STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY, Plaintiff-Appellee,	UNPUBLISHED December 27, 2011
v	No. 299632 Monroe Circuit Court
MARY LOU FOX, a/k/a MARY LOU CLEER, Defendant-Appellant.	LC No. 09-027288-CZ

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals by right the judgment awarding plaintiff $27,530 for overpayment of no-fault work loss benefits. We vacate the judgment and remand for an evidentiary hearing and further proceedings consistent with this opinion.

Defendant was injured on February 11, 2005. She received no-fault work loss benefits from plaintiff and disability insurance benefits from another insurer. Plaintiff calculated defendant's monthly work-loss benefits by subtracting the monthly amount defendant was receiving from the disability insurer pursuant to a coordinated benefits agreement in plaintiff's policy and MCL 500.3109a. After the three-year work loss benefits period expired, defendant received a retroactive social security disability award. Plaintiff then asserted a right to reimbursement of overpaid insurance benefits pursuant to MCL 500.3109(1). See also *Profit v Citizens Ins Co of America*, 444 Mich 281, 287-288; 506 NW2d 142 (1999). Plaintiff brought this action for reimbursement. The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted summary disposition to plaintiff and entered judgment accordingly.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

The Supreme Court in *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 197-200; 596 NW2d 142 (1999), determined that an insurer that has overpaid no-fault benefits as a result of failure to offset social security benefits may seek reimbursement under the equitable doctrine of unjust enrichment. Here, the trial court relied on *Morris* and correctly sought to determine offsets permitted and required from defendant's work loss benefit under no-fault, but mistakenly

applied the controlling statutory and case law for want of specific evidence that was in part not available to the trial court at the time.

The no-fault act mandates that insurers provide work loss coverage for the first three years after an accident. MCL 500.3107(1)(b). In this case, the parties agree that defendant was entitled to collect work loss benefits of approximately $2,833 each month. In keeping with the no-fault policy's coordination of benefits provisions, plaintiff reduced the monthly amounts it paid to defendant by the monthly amount of disability insurance benefits defendant received. This reduction was appropriate under the no-fault coordination of benefits statute, MCL 500.3109a. The statute allows no-fault insurers to issue policies with coordination of benefits provisions upon election of the insured, and the defendant here so elected. Defendant was still receiving the mandatory work loss benefit amount as provided in MCL 500.3107(1)(b) from the combined benefits paid by the disability insurer and by plaintiff.

Plaintiff later sought to further reduce the benefits defendant had received by seeking reimbursement from defendant for social security benefits that had been paid retroactively. Because defendant was not entitled to social security disability benefits for the first 6 months post injury, plaintiff claimed reimbursement for the last 30 months of payments to plaintiff. The setoff statute provides, "[b]enefits 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).

Upon defendant's receipt of social security disability benefits, the disability benefits insurer also sought recoupment of the amount of social security benefits received pursuant to its contract with defendant. At oral argument defendant reported that an action with the disability insurer has not been filed. The disability insurer has instead reduced its benefits payments by offsetting the overpayment due to the retroactive social security disability payment. At the time of the motion for summary disposition, resolution of the disability insurer's offset had not been determined and, therefore, the trial court was not apprised of the reduction in net disability benefits by the disability insurer with whom the no-fault insurer coordinated. The information provided to this Court is an expansion of the lower court record, and plaintiff allows that if the information is established that the disability insurer has recouped social security disability benefits, the resultant underlying judgment may be incorrect. Based upon the record before us, we are unable to definitively ascertain the correctness of the judgment.

