

STATE OF MICHIGAN  
COURT OF APPEALS

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OLGA COLUCCELLI,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,

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July 29, 1992

No. 136382

UNPUBLISHED

Before: Fitzgerald, P.J., and Hood and Kingsley\*, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition for defendant.<sup>1</sup> We affirm.

Plaintiff was a passenger in a car driven by her husband and insured by defendant. When plaintiff's husband swerved to avoid a car that ran a red light, he went off the road and collided with a utility pole. Plaintiff's husband died as a result of the accident and plaintiff was seriously injured. The identity of the driver who ran the red light is unknown.

Plaintiff filed a claim against defendant based on her husband's negligence and received \$25,000, the liability coverage policy limit. Plaintiff also filed a claim against the uninsured motorist coverage of her husband's policy.<sup>2</sup> Defendant refused to arbitrate the claim because, under the terms of the policy, the uninsured motorist coverage is reduced by any amount recovered under the liability coverage. Plaintiff brought this action seeking an order requiring defendant to arbitrate. The trial court relied on Auto-Owner's Ins. Co v Lydon, 149 Mich App 643; 386 NW2d 628 (1986), lv den 428 Mich 847 (1987) in granting defendant's motion for summary disposition.

Plaintiff's husband's insurance policy with defendant contained the following provision regarding uninsured motorist coverage:

Subject to the Definitions, Exclusions, Conditions and Limits of Liability that apply to this Part, we will pay damages for bodily injury which: is caused by accident; and arises out of the ownership, operation, maintenance or use of an uninsured motor vehicle; and results in death, serious impairment of body function or permanent serious disfigurement; and an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. [Emphasis omitted.]

The "limits of liability" provision for the uninsured motorists coverage provides:

Any amount payable will be reduced by:

payment made by the owner or operator of the uninsured motor vehicle or organization which may be legally liable;

payment made under the Liability Insurance Coverage of this Policy;

payment made under Medical Payments Coverage of any policy. [Emphasis omitted.]

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\*Circuit Court judge, sitting on the Court of Appeals by assignment.

In Lydon, supra, a factually analogous case, the defendant was injured when her husband's vehicle, in which she was a passenger, collided with an uninsured vehicle. The defendant's husband had paid separate premiums for residual bodily injury liability and uninsured motorist coverage. The policy also had a set-off clause.<sup>3</sup> Defendant filed a claim with plaintiff for recovery of noneconomic damages under both the liability provision and the uninsured motorist provision. Each coverage had a policy limit of \$20,000. Defendant collected \$20,000 under the liability provision. Plaintiff denied the claim under the uninsured motorist provision because it was barred by a set-off clause. This Court reversed the trial court's grant of summary disposition for defendant, holding that "Since uninsured motorist coverage substitutes for residual liability coverage, an insurance contract may provide that benefits paid under one may be set off against benefits payable under the other."<sup>4</sup> See also Schroeder v Farmers Ins Exchange, 165 Mich App 506; 419 NW2d 9 (1987).

Here, the set-off provision clearly precludes the payment of additional noneconomic or excess economic benefits to plaintiff. Hence, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Harold Hood  
/s/ James C. Kingsley

<sup>1</sup> Defendant's motion for summary disposition was based on MCR 2.116(C)(7), (8), and (10). The order granting summary disposition does not state the section under which summary disposition was granted. However, it appears that summary disposition would have been appropriate under either (C)(8) or (C)(10).

<sup>2</sup> The uninsured motorist coverage had a policy limit of \$20,000.

<sup>3</sup> As in the present case, the policy had a set-off clause that stated if a claim is made under both the uninsured motorist provision and the bodily injury liability provision, a payment made under one of the provision will reduce any payment made under the other provision.

<sup>4</sup> If plaintiff's husband had elected to purchase greater uninsured motorist coverage, enforcement of the set-off clause would have reduced plaintiff's uninsured benefits only to the extent of the liability coverage. Her noneconomic and excess economic damages would have been recoverable up to the limit of the uninsured motorist coverage.

# THE WEEK'S OPINIONS

## Michigan Court of Appeals

UNPUBLISHED OPINIONS

### Civil

(Continued)

(Continued from Page 15A)

did not strike a member of the [insured's] family or a vehicle which a member or the [insured's] family was occupying."

Affirmed in part and reversed in part.

*Webb v. Farmers Ins. Exchange.* (Lawyers Weekly No. MA-5262 - 2 pages).

Summary by KMP.

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### No-Fault - Uninsured Motorist Set-Off Provision

Where the court found that plaintiff's uninsured motorist claim was barred because of the policy's set-off provision, we affirm.

Plaintiff was injured in a car accident. Plaintiff's husband, who was driving, swerved to miss a car that ran a red light. Their car hit a tree. Plaintiff's husband died. Plaintiff filed a claim with her husband's no-fault insurer based on her husband's negligence. Defendant-insurer paid plaintiff the \$25,000 policy limit. Plaintiff also filed a claim based on her husband's uninsured motorist coverage. Plaintiff sued to compel defendant to arbitrate. Defendant was

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granted summary disposition. Plaintiff appeals.

The policy's uninsured motorist provision provided that any coverage available under it would be reduced by payment made under the policy's liability insurance provision. The uninsured motorist coverage had a policy limit of \$20,000. Therefore, "the set-off provision clearly precludes the payment of additional noneconomic or excess economic benefits to plaintiff." Summary disposition was proper.

Affirmed.

*Coluccelli v. Auto Club Ins. Ass'n.* (Lawyers Weekly No. MA-5255 - 2 pages).

Summary by KMP.

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### Probate - Parental Rights Improperly Terminated

Where 1) grounds for termination had not been established by clear and convincing evidence and 2) the court terminated respondents' parental rights based solely on their refusal to submit to psychological evaluations, we reverse the court's termination of their parental rights.

"There was some evidence of neglect, and some reason to be concerned about respondents' ability to supervise their son properly. However, we are left with the definite and firm conviction that there was not clear and convincing evidence establishing grounds for termination. We believe the probate court's decision was ... based only on respondents' refusal to submit to psychological evaluations.... [T]he lack of psychological evaluations were not shown to be necessary to returning the boy to respondents' care.

"We do not condone respondents' refusal to undergo evaluation. However, termination of parental rights is not some club to hold over parents' heads to obtain obedience to court orders. ... If a psychological evaluation is truly needed for the boy's health and safety, that need must be clearly demonstrated before respondents' refusals can be interpreted as demonstrating an unwillingness to provide for the care and custody of their son."

Reversed and remanded.

*In the Matter of Dobbins.* (Lawyers Weekly No. MA-5400 - 4 pages).

Summary by LCC.

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### Probate - Parental Rights Terminated

Where there was clear and convincing evidence that respondent-mother 1) abandoned her children, 2) still had a drug problem and 3) would be in no condition to provide proper care and custody for the children within a reasonable time, the court properly terminated her parental rights.

Affirmed.

*In the Matter of Rubart, et al.* (Lawyers Weekly No. MA-5398 - 3 pages).

Summary by LCC.

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### Probate - Parental Rights Terminated

Where the court terminated respondent-father's parental rights in this stepparent adoption proceeding, we affirm.

Respondent conceded that he did not pay child support for over three years. The court also found respondent failed to regularly and substantially visit, contact, or communicate with the children for two years before the petition was filed. "The evidence was sufficient to justify termination of respondent's parental rights under the Adoption Code."

Affirmed.

*In the Matter of Allen, et al.* (Lawyers Weekly No. MA-5416 - 2 pages).

Summary by LCC.

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(Continued on Page 17A)

## LAWYER TO LAWYER REFERRALS

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