any earned income history associated with his work as a self-employed author, the submission of a work loss claim to the jury invites speculation and

conjecture. While the Court understands that damages can often not be proved with mathematical precision, neither can they be based upon speculation and conjecture.

Here, to award economic damages, the jury would have to find that Plaintiff would have finished his novel, that some publisher would have accepted it for publication or that Plaintiff would have incurred the cost of publication out of his own pocket and that the novel would have been well received by the public. Certainly, the jury would have to find that the novel would have generated sufficient sales to cover the costs of publication and promotion before any net profit would flow to Plaintiff. In the absence of any such earnings history, the Court does not believe that such a claim may properly be submitted to the jury.

Plaintiff Carlene Peregrine also seeks an award of economic damages for work loss associated with a loss of employment which she alleges was occasioned by her husband's accident and resultant injuries. Yet, Ms. Peregrine acknowledges that she terminated her employment to assist her husband in the absence of any suggestion, request or order by a treating physician to do so. She acknowledges that this is a decision which she made personally and in lieu of hiring another person to provide those services. Plaintiffs do have an obligation to mitigate their damages and the No-Fault Act does make a provision for the payment of nursing services and for the provision of replacement services during the first three years following an automobile accident. Although Ms. Peregrine acknowledges that her husband was sufficiently recovered to allow her to return to full-time employment in July of 1991, she admits that she has made effort to seek the return of her prior position or apply for other employment.

Again, it is this Court's finding, as a matter of law, that Plaintiff Carlene Peregrine's loss of employment, and the work loss associated with it, is not a compensable element of damage in this case. While the Court can sympathize with the Plaintiff Carlene Peregrine's desire to assist her husband, it cannot allow that sympathy to overwhelm the structure and legislative intent and

purpose implicit within the No-Fault Act. Nursing and replacement service benefits were available and Plaintiff Carlene Peregrine personally chose to terminate her employment in lieu of retaining an individual to provide these services and seek compensation for them from her insurance carrier. These are uncontested facts upon which reasonable minds cannot disagree. That is, Ms. Peregrine's personal decision to terminate her employment was not a direct and probable consequence of Plaintiff's injury, but a personal decision made by her, the economic ramifications of which are not compensable in a third-party tort action against the Defendant driver or vehicle owner.

Finally, the Court will turn its attention to the issue of replacement services. Without question, Mr. Peregrine is entitled, under the statute, to claim replacement services provided by his wife while he was incapacitated from his injuries.

> "[R]eplacement service benefits are properly recoverable, even if performed by members of Plaintiff's own family." Butler v DAIIE, 121 Mich App 727, 747; 335 NW2d 70 (1982).

Plaintiff has made no claim for replacement services in the period following his accident from his own insurance carrier. Thus, any such costs incurred during that period cannot be submitted as an element of damages in this case as they cannot be shown to be "excess." Similarly, out-of-pocket medical expenses which have not been submitted to the first-party No-Fault carrier cannot be reimbursed by the Defendants in this case.

In summary, within the context of this third-party tort action brought pursuant to the Michigan No-Fault Act, Plaintiff Geoffrey Peregrine may not proceed with a claim for the recovery of loss of earning capacity or excess work loss. Plaintiff Carlene Peregrine may not proceed with her claim for the loss of employment income attributable to her voluntary termination of employment. Finally, Plaintiffs may not seek "excess" compensation for replacement services, medical expenses or any other item of expense compensable by the Plaintiffs' own insurance carrier. This matter will proceed

to trial, then, on Plaintiffs' claims for noneconomic damages arising out of the motor vehicle accident and injuries sustained therein. Defendant's motion for partial summary disposition is granted.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 5/13/92