

STATE OF MICHIGAN
COURT OF APPEALS

JEAN McCAIN,

Plaintiff-Appellant,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellee.

FOR PUBLICATION

December 20, 1996

9:20 a.m.

No. 171044

LC No. 92-000401-CZ

Before: MacKenzie, P.J., and Jansen and T.R. Thomas,* JJ.

JANSEN, J.

Plaintiff appeals as of right from a December 2, 1993, judgment of the Eaton County Circuit Court in favor of defendant in this no-fault automobile insurance action. We affirm the order granting summary disposition, but remand for the trial court to enter judgment in the amount of \$17,168.95 for the reasons set forth.

On February 9, 1990, plaintiff's husband was killed in an automobile accident as he was traveling home from work. Plaintiff sought survivor's benefits for wage loss from defendant, the decedent's no-fault automobile insurance carrier. At the time of the accident, the decedent had an average weekly income of \$485.21, and his income for a thirty-day period was \$2,071.25. Eighty-five percent of the decedent's average wage was \$1,760.56 for a thirty-day period. From February 1990 to February 1992, defendant paid the difference between the amount of social security benefits plaintiff received (\$1,232 a month) and eighty-five percent of the decedent's average weekly wage for a thirty-day period (\$1,760.56). Defendant also deducted the annual cost of living increase in social security benefits received by plaintiff.

Plaintiff also filed a claim for worker's compensation death benefits and entered into negotiations with the worker's compensation insurance carrier. Defendant moved to intervene in the case pursuant to MCL 418.847; MSA 17.237(847) and *Russell v Welcor, Inc*, 157 Mich App 351; 403 NW2d 133 (1987). A \$50,000 settlement of the case included a waiver by the worker's compensation insurance carrier of its right to reimbursement from the tort claim plaintiff brought against the owner and driver of the other vehicle involved in the accident. Defendant then

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

stopped paying benefits to plaintiff following her redemption of her worker's compensation claim in March 1992.

Plaintiff filed the instant suit for resumption of payments, claiming that they were terminated in violation of the no-fault insurance act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.* Defendant had also paid hospitalization benefits to plaintiff, a benefit the decedent received from his employer. These benefits were also terminated, and plaintiff filed a claim for them pursuant to MCL 500.3108; MSA 24.13108. Plaintiff claimed benefits for the periodic raises the decedent would have received pursuant to MCL 500.3108; MSA 24.13108, and plaintiff claimed that defendant's offset of the raises in social security benefits was in violation of MCL 500.3108; MSA 24.13108. Plaintiff also sought interest and attorney fees on the basis that the payments from defendant were more than thirty days overdue.

Defendant answered and filed a counter-claim, alleging that it was entitled to a deduction of both social security benefits and worker's compensation benefits plaintiff may be entitled to, retroactive to February 9, 1990, because she had redeemed her worker's compensation claim. Defendant then moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court granted the motion under MCR 2.116(C)(8), believing that the parties differed only in the manner in which social security benefit setoff should be calculated. Judgment was entered in favor of defendant in the amount of \$20,597.11 for overpayment of benefits to plaintiff.

On de novo review of the record, we find that the trial court properly granted summary disposition pursuant to MCR 2.116(C)(8) to defendant because plaintiff's complaint is unenforceable as a matter of law and no factual development could possibly justify a right of recovery. *Frick v North Bank*, 214 Mich App 177, 179; 542 NW2d 331 (1995).

Under the no-fault insurance act, a decedent's survivor is entitled to recover a percentage of the decedent's average earnings for three years from the date of the accident. MCL 500.3108(1); MSA 24.13108(1). Eighty-five percent of the decedent's average wage was \$1,760.56 for a thirty-day period. However, defendant is statutorily entitled to set off certain amounts from plaintiff's claim for survivor's benefits. MCL 500.3109(1); MSA 24.13109(1) provides:

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.

At issue in this case are social security and worker's compensation benefits. It is well-settled that social security survivor's benefits must be set off from work loss benefits payable for an automobile accident resulting in death where the worker's compensation benefits are paid as a result of the same accident and duplicate no-fault benefits. *O'Donnell v State Farm Mutual Automobile Ins Co*, 404 Mich 524; 273 NW2d 829 (1979); *Thompson v DAIIE*, 418 Mich 610; 344 NW2d 764 (1984); *Profit v Citizens Ins Co of America*, 444 Mich 281; 506 NW2d 514 (1993); *Popma v Auto Club Ins Ass'n*, 446 Mich 460; 521 NW2d 831 (1994). Similarly, worker's compensation benefits are required to be subtracted from no-fault work loss benefits otherwise payable for an automobile injury. *Mathis v Interstate Motor Freight System*, 408 Mich

164; 289 NW2d 708 (1980); *Perez v State Farm Mutual Automobile Ins Co*, 418 Mich 634; 344 NW2d 773 (1984). Moreover, this Court has recently held that both federal social security and state worker's compensation benefits may be set off against no-fault automobile insurance benefits. *Root v Ins Co of North America*, 214 Mich App 106; 542 NW2d 318 (1995).

Accordingly, the trial court properly set off both the social security and worker's compensation benefits received by plaintiff and summary disposition was properly granted to defendant. However, we believe that the trial court erred in entering its judgment in the amount of \$20,597.11. The trial court's computation fails to account for the fact that the worker's compensation carrier waived participation in the third-party tort recovery under § 827 of the worker's disability compensation act (WDCA) in exchange for the redemption agreement. We find that *Sibley v DAIIE*, 431 Mich 164; 427 NW2d 528 (1988) requires that the tradeoff be recognized.

In *Gregory v Transamerica Ins Co*, 425 Mich 625, 628; 391 NW2d 312 (1986), the Supreme Court held that the amount of the full worker's disability benefits for the full period of disability, as if there had been no redemption, must be subtracted from the amount of the no-fault benefits. See also, *Popma, supra*, p 476 (it is the entire amount of qualifying benefits provided, or required to be provided, by state or federal law on behalf of the claimant that determines the amount of actual setoff). However, in *Sibley, supra*, p 169, the Supreme Court stated that if the reduction in the automobile insurer's responsibility is from a source that gains reimbursement from the injured person's tort recovery, the amount so gained should not be deemed to be benefits provided within the meaning of § 3109(1) relieving the primarily liable automobile insurer of its primary responsibility to pay full benefits without reduction by reason of any tort recovery.

Therefore, we find that *Sibley* requires that any of the worker's compensation carrier's share of a third-party tort recovery must be subtracted from the statutory benefit rate. Nothing in *Sibley* suggests that only an actual deduction of a third-party tort recovery, rather than a negotiated credit, can reduce the no-fault insurer's setoff for worker's compensation benefits.

Here, because the \$50,000 redemption amount appears to represent an accurate estimate of the net effect of the worker's compensation benefits less some recovery from the third-party tort action, defendant is entitled to coordination of the redemption amount, but is not entitled to a credit of the statutory benefit rate. Under the WDCA, plaintiff would have been entitled to receive worker's compensation death benefits for five hundred weeks; thus, the \$50,000 redemption amount represents payment for five hundred weeks of liability for death benefits, or \$100 a week. See MCL 418.321; MSA 17.237(1). Because no-fault survivor's benefits are payable for three years after the date of death, MCL 500.3108(1); MSA 24.13108(1), the worker's compensation amount to be coordinated is \$100 a week for three years (156 weeks), or \$15,600. We provide the following calculations:

Plaintiff's no-fault wage loss benefits per month:	\$1,760.56	3-year total:	\$63,380.16
Plaintiff's social security survivor's benefits per month:	\$1,232	3-year total:	\$44,352.00
Plaintiff's worker's compensation net benefits:	\$50,000	3-year total:	\$15,600.00

Total coordinatable benefits:	\$59,952.00
Net no-fault benefits payable to plaintiff:	\$3,428.16
No-fault benefits actually paid to plaintiff:	\$20,597.11
Correct amount of reimbursement owed by plaintiff to defendant:	\$17,168.95

Accordingly, we conclude that the trial court erred in finding that plaintiff had to reimburse defendant for the entire amount of no-fault benefits actually paid. Rather, under *Sibley*, we find that plaintiff must reimburse defendant in the amount of \$17,168.95 for overpayment of no-fault benefits.

The trial court's order granting summary disposition in favor of defendant is affirmed. We vacate the trial court's judgment in favor of defendant in the amount of \$20,597.11 and remand for the trial court to enter judgment in favor of defendant in the amount of \$17,168.95. No further jurisdiction is retained in this matter.

/s/ Kathleen Jansen
/s/ Barbara B. MacKenzie
/s/ Terrence R. Thomas