STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY MINSTER, personal representative of the estate of EUGENE A. MINSTER, deceased,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION
May 31, 1996
9:00 a.m.

No. 177279
LC 93-003195-CZ

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment in favor of defendant and against plaintiff in the amount of $1,723.00, reflecting the overpayment of work loss benefits that defendant made to plaintiff's decedent. We affirm.

The unique issue presented in this case is whether plaintiff's decedent's social security disability benefits may be deducted from both the disability benefits that he received through his employer's self-funded disability plan[1] that is controlled by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, and from the no-fault insurance benefits that he received from defendant, pursuant to MCL 500.3109(1); MSA 24.13109(1).[2] Given that an ERISA plan's setoff provision must be enforced according to its plain meaning, *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 387, 389-390; 505 NW2d 820 (1993), and that § 3109(1) of the no-fault act clearly requires the set off of social security benefits even for noncoordinated no-fault policies, *Profit v Citizens Ins Co of America*, 444 Mich 281, 288; 506 NW2d 514 (1993), we believe that defendant is also entitled as a matter of law to set off each social security payment that plaintiff's decedent received. Thus, the trial court did not commit legal error in interpreting and applying § 3109(1) to the facts of this case. See *Ireland v Smith*, 214 Mich App 235, 243; 542 NW2d 344 (1995).

According to plaintiff, a conflict exists between the ERISA disability plan offered by plaintiff's decedent's employer and defendant's no-fault policy because *both* the plan administrator and defendant claim that they are entitled to set off or reduce their benefit payments by the amount of the social security benefits paid to plaintiff's decedent. Plaintiff believes that this arrangement is patently inequitable. Plaintiff relies on *Frederick & Herrud, supra*, for the proposition that defendant's policy must "give way" so the ERISA disability plan can be enforced. We believe that plaintiff's reliance on this case is misplaced. In *Frederick & Herrud, supra* at 387, 389-390, the Michigan Supreme Court held that if both an ERISA plan

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

and a no-fault plan contain coordination of benefits provisions, the ERISA plan's coordination policy must be enforced and the no-fault insurer is liable as the primary insurer despite the fact that § 3109(1) allows no-fault carriers to sell coordinated benefits policies:

> Although the Michigan [no-fault] statute purports to regulate insurance and not ERISA plans, we conclude that it has a direct effect on the administration of the [ERISA] plans in these cases because it would virtually write a primacy of coverage clause into the plans. This is the type of state regulation that would lead to administrative burdens that the historical progression of federal cases recounted earlier forbids. [*Id.* at 387.]

We do not interpret *Frederick & Herrud, supra*, as plaintiff does to mean that because ERISA preempts state laws regarding self-funded employee benefit plans, it also preempts any state law that deals with any other payment of any other disability or work loss benefits. Indeed, our Supreme Court expressly rejected this idea. See *id.* at 381, 385.[3] Rather, *Frederick & Herrud, supra*, and *Profit, supra*, make clear the path that we must follow in this case, and we cannot ignore the setoff language of § 3109(1) merely because plaintiff's decedent also received other disability benefits under an ERISA plan that contained similar setoff language.

Plaintiff argues that permitting defendant to set off social security benefits against no-fault work loss benefits is patently unfair and constitutes an inequitable penalty in light of the controlling ERISA plan, which also required a set off of social security benefits.[4] Plaintiff further asserts that because she paid a higher premium for a noncoordinated benefits no-fault policy, she is entitled to receive more benefits, not less. Plaintiff cites no statutory or case law authority for this proposition, however, and we find no support for it. Our review of plaintiff's no-fault policy reveals that the policy's setoff language applies whether the policy is coordinated or noncoordinated. Moreover, nothing in the language of § 3109(1) or the legislative history evidences a legislative intent to suspend the no-fault act's *mandatory* setoff provisions under any circumstances.

We recognize that plaintiff's decedent was receiving more benefits before he applied for social security benefits than after he began receiving them and was subject to setoff, i.e., he received no-fault work loss benefits plus employer-provided disability benefits as opposed to no-fault benefits plus employer benefits less two times the amount of each social security payment. See *Grau v DAIIE*, 148 Mich App 82, 89-90; 383 NW2d 616 (1985).[5] This fact alone does not permit us to ignore the intent of the Legislature as expressed in § 3109(1). Any inequity that exists must be remedied by the Legislature. See *DeMeglio v Auto Club Ins Ass'n*, 449 Mich 33, 47-48; 534 NW2d 665 (1995); *Grau, supra* at 89.

Accordingly, upon our de novo review of the record, we find that the trial court did not err when it determined, as a matter of law, that defendant was entitled to deduct from the work loss benefits it paid to plaintiff's decedent the amount of social security disability payments that he received before his death. Because plaintiff does not challenge the amount of the overpayment that the trial court ordered her to repay, we do not address that issue.

Affirmed.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Matuzak

[1] Under Article II, § 6(h) of the Supplemental Agreement Covering Life and Disability Benefits Programs agreement between General Motors Corporation, plaintiff's decedent's employer, and the UAW, "[s]ickness and Accident Benefits otherwise payable for any period of disability shall be reduced by the weekly equivalent of any Disability Insurance Benefits or Old-Age Insurance Benefits (Primary Insurance Amount only) to which the employe[e] is entitled for the same period under the Federal Social Security Act or any future legislation providing similar benefits, except old-age benefits reduced because of the age at which received."

[2] MCL 500.3109(1); MSA 24.13109(1) provides in part: "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." Personal protection insurance benefits include benefits for medical expenses and work loss. MCL 500.3107; MSA 24.13107.

[3] "Congress' first move in its effort to prevent regulation that would frustrate the purposes behind the ERISA was the enactment of the preemption clause. . . . Nonetheless, Congress removed from the reach of state regulation pension or health and welfare benefits plans established under the ERISA pursuant to the deemer clause, *although it did not specifically forbid any state regulation of insurance*, banking, or securities law." *Id.* [Emphasis added.]

[4] When confronted by his employer's ERISA plan regarding the set-off and overpayment, plaintiff's decedent repaid the plan over four thousand dollars.

[5] In *Grau, supra* at 90, this Court recognized that permitting the setoff of Social Security benefits against both the plaintiff's no-fault benefits and her employee disability benefits did not amount to a "double setoff;" rather, it merely precluded double recovery from no-fault insurance and Social Security disability benefits as well as double recovery from the bargained-for employee disability plan and Social Security disability benefits.