Neither the setoff provision nor the coordination of benefits provision of the no-fault statute allow the no-fault insurer to reduce work loss benefits payments below the benefit amount mandated in MCL 500.3107. In applying the setoff provisions under no-fault, the combination of all benefits should equal the work loss benefits amount, neither more nor less. Here, however, the record does not establish that plaintiff overpaid the no-fault work loss benefits, or that defendant received duplicative benefits. As our Supreme Court has explained:

> Section 3109(1) does not mandate the offset of all governmentally provided benefits, only duplicative benefits. The history of § 3109(1) indicates that the Legislature's intent was to require a set-off of those governmental benefits that *duplicated* the no-fault benefits payable because of the accident and *thereby* reduce or contain the cost of basic insurance. It is by the offsetting of duplicative

> benefits that § 3109(1) *thereby* reduce[s] or contain[s] the cost of basic insurance. It is not within the purpose of § 3109(1) to require the offset of governmental benefits that are not duplicative. [*Morgan v Citizens Ins Co of America*, 432 Mich 640, 648; 442 NW2d 626 (1989) (internal quotation and citation omitted).]

Similarly, the coordination of benefits statute "was written to contain insurance and health care costs *and to eliminate duplicate recovery*." *Smith v Physicians Health Plan, Inc*, 444 Mich 743, 749; 514 NW2d 150 (1994) (emphasis added).

Absent proof of overpayment or duplication of benefits, plaintiff has not established entitlement to reimbursement from defendant's social security disability benefits.[1] We note, however, that the record is insufficient to make a definitive determination of the actual amount of work loss benefits defendant should have received. The record contains a chart, apparently compiled by defendant, which lists employment income earned by defendant during the work loss benefits period. The record also contains another chart, apparently compiled by plaintiff, which lists monthly benefits paid to defendant. We cannot determine from these charts whether plaintiff properly attributed the employment income to each monthly calculation, nor can we determine which months, if any, plaintiff overpaid the work loss benefits in relationship to the social security disability benefits attributable to those months (taking into consideration the cost-of-living adjustments described in the social security award letter). Accordingly, we remand for further proceedings to determine whether plaintiff overpaid the work loss benefits and whether defendant received duplicative benefits. To reiterate, these calculations must be made on a retroactive monthly basis to ensure that defendant retains monthly work loss benefits equal to the no-fault rate mandated by MCL 500.3107(1)(b). The calculations must also account for any present and future offsets taken by the disability insurer.

Finally, defendant contends that plaintiff's right to recover the overpayment of insurance benefits implicates 42 USC 407(a), which provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Defendant cites *Biondo v Biondo*, 291 Mich App 720, ___; ___ NW2d ___ (2011), in which this Court concluded that 42 USC 407(a) preempted a provision in a divorce judgment that required the parties to "equalize their social security benefits." *Id.*, slip op p 1. Defendant seeks an

[1] On remand, in the absence of an agreement on the amounts paid and received so the trial court can definitively ascertain a situation of overpayment from duplication of benefits and the relationship of the net benefits received by defendant to the no-fault work loss benefits rate, an evidentiary hearing will be required. Defendant's monthly benefit amount from all sources, plus defendant's earned wages, must equal the mandatory no-fault monthly rate.

extension of the reasoning in *Biondo* and a conclusion that 42 USC 407(a) preempts any application of MCL 500.3109 that would operate to offset the value of social security benefits.

Contrary to defendant's argument, § 407(a) does not preclude an insurer from deducting social security disability benefits from insurance proceeds. *Lamb v Connecticut Gen Life Ins Co*, 643 F2d 108, 109, 111 (CA 3, 1981); see generally *McDaniels v Heckler*, 571 F Supp 880, 884 (D Md, 1983), aff'd 732 F2d 150 (CA 4, 1984) (citing *Lamb* and others). The reduction of non-social security benefits does not implicate § 407(a) because the setoffs from insurance proceeds does not reduce the funds that the recipient receives from social security. *McDaniels*, 571 F Supp at 884. "The level of minimum benefits set by Congress was preserved." *Id*. The same cannot be said of an equalization formula in a divorce judgment such as in *Biondo* where the parties' social security benefits would have been divided between the parties. Therefore, defendant's reliance on *Biondo* is misplaced.

Judgment vacated, and the matter is remanded for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio