

STATE OF MICHIGAN
COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v

HARRY EVERSMAN, BONNIE EVERSMAN and
CHRISTINA EVERSMAN, a minor, by her next
friend BONNIE EVERSMAN,

Defendants-Appellees.

UNPUBLISHED

July 30, 1996

No. 181214

LC No. 94-16904-CK

Before: Doctoroff, CJ., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff Auto-Owners Insurance Company appeals the circuit court order denying plaintiff's motion for summary disposition and granting defendants motion for summary disposition. We reverse and remand.

At issue in this case is the effect of plaintiff's reservation of the right to seek reimbursement of \$38,334.40 in social security disability benefits that plaintiff did not set off against no-fault wage loss benefits paid to defendant Harry Eversman following his injury and subsequent disability after he was struck by a car. Although reimbursement would be proper under *Profit v Citizens Ins Co of America*, 444 Mich 281; 506 NW2d 514 (1993) (*Profit II*), the circuit court determined that *Profit II* created a new rule of law that was to be treated prospectively only. The circuit court erred in its decision.

A rule of law is 'new' "either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision." *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982). The issue of whether social security disability benefits were subject to mandatory subtraction from wage loss benefits was not an issue of first impression. See *Thompson v Detroit Automobile Inter-Insurance Exchange*, 418 Mich 610; 344 NW2d 764 (1984). Moreover, our Supreme Court in *Profit II, supra*, made clear that it was

following past precedent in ruling that the benefits are subject to mandatory set off. *Profit II, supra* at 288. Because *Profit II* did not decide an issue of first impression or overrule clear precedent, it did not announce a new rule of law. Accordingly, the trial court erred in applying *Profit II* prospectively only. *Phillips, supra*.

There is no evidence that plaintiff did not proceed in good faith, by reserving its rights for later enforcement, and paying the benefits without setoff as required by the then-controlling decision in *Profit v Citizens Ins Co*, 187 Mich App 55; 466 NW2d 354 (1991), rev'd 444 Mich 281 (1993) (*Profit I*). Accordingly, we remand to the trial court for entry of summary disposition in favor of plaintiff. However, as suggested by plaintiff's counsel during argument below on the motion for summary disposition, we limit plaintiff's recovery of the \$38,334.40 to the lump-sum retroactive workers' compensation award that defendants expect to receive.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Roman S. Gibbs