STATE OF MICHIGAN

COURT OF APPEALS

SHEILA CLARK,

Plaintiff-Appellant,

v

JEFFREY A. SKOWRONSKI,

Defendant-Appellee.

UNPUBLISHED
January 18, 2002

No. 222403
Wayne Circuit Court
LC No. 98-831937-NI

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. We affirm in part, reverse in part, and remand for further proceedings.

In this action arising from an automobile accident, plaintiff argues that the trial court erred in granting summary disposition in favor of defendant because defendant failed to establish that plaintiff had no insurance coverage. Plaintiff claims, without citation, that the absence of insurance is an affirmative defense that places the burden of proof of that fact on the negligent party.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In a motion for summary disposition under MCR 2.116(C)(10), the moving party must specifically identify the issues that fail to create any genuine issues of material fact and support its position by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden then shifts to the nonmoving party to set forth specific facts, by affidavits or other documentary evidence, showing that there is a genuine issue for trial. MCR 2.116(G)(4); *Smith, supra*. If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith, supra* at 455-456, n 2.

Here, defendant moved for summary disposition on the basis that plaintiff lacked insurance on her vehicle at the time of the accident. MCL 500.3135(2)(c) precludes recovery of

noneconomic damages where a plaintiff is uninsured.[1] See *Chop v Zielinski*, 244 Mich App 677, 684; 624 NW2d 539 (2001); *Stevenson v Reese*, 239 Mich App 513; 609 NW2d 195 (2000). Defendant provided to the trial court the police report, which lists defendant's insurer, but provides no notation of insurance for plaintiff's vehicle. Defendant further provided deposition testimony of plaintiff indicating that she did not recall whether she had auto insurance at the time of the accident. Plaintiff then had the burden of providing evidence that there was a genuine issue of material fact relating to her insurance coverage. Although plaintiff stated in a self-serving affidavit that she was insured under a policy that her mother had obtained, she did not name the insurer or the policy number.[2] Days after plaintiff signed the affidavit, the trial court heard defendant's motion for summary disposition, at which time plaintiff's counsel stated:

> [W]e haven't been able to establish whether she [plaintiff] had insurance or not because her insurance was through her mother with whom she lived and there was some change in the insurance policy which we have not been able to tie down. It maybe [sic] that she does not have insurance….

Despite the trial court's grant of a two-week period to demonstrate proof of insurance, plaintiff failed to do so. Thus, defendant was entitled to summary disposition.[3] See *Maiden*, *supra* at 121.

Plaintiff also argues that MCL 500.3135 was enacted to limit noneconomic damages only, and that even if she is uninsured, she is entitled to proceed on her economic claims. In his brief on appeal, defendant concedes that MCL 500.3135(2)(c) only bars recovery of noneconomic damages,[4] but continues to argue that he presented an alternative argument for

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[1] MCL 500.3135(2)(c) provides:

> Damages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor vehicle the security required by section 3101 [MCL 500.3101] at the time the injury occurred.

[2] We note that a trial court is permitted to draw an adverse inference against a party that fails to produce evidence within its control. *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989).

[3] We note that plaintiff also argues that the trial court erred in granting summary disposition on the issue of serious impairment of body function. Defendant concedes that the trial court's order incorrectly stated that it granted summary disposition with respect to whether plaintiff suffered a serious impairment. This error is harmless where summary disposition was otherwise appropriate. See *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999). This issue need not be addressed further because it relates to noneconomic damages, and plaintiff is barred from noneconomic damages pursuant to MCL 500.3135(2)(c), as discussed above.

[4] This Court has stated that MCL 500.3135(2)(c) does not abolish an uninsured motorist's right to recovery, but rather limits the remedies available to an uninsured motorist. *Stevenson*, *supra* at 518. "Uninsured motorists may seek certain damages under the no-fault act. See MCL 500.3135(3)(a) and (d)…." *Id.*

summary disposition on plaintiff's claim for economic damages. According to defendant, he presented an argument that plaintiff failed to present any evidence to establish her entitlement to economic damages, specifically for "work loss" damages.[5] However, the lower court record is devoid of evidence that that argument was made to the trial court, and even though the trial court granted complete summary disposition in this case, the trial court's order does not indicate that defendant was entitled to summary disposition for that reason. We decline to address on appeal whether summary disposition was appropriate for that reason where it is not clear from the record that plaintiff had notice of that argument and an opportunity to defend.[6] Hence, remand to the trial court is necessary.

Plaintiff also argues that the trial court's grant of summary disposition should be reversed because MCL 500.3135 is unconstitutional in that it violates equal protection. Plaintiff cites no supporting legal authority for this proposition, and consequently, has abandoned the issue. *Prince v McDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

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

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck

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[5] Defendant argues that medical and hospital expenses are barred as a matter of law, and that MCL 500.3135(3)(c) only permits an injured party to recover for "work loss."

[6] Although defendant's brief cites to "8/12/99 Reply Brief, 1-2," we found no such reply brief in the lower court record nor any indication on the docket statement that defendant filed a reply brief on that date.