STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY WARD, Plaintiff-Appellant/Cross-Appellee,	FOR PUBLICATION
v	No. 284994 Kent Circuit Court
TITAN INSURANCE COMPANY, Defendant-Appellee/Cross-Appellant.	LC No. 04-006032-NF Advance Sheets Version

Before: SERVITTO, P.J., and BANDSTRA and MARKEY, JJ.

BANDSTRA, J.

Plaintiff appeals as of right the trial court's denial of his request for work loss benefits, penalty interest, and attorney fees. Defendant cross-appeals, arguing that the trial court incorrectly awarded the full cost of plaintiff's housing expenses. We reverse and remand.

We review a decision on a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, *supra* at 568, quoting *Maiden*, *supra*.

With respect to plaintiff's first issue on appeal, MCL 500.3107(1)(b) provides that personal protection insurance benefits are payable for "[w]ork 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." A plaintiff must suffer a loss of income to be entitled to benefits under this section. *Ross v Auto Club Group*, 481 Mich 1, 12; 748 NW2d 552 (2008). Claimants have the burden of proving the amount they would have earned had they not been injured in the automobile accident. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 472-473; 521 NW2d 831 (1994). Independent contractors can recover work loss benefits because work loss benefits include not only lost wages, but also lost profit, which is attributable to personal effort and self-employment. *Kirksey v Manitoba Pub Ins Corp*, 191 Mich App 12, 17; 477 NW2d 442 (1991).

Here, plaintiff's deposition testimony that he was regularly employed at Club Tequila as a bouncer at the time of his accidental injuries was corroborated by two fellow employees, Alvin Bright and Larry Howard, as well as by an affidavit from the person plaintiff claimed had employed him, Teion Crews. In response, defendant points out that the owner of Club Tequila denied ever having plaintiff as an employee. However, Crews later gave sworn testimony that plaintiff was an independent contractor rather than a direct employee. But, on the other hand, as defendant also points out, Crews' testimony also indicated that plaintiff did not work as often as he claimed (and as Crews has previously averred) and, further, that plaintiff was not likely to have continued on as a bouncer in any capacity as a result of plaintiff's marijuana use.

Suffice it to say that this case was replete with factual questions surrounding plaintiff's employment at the time of the accident and thus his entitlement to wage loss benefits resulting from the accident. How often plaintiff worked, what he earned, his prospects for continued employment, whether he was an employee or an independent contractor and related questions are best left to the fact-finder; they were not properly resolved against plaintiff through a summary disposition order.

Defendant argues vociferously that plaintiff's inability to produce documentation of his employment should be dispositive, but with no precedential support for that proposition. We find our dissenting colleague's agreement with defendant to be based on a mistaken understanding of the statutory scheme. MCL 500.3158(1) does require an employer to furnish a sworn statement regarding the earnings of an injured person but nowhere does it state that, if such information is not provided, an injured person completely loses the right to work loss benefits under MCL 500.3107(1)(b).[1] The dissent would penalize plaintiff for his former employer's failure to comply with MCL 500.3158 even though that statutory provision says nothing about employees and only places a responsibility on employers. As the dissent contends, under the facts and circumstances of this case, penalizing an employee for an employer's failure to produce a sworn statement might be appropriate. However, imposing such a penalty would be a public policy decision for the Legislature, not the courts. Nowhere do the statutes suggest that MCL 500.3158(1) is the only manner in which a wage loss claim may be proved or that the right to a wage loss claim under 500.3107(1)(b) hinges on compliance with MCL 500.3158(1). We are not free to read something into the statute that doesn't exist, no matter how egregious the facts may be.

Further, we note that, while plaintiff freely admitted at his deposition that the wages he claimed he earned at Club Tequila were paid "under the table" and the record suggests that plaintiff failed to properly file income tax returns regarding any income he earned, his claim would not be barred under the wrongful conduct rule. *Orzel v Scott Drug Co*, 449 Mich 550, 558-559; 537 NW2d 208 (1995). That rule only bars a claim of a plaintiff "who founded his cause of action on his own illegal conduct." *Id*. at 559. Plaintiff's claim here is not based upon his failure to properly file income tax returns; it is based on his allegations of an automobile

[1] Of course, the lack of earnings documentation is something for the fact-finder to consider in weighing plaintiff's work loss claim.

accident and resulting work loss injuries. The wrongful conduct rule does not apply because plaintiff's alleged failure to file income tax returns would be only incidentally or collaterally connected to his claim for work loss benefits. *Id*. at 564. Further, we note that the failure to file federal tax returns is not listed as one of the reasons identified by the Legislature to deny a person personal protection insurance benefits. See MCL 500.3113; *Cervantes v Farm Bureau Gen Ins Co*, 272 Mich App 410, 418; 726 NW2d 73 (2006).

In sum, we agree with plaintiff that factual questions existed with respect to his wage loss claim. The trial court improperly granted defendant summary disposition on that claim.

Turning next to defendant's cross-appeal, we further conclude that the trial court erred by awarding plaintiff housing costs based on the full amount he currently pays for rent. This issue is governed by *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521; 697 NW2d 895 (2005). Although *Griffith* considered compensation for food expenses, it indicated, in dicta, that its reasoning and analysis would also apply to housing costs. *Id*. at 538. Under the *Griffith* analysis, plaintiff's housing costs are only compensable to the extent that those costs became greater as a result of the accident. *Id*. at 535-540. Plaintiff must show that his housing expenses are different from those of an uninjured person, for example, by showing that the rental cost for handicapped accessible housing is higher than the rental cost of ordinary housing. In the absence of that kind of factual record, the trial court erred by concluding that plaintiff was entitled to housing costs compensation merely on the basis of the amount plaintiff was currently paying in rent, for a residence that the record does not even demonstrate was handicapped accessible.

Accordingly, we reverse the orders granting summary disposition to defendant regarding the wage loss claim and to plaintiff regarding the housing cost claim. In light of those determinations, we need not consider plaintiff's arguments regarding penalty interest and attorneys fees, which would be better addressed initially by the trial court following factual determinations as to timing and the propriety of plaintiff's no-fault insurance claims, as well as defendant's actions in response.

We reverse and remand for further proceedings not inconsistent with this opinion. Neither party having fully prevailed, no costs shall be imposed. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Deborah A. Servitto