

STATE OF MICHIGAN
COURT OF APPEALS

LOREE J. FULKERSON, as Next Friend
of LYNN L. FULKERSON,

Plaintiff-Appellant,

APR 11 1986

-v-

No. 75360

PROVIDENCE WASHINGTON
INSURANCE COMPANY,

Defendant-Appellee,

and

NATIONAL MUTUAL INSURANCE
COMPANY, CELINA GROUP,

Defendant and Third-Party
Plaintiff-Appellee.

-v-

THE BOARD OF COUNTY ROAD
COMMISSIONERS OF THE COUNTY
OF GENESEE,

Third-Party Defendant-
Appellee.

BEFORE: Cynar, P.J., M.H. Wahls, S.T. Finch*, JJ.

PER CURIAM

Plaintiff¹ appeals by right the circuit court's judgment in favor of defendant on her claim for no-fault survivors' benefits. The court held that the aggregate amount of social security and workers' compensation benefits received by plaintiff and her family exceeded the amount of survivors' benefits plaintiff would be entitled to under section 3108 of the no-fault act, MCL 500.3108; MSA 24.13108.

The material facts are set forth in a stipulation filed by the parties in circuit court. Jay Fulkerson, husband of Loree Fulkerson and father of Lynn Fulkerson and Patrick Fulkerson, his surviving dependents, was killed on May 12, 1976, during the

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

course of his employment with the Board of County Road Commissioners of Genesee County, when the hopper door of the vehicle which he was operating fell on him.

From May 25, 1976 to August 31, 1977, the surviving Fulkersons received \$126 per week in workers' compensation survivor benefits. On August 31, 1977, future payments were redeemed for \$31,500.00. From May 1976 through May 1979, Lynn received \$8,305.20 and Loree received \$12,695.40 in social security benefits. From May 1976 through December 1977, Patrick received \$4,451.00 in social security benefits.

On June 6, 1980, a third-party product liability wrongful death action against the manufacturer of the sweeper was settled for \$258,232.00. Citizens Insurance Company of America, the workers' compensation carrier, was reimbursed for compensation benefits already received by the family totaling \$40,362.00, pursuant to MCL 418.827; MSA 17.237(827).

On March 24, 1981, Loree filed the instant complaint on behalf of herself and as next friend of her daughter, Lynn, alleging that defendant Providence Washington Insurance Company (the Road Commission's no-fault insurer) failed to pay no-fault benefits, including funeral expenses and survivors' loss benefits. The complaint was amended to delete Loree's individual status and to include National Mutual Insurance Company (the deceased's no-fault insurer on his personal automobile). National then filed a third-party complaint against the Road Commission seeking indemnification against any judgment plaintiff might obtain against National.

On October 28, 1983, the trial court held that any survivors' benefits plaintiff might be entitled to for three years following the death of her father must be reduced by the aggregate amount of social security and workers' compensation benefits received by plaintiff, her brother, and her mother for the three years following the death of plaintiff's father. The court determined that the amount of social security and workers' compensation benefits received were in excess of the maximum

survivors' benefits payable to plaintiff and entered judgment for defendants. The court also held that the subsequent total reimbursement of the workers' compensation benefits to the employer's workers' compensation insurance carrier from the proceeds of the wrongful death action did not affect defendant no-fault insurers' right to deduct the amount of workers' compensation benefits from any survivors' benefits payable to plaintiff.

I. WORKERS' COMPENSATION SET-OFF

The first issue is whether the trial court erred by allowing a set-off or deduction of already reimbursed workers' compensation benefits from the no-fault survivors' benefits. We agree with plaintiff that, because the compensation insurer was previously reimbursed from the proceeds of the wrongful death settlement, the no-fault insurer is no longer entitled to a set-off for such benefits, based on the reasoning set out in Ryan v Ford Motor Co, 141 Mich App 762; 368 NW2d 266 (1985), which we adopt and will not here reiterate.

II. COMPUTATION OF SOCIAL SECURITY SET-OFF

The second issue is whether the social security benefits received by plaintiff's mother and brother should be subtracted from benefits due or whether the setoff should be limited to the amount received by plaintiff alone. The trial court ruled that any amount received by plaintiff should be reduced by the aggregate amount of social security benefits received by all three dependents.

Survivors' loss benefits under section 3108(1) are based on a dependent's loss of economic contribution and loss of services from the deceased. Here, the parties agree that, at the time of his death, the deceased's earnings were sufficient to qualify plaintiff for the maximum allowable survivors' benefit of \$1,000 per month. Section 3108(2) states: "[t]he maximum shall apply to the aggregate benefits for all survivors payable under

this section, on account of the death of any person". (Emphasis added.) Defendant argues that it would be unfair to allow plaintiff the total amount of survivors' benefits for all survivors and only set off the social security benefits received by her. We agree.

The immediate family surviving the decedent are his wife, son and daughter. The distinctions which plaintiff seeks to make in their identities for purposes of the various claims arising from their decedent's death (wrongful death, workers' compensation, social security and no-fault survivors' benefits) are lost on this Court. It is a single family unit seeking to survive economically after the loss of its breadwinner with whatever benefits are available. The survivors could not file separate claims for their no-fault survivors' benefits, so the fact that they must do so for social security benefits, is of no moment.

The set-offs and reimbursements required by both the no-fault and workers' compensation law are not kind to the bereaved. Undoubtedly these limitations on survivors' benefits result in hardship to this already burdened family, but the Court cannot give recovery where the legislature has precluded it in law.

III. RESULT & INSTRUCTIONS

The circuit court's order of judgment in favor of defendants is reversed. This case is remanded to the circuit court to determine and enter judgment for the amount of no-fault survivors' benefits due to the family unit after set-off of all social security benefits paid to the surviving spouse and children, but without any set-off or reduction for the workers' compensation benefits paid and reimbursed. The circuit court shall further determine the amount of statutory pre-judgment and no-fault interest, costs and attorney fees due plaintiff and shall include these sums in her judgment.

REVERSED and REMANDED for further proceedings consistent
with this opinion.

/s/ Myron H. Wahls
/s/ Sharon Tevis Finch

Judge Cynar concurs in the result only.
/s/ Walter P. Cynar

FOOTNOTES

¹ The use of plaintiff throughout this opinion refers to Lynn
Fulkerson, the deceased's daughter.