[Cite as *Fickes v. Kirk*, 2007-Ohio-6011.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

OLGA L. FICKES, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2006-T-0094**
- vs -	:	
ROSE M. KIRK,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 04 CV 490.

Judgment: Affirmed.

James L. Pazol, Anzellotti, Sperling, Pazol & Small Co., L.P.A., 21 North Wickliffe Circle, Youngstown, OH 44515 (For Plaintiffs-Appellants).

Roger H. Williams and *Josphua R. Angelotta*, Williams, Sennett & Scully Co., L.P.A., 2241 Pinnacle Parkway, Twinsburg, OH 44087 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Appellants, Olga L. Fickes and Larry V. Fickes, II, appeal from judgment entries of the Trumbull County Court of Common Pleas; the first granting appellee, Rose M. Kirk, setoff in the amount of $7,407.24, and the second, amending the prior judgment entry based on a jury verdict to account for that difference in the jury's award.

{¶2} This case arises from an accident occurring on April 3, 2002, in a Walmart parking lot, in which Kirk's vehicle struck Mrs. Fickes' vehicle after allegedly failing to yield the right of way. Kirk was insured by State Farm, while the Fickes' carrier was Nationwide.

{¶3} On February 27, 2004, appellants filed a two count complaint for personal injury and loss of services and consortium. Kirk answered the complaint on April 30, 2004.

{¶4} Nationwide paid $7,407.24 to Mrs. Fickes under the medical payments coverage in her policy. While the instant action was pending, Nationwide informed appellants that it was pursuing inter-company arbitration against State Farm to recover this payment. The arbitration resulted in an award in favor of Nationwide for the aforementioned amount, which was subsequently paid by State Farm.

{¶5} On March 27, 2006, a trial by jury was held on the instant action. On March 29, 2006, the jury rendered a verdict in favor of the Fickes, in the amount of $22,365.00, plus costs.[1] The trial court entered this as a judgment the same day.

{¶6} During post-trial proceedings before the court, appellants moved to tax as costs certain discovery expenses, while Ms. Kirk submitted a brief requesting set-off of the arbitration award in favor of Nationwide against the jury verdict. By judgment entries dated July 28, 2006, the court denied appellants' motion for costs, granted set-off in favor of Kirk, and amended the jury's judgment award to $14,957.76. Appellants timely appealed, assigning the following as error:

{¶7} "The trial court erred to the prejudice of Plaintiff-Appellants when it granted a set off from the judgment of the jury."

{¶8} Appellants raise many arguments in support of their assignment or error. First, they assert that set-off is an affirmative defense governed by Civ.R. 8(C), and argue that since Kirk failed to raise this issue in her answer, it was waived. Second, appellants assert that the record lacks any evidence probative of the alleged arbitration

1. The jury's damage award was broken down as follows: $15,605.00 was awarded for Mrs. Fickes' medical expenses; $1,760.00 was awarded for lost wages; and $5,000.00 was awarded for pain and suffering.

award, and therefore, if such an award exists, it would be unenforceable against them as non-parties to that proceeding. Appellants further argue that since State Farm was not a party to the personal injury case, any arbitration award against it in favor of Mrs. Fickes' insurer is unrelated to the action against Kirk. Finally, appellants argue that the collateral source rule bars set-off of the jury verdict in the amount of the arbitration award.

{¶9} Kirk raises two arguments in defense of the set-off: First, she notes that Ohio law disfavors double recoveries, and argues that the payment from her insurer, State Farm, reimbursing the Fickes' insurer, Nationwide, for its payments under the medical payments portion of her policy, was not from a "collateral" source. Therefore, she argues that the failure to subtract such payment from the jury award would result in a double recovery. Second, Kirk argues that since the standard of review applicable in this case is abuse of discretion, appellants cannot demonstrate that the trial court erred by awarding setoff.

{¶10} Allowance of a setoff is a matter within the sound discretion of the trial court, and the court's decision will not be set aside absent a clear abuse of discretion. *Webster v. Dalcoma Ltd. Partnership Four* (Sep. 17, 2001), 12th Dist. No. CA2000-11-028, 2001 Ohio App. LEXIS 4140, at *9 (citation omitted). An abuse of discretion is more than a mere error of law or judgment, but implies that the court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} In the case sub judice, the only portion of the trial transcript submitted by appellants recounts the closing argument of Kirk's counsel. The relevant insurance policies are not part of the record. The *only* evidence of the arbitration award in the

record is the affidavit of George Capellas, a claims supervisor for State Farm, which was attached to Ms. Kirk's brief in support of the set-off in the trial court.

