# STATE OF MICHIGAN

# COURT OF APPEALS

NANCY TAYLOR,

Plaintiff-Appellant,

v

GREAT LAKES CASUALTY INSURANCE,

Defendant,

and

FRANKENMUTH MUTUAL INSURANCE,

Defendant-Appellee.[1]

UNPUBLISHED
September 19, 2013

No. 308213
Wayne Circuit Court
LC No. 09-023250-NF

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

In this arbitration case, arising from a claim for underinsured motorist benefits, plaintiff appeals as of right the trial court's denial of her motion to set aside the arbitration award. We affirm.

The underlying facts of this case are undisputed. In July 2008, plaintiff was a passenger in a motor vehicle operated by William Ryle when the vehicle was hit from behind by another motor vehicle driven by Susan Smith. As a result of the accident, plaintiff suffered injuries for which she ultimately received social security and long-term disability benefits.

Plaintiff sued defendant seeking underinsured motorist benefits through its policy with Ryle. The case was dismissed and the parties submitted to common-law arbitration. Plaintiff asserted wage-loss benefits far in excess of the $300,000 policy limit, but conceded a $20,000 set-off for her policy limit recovery from Smith's insurance carrier, and requested recovery of $280,000. Defendant claimed that, pursuant to *Park v American Cas Ins Co*, 219 Mich App 62;

[1] Defendant Great Lakes Casualty Insurance is not a party to this appeal, having been dismissed with prejudice by stipulation in March 2011. Therefore, all references throughout this opinion to "defendant" are to Frankenmuth Mutual Insurance.

555 NW2d 720 (1996), it was entitled under the policy to a set-off for all social security and long-term disability benefits plaintiff was receiving and that her maximum recovery would be just over $67,000. The arbitrators ultimately awarded plaintiff $65,000. Plaintiff filed a motion in the trial court to vacate the arbitration award, alleging that the set-offs constituted clear legal error on the face of the award. The trial court denied the motion and entered a judgment for plaintiff for $65,000. Plaintiff now appeals.

Judicial review of common law arbitration awards is limited. Courts may vacate an award due to: (1) lack of jurisdiction in the arbitrator; (2) fraud on the part of the arbitrator; (3) fraud on the part of a party; (4) gross unfairness in the conduct of the proceedings; (5) violation of public policy; or (6) want of entirety in the award. *DAIIE v Gavin*, 416 Mich 407, 441; 331 NW2d 418 (1982); *Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006). In addition, courts may properly review both statutory and common-law arbitration awards for an error of law where that error "clearly appears on the face of the award." *Gavin*, 416 Mich at 443.

> Reviewing courts should focus upon the materiality of the legal error to test whether judicial disapproval is warranted, and not upon the question whether the rule of law was so well settled, widely known, or easily understood that the arbitrators should have known of it. Arbitrators are not necessarily trained in the law and are men and women of varying ability and expertise. [*Id.* at 443-444.]

We agree with plaintiff that, if the application of *Park* was erroneous, it is apparent on the face of the award. There is no question that, but for the application of *Park*, the award would have been substantially different. *Id.* at 444. Thus, the question before us is whether the arbitrators properly granted defendant the set-offs for plaintiff's social security and long-term disability benefits. We hold that they did.

The language at issue in the relevant policy is, "Any amount otherwise payable for damages under this coverage shall be reduced by . . . [a]ll sums paid or payable because of the bodily injury under any workers' compensation, disability benefits law or any similar law."

In *Park*, where this Court held that this type of set-off was appropriate, the policy language was similar, but not identical:

> "2. Any amount payable under this coverage shall be reduced by:
>
> a. All sums paid or payable under any workers' compensation, disability benefits or similar law." [*Park*, 219 Mich App at 69.]

Plaintiff argues that *Park* is not applicable because the language considered by this Court did not include the limiting term "because of the bodily injury." Rather, plaintiff asserts, the applicable precedent was *Bradley v Mid-Century Ins Co*, 409 Mich 1; 294 NW2d 141 (1980). We disagree. Although the policy language considered in *Bradley* does include the modifier "because of bodily injury," *Bradley* was not considering set-offs for social security or disability benefits. Rather, the insurers were arguing that the policy authorized "the subtraction of amounts paid for no-fault benefits from the policy limits of uninsured motorist protection without regard to the

total damages which would be payable by the uninsured motorist or the nature of those damages, economic or non-economic." *Id.* at 60-61.

Furthermore, even if *Bradley* had been considering the same type of set-off at issue here and in *Park*, the *Bradley* opinion relied heavily on the rule of reasonable expectations, see, e.g., *id.* at 63, and that portion of the opinion was overruled by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63; 664 NW2d 776 (2003) ("[W]e hold that the rule of reasonable expectations has no application in Michigan, and those cases that recognized this doctrine are to that extent overruled.").

By contrast, *Park* discussed precisely the issue present in this case—"whether worker's compensation and social security disability benefits are economic losses that an insurer is entitled to set off from uninsured motorist coverage as a matter of public policy"—and concluded that the insurer was entitled to the set-off. *Park*, 219 Mich App at 72-73. Moreover, the opinion did not rely solely on the language of the contract, but noted that the Uniform Motor Vehicle Accident Reparations Act of 1972 provided for subtraction of worker's compensation and social security benefits when calculating net loss and, "[b]ecause the Michigan no-fault act was premised on the uniform act, it follows that plaintiff should not be permitted twice to recover for his economic damages." *Id.* at 76-77 (citation omitted).

Nevertheless, even if we were to ignore the policy argument from *Park*, we would reach the same result because we conclude that the inclusion of the language "because of the bodily injury" in the relevant policy does not alter the result from *Park*. Under the policy at issue, defendant was entitled to a set-off of "[a]ll sums paid or payable because of the bodily injury under any workers' compensation, disability benefits law or any similar law." It was the existence of "the bodily injury" that entitled plaintiff to benefits under the policy in the first place. Thus, only the workers' compensation, disability, or other benefits attributable to "the bodily injury" permitted a set-off. Presumably, if plaintiff were receiving benefits for an injury or illness completely unrelated to the injuries caused by the accident, defendant would not be entitled to a set-off. However, where there is no argument that the social security and long-term disability benefits plaintiff receives are not "because of the bodily injury," defendant was entitled to the set-off.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kurtis T. Wilder
/s/ Donald S. Owens