

STATE OF MICHIGAN  
COURT OF APPEALS

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MARTIN TYCKOSKI, conservator of the  
estate of MARCIA HARDING, a legally  
incapacitated person,

Plaintiff, Counter-  
Defendant, Appellee,

August 10, 1993

v

AMERICAN FELLOWSHIP MUTUAL INSURANCE  
COMPANY, a Michigan insurance company,

Defendant, Counter-  
Plaintiff, Appellant.

No. 133980  
LC No. 87339735 CK

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Before: Fitzgerald, P.J., and Weaver and Marilyn Kelly, JJ.

PER CURIAM.

Defendant appeals from an Oakland Circuit Court order granting summary disposition to plaintiff. On appeal, defendant argues that the court erred in refusing to allow social security disability benefits to which plaintiff was entitled to be set off against wage loss benefits due her. It asserts, also, that the court erred in relying on an opinion of the Michigan Attorney General as opposed to binding Michigan precedent. We reverse.

On October 20, 1984, Marcia Harding suffered a severe head injury in an automobile accident. She has remained in a comatose state throughout the three years this case has been at issue. Marcia's husband, Ian Harding, was the conservator of her estate until March, 1988 when plaintiff Martin Tyckoski succeeded him.

Defendant is Marcia Harding's no-fault insurer. It paid wage loss benefits to her for the three years following the accident. Plaintiff then filed suit for unpaid wage loss benefits and expenses for improvements to the Harding's home due to Marcia's condition. Defendant counterclaimed, alleging that unpaid social security disability benefits to which Marcia was entitled should be offset against the amount it paid. Plaintiff filed a motion for summary disposition on the counterclaim. The trial court granted plaintiff's motion, ruling that defendant is not entitled to a setoff, because plaintiff never actually received social security disability benefits.

On appeal, defendant argues that the trial court erred in refusing to offset social security disability payments Marcia was entitled to against wage loss benefits. The insurance code provides:

Sec. 3109. (1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury. [MCL 500.3109(1); MSA 24.13109(1).]

Social security disability benefits actually received must be subtracted from no-fault work loss benefits, regardless of whether the benefits were paid to an injured party or to the parties' dependents. Thompson v DAHE, 418 Mich 610, 624-626; 344 NW2d 764 (1984). Here, undisputedly, neither Marcia nor her legal representative applied for or received social security disability benefits during the period defendant was statutorily mandated to pay work loss benefits.<sup>1</sup>