{¶12} The affidavit from Capellas, averred that State Farm reimbursed Nationwide in the amount of $7,407.24 for a medical payment subrogation claim resulting from Olga Fickes' accident, and that this claim was supported by documentation confirming Fickes' medical expenses. The affidavit and supporting documentation confirmed that the subrogation claim was paid on June 6, 2005.

{¶13} Here, the parties do not dispute that Nationwide paid Mrs. Fickes under the medical payments portion of their insurance contract with Nationwide and that Nationwide recouped the sum from State Farm, Kirk's insurer.

{¶14} It is a well-settled rule of law that "the measure of damages is that which will compensate and make the plaintiff whole." *Pryor v. Webber* (1970), 23 Ohio St.2d 104, at paragraph one of the syllabus. In other words, the law of damages is generally intended to preclude double recovery for an injury. The only exception to this general rule of damages is the collateral source rule, which has been described as "the judicial refusal to credit to the benefit of the wrongdoer money *** received in reparation of the injury *** which emanates from sources other than the wrongdoer." Id. at 107 (citation omitted). "The rationale for the exception *** is that benefits the plaintiff receives from a source *wholly independent* of the wrongdoer should not benefit the wrongdoer by reducing the amount of damages which a plaintiff might otherwise recover ***." *Klosterman v. Fussner* (1994), 99 Ohio App.3d 534, 538 (citation omitted) (emphasis added).

{¶15} As her insurer, State Farm is not wholly independent from Kirk, since "[t]he relationship of insurer to insured is one of privity." *Montecalvo v. Am. Family Ins. Co.*,

11th Dist. No. 2006-T-0074, 2006-Ohio-6881, at ¶9, citing *Suver v. Personal Serv. Ins. Co.* (1984), 11 Ohio St.3d 6, 9.

{¶16} Furthermore, Capellas' affidavit is competent, credible evidence of State Farm's payment under the policy on Kirk's behalf. "If there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion." *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403 (citation omitted).

{¶17} Although appellants are correct that the med pay coverage portion in an insurance policy is different from liability coverage, in that payment is not *necessarily* conditioned upon the negligence of the insured, it does not logically follow that such coverage is *always* considered a source collateral to the policy. *Montecalvo*, 2006-Ohio-6881, at ¶¶13-15.

{¶18} It is true that Evid.R. 411 prohibits the admission of "[e]vidence that a person was *** insured against liability *** upon the issue of whether he acted negligently or wrongfully." However, in the instant case, the evidence of the insurance payment was not admitted to establish liability; rather, it was only admitted to establish a setoff *after* the jury had returned its verdict. Motions for setoff of a jury's verdict are routinely considered by courts. See e.g., *Leisure v. State Farm Mut. Auto. Ins. Co.* 5th Dist. No. 2002CA00277, 2002CA00313 & 2002CA00330, 2003-Ohio-2491 at ¶6.

{¶19} An appellant bears the burden of showing error by reference to matters in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Here, appellants have failed to provide any evidence, in the form of a transcript or copies of the relevant insurance policies, to show that the med pay coverage came from a source "wholly independent" of Kirk as "the wrongdoer." Without additional evidence on the record, we cannot pass on the issue of whether the collateral source rule was invoked in this particular case. When portions of the record "necessary for resolution of assigned

errors are omitted *** the reviewing court has nothing to pass upon and thus, *** has no choice but to presume the validity of the lower court's proceedings, and affirm." Id.

{¶20} Appellants' sole assignment of error is without merit. We affirm the judgment of the Trumbull County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶21} The Fickes raise many arguments in support of their assignment. They assert that set-off is an affirmative defense governed by Civ.R. 8(C), which Ms. Kirk waived by failing to raise in her answer. They maintain both that the record lacks any evidence probative of the alleged arbitration award, and that such an award would be unenforceable against them, since they were not parties to any arbitration proceedings. They note that State Farm was not a party to this action, and contend that any arbitration award against it in favor of Mrs. Fickes' insurer is unrelated to their tort action against Ms. Kirk. They allege that the collateral source rule bars set-off of the arbitration award.

{¶22} Ms. Kirk raises two arguments in defense of the set-off. First, she notes that Ohio law disfavors double recoveries. Since her insurer, State Farm, has allegedly reimbursed the Fickes' insurer, Nationwide, for its payments under the medical payments coverage of the Fickes' policy, she argues that failure to subtract that payment from the jury award would result in a double recovery. Second, Ms. Kirk

alleges that the standard of review applicable in this case is abuse of discretion, and that the Fickes cannot cross that high hurdle.

{¶23} We are somewhat constrained in our review of this case due to the paucity of the record. The only portion of the trial transcript before us recounts the closing argument of Ms. Kirk's counsel. The relevant insurance policies are not in the record. There is, however, the affidavit of George Capellos, a claims supervisor for State Farm, attached to Ms. Kirk's brief in support of the set-off in the trial court. Most significant, however, is the absence of a release from the Fickes to State Farm. This is dispositive.

{¶24} It is black letter law in Ohio that insurance is generally not even to be mentioned in front of a jury in liability cases such as this. The appropriate method for resolving matters such as the offset of medical payments is, either by stipulation of the parties; or, when that is not possible, by post-trial motion under Civ.R. 60(B). See, e.g., *Peters v. Malone*, 4th Dist. No. 03CA23, 2004-Ohio-3327. In the latter situation, the evidence pertaining to offset must be such as to warrant relief from judgment. Cf. Id. at ¶18-20.

{¶25} Consequently, we should treat the post-trial proceedings in this case as having been made under Civ.R. 60(B). We review such proceedings for abuse of discretion. *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, at ¶24. Abuse of discretion connotes more than an error of law or judgment; it means the trial court's attitude was unreasonable, arbitrary, or unconscionable. Id.

{¶26} The parties do not dispute that Nationwide paid the Fickes under the medical payments portion of their insurance contract with Nationwide; and that Nationwide recouped the sum paid from State Farm, Ms. Kirk's insurer. It is well-recognized that the medical payments portion of an insurance policy is different than the liability portion. Cf. *Montecalvo v. Am. Family Ins. Co.*, 11th Dist. No. 2006-T-0074,

2006-Ohio-6881, at ¶12. The premium is generally separate; the coverage is not necessarily premised on a finding of liability; and the coverage is payable to the injured party, or the person paying covered medical expenses. Cf. Id.

{¶27} I find the opinion of the Fourth District in *Peters*, supra, persuasive. In that case, appellee was injured while riding in appellant's truck. Id. at ¶1. Prior to trial, appellant's insurer paid appellee under the medical payments portion of its policy. Id. at ¶3. Following entry of a verdict in favor of appellee, appellant's insurer paid appellee the judgment, less the amount previously paid her under the medical payments coverage, and requested she file a satisfaction of judgment, which she refused to do. Id. In post-trial proceedings under Civ.R. 60(B), the trial court refused the request of appellant's insurer that its payments to appellee under the medical payments coverage be deducted from the judgment rendered at trial. Id. at ¶4-5.

{¶28} On appeal, the Fourth District affirmed. It held that appellee was, in effect, a third-party beneficiary of the medical payments portion of appellant's insurance contract, but not a third-party beneficiary of the liability portion, which inured solely to the benefit of the insured tortfeasor. *Peters* at ¶9-12. The court held that, absent some contractual agreement by appellee to deduct medical payments from any liability award in her favor, she could not be required to reimburse these payments to appellant's insurer. Id. at ¶13-16.

{¶29} The situation in this case resembles that presented in *Peters*. Ultimately (through the instrumentality of its arbitration with the Fickes insurer), the tortfeasor's insurer made medical payments to the Fickes. But, it never obtained an agreement, or release, from the Fickes, specifying that such payments would be offset against any liability award. Consequently, there was no evidence before the trial court that the Fickes settled their claim for med pay. As such, they were not obligated by the contract

to repay the amounts they received as medical payments; and the trial court abused its discretion by offsetting those payments against the jury verdict.

{¶30} Respectfully, I dissent.