[Cite as *Captain v. United Ohio Ins. Co.*, 2010-Ohio-2691.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

CHARLES F. CAPTAIN, III, et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	Case No. 09CA14
v.	:	
	:	DECISION AND JUDGMENT ENTRY
UNITED OHIO INSURANCE COMPANY,	:	
	:	**Released 6/3/10**
Defendant-Appellee.	:	

APPEARANCES:

Richard W. Schulte and Stephen D. Behnke, BEHNKE, MARTIN & SCHULTE, Dayton, Ohio, for appellants.

Stephen V. Freeze, FREUND, FREEZE & ARNOLD, LLP, Dayton, Ohio, for appellee.

Harsha, J.

{¶1} James Willey caused an accident that killed Terry Everhart and Frederick Warner Waddell, Jr. and seriously injured Johnnie Harp and Charles Captain, III. Willey had state minimum liability insurance coverage through United Ohio Insurance Company ("United Ohio"). Rather than negotiating with the injured parties, the company filed an interpleader action and deposited the $25,000 policy limit into a court registry. United Ohio also obtained a declaratory judgment discharging its duty to defend Willey. After the court distributed the money to the four injured parties or their estates, Everhart's estate and Captain obtained excess judgments against Willey even though United Ohio continued to defend him. Willey then purportedly assigned to Captain and Everhart's estate his right to bring a bad faith action against United Ohio. Then Willey, Captain, and Everhart's estate (collectively, the "Appellants") filed this action, arguing

that United Ohio acted in bad faith when it 1.) filed the interpleader action instead of negotiating a settlement protecting Willey from excess judgments; and 2.) failed to provide Willey with independent counsel during the declaratory judgment action. Now they appeal the trial court's decision granting summary judgment to United Ohio.

{¶2} The Appellants contend that the trial court applied the wrong legal standard in deciding that United Ohio was entitled to judgment as matter of law. They essentially argue that the court failed to consider whether they opposed United Ohio's summary judgment motion with evidence tending to show the company lacked a "reasonable justification" for its actions. Instead, the Appellants claim the court created a per se rule that insurers never act in bad faith by filing an interpleader action – even if they make no effort to obtain releases protecting their insured from excess liability. It is unclear what standard the court used. We assume, without deciding, that the court erred by applying a per se rule instead of evaluating the evidence from a reasonable justification standpoint. However, this error is harmless because, as we note in the next two paragraphs, the Appellants failed to produce any summary judgment evidence that would have created a triable issue of fact under the reasonable justification standard.

{¶3} The Appellants argue that genuine issues of material fact remain concerning whether United Ohio acted in bad faith. First, they claim summary judgment evidence creates a genuine issue about whether United Ohio could have negotiated a global settlement, i.e. a comprehensive settlement with all four claimants. Specifically, they argue that the claimants would have signed releases for a share of the insurance proceeds because it was economically impractical to pursue an excess judgment against Willey, who had few or no assets. But even if we accept this argument as fact,

it substantiates United Ohio's position. The company felt interpleader was appropriate because: 1.) the damages far exceeded the policy limits; 2.) uncontroverted evidence showed that the claimants "seemed to be relatively hostile toward the company"; and 3.) so long as the claimants received an equitable share of the insurance proceeds, they were unlikely to pursue litigation against a judgment proof tortfeasor – even without signing releases. Thus, the Appellants' summary judgment evidence does not create a genuine issue of material fact about whether the company lacked a reasonable justification for filing the interpleader action.

{¶4} The Appellants also contend that United Ohio acted in bad faith by filing the declaratory judgment action without providing Willey independent counsel to protect his interests. They argue that by filing the action, United Ohio tried to abandon Willey in order to avoid defense costs. But United Ohio's attorney thought the policy language supported the declaratory judgment action, i.e. the company's duty to defend ended when it paid the policy limits into the court registry. Moreover, given the unlikelihood that the claimants would pursue excess judgments, United Ohio did not anticipate that Willey would have defense costs after the interpleaded funds were distributed. And when Captain and Everhart's estate filed cross-claims, United Ohio defended Willey. The Appellants' summary judgment evidence does not create a genuine issue of material fact about whether the company lacked a reasonable justification for its handling of the declaratory judgment action. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶5} The relevant facts of the case are undisputed. James Willey was driving

an automobile owned by his mother, Stephanie Bales, in Highland County, Ohio. Willey crossed the center line and struck another vehicle. Two of Willey's passengers, Everhart and Waddell, died from their resulting injuries. Willey's third passenger, Captain, suffered permanent brain damage. Willey and the driver of the other vehicle, Harp, also sustained serious injuries in the accident.

{¶6} United Ohio insured Willey under an automobile insurance policy his mother obtained. The policy provided Willey with the state minimum coverage for bodily injury liability, i.e. $12,500 per person/$25,000 per incident. See R.C. 4509.101(A)(1); R.C. 4509.01(K). The insurance contract provided in part that:

> [United Ohio] will pay damages for **bodily injury** * * * that any **insured** becomes legally responsible because of an auto accident [sic]. * * * We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted by payments of judgments or settlements. We have no duty to defend any suit or settle any claim for bodily injury * * * not covered under this policy.

{¶7} Steven Calvert, a United Ohio claims manager, was primarily responsible for handling the company's accident file. He concluded that Willey was the at-fault driver and that the accident damages greatly exceeded Willey's coverage. At his deposition, Calvert testified that he "frequently" received phone calls from individuals involved in the claim. The general tone of the calls was "we got these bills, when are we going to get paid, when are you going to pay us?" Calvert testified that in his conversations with the parties to the claim, "they seemed to be relatively hostile toward the company." When he explained to Waddell's father and April Phipps, Captain's sister, that United Ohio's coverage totaled $25,000, "both of them became agitated." Calvert also testified that the father of either Everhart or Waddell cursed him out over

the phone.

{¶8} Based on the tone of these conversations, the serious nature of the injuries involved, and the low policy limit, Calvert did not believe that United Ohio "stood a very good chance of a claims manager tendering an offer that would be accepted." He hired attorney Dennis VanHouten to file a Civ.R. 22 interpleader action. Calvert "thought the best way would be to tender the money to the court and let the court make the decision how the funds should be distributed fairly." He believed the claimants would "be more acceptable to having a court make [the] determination" of how to distribute the $25,000. And he thought interpleader "would be a quick way to resolve [the matter] for [the] policyholder and potentially avoid any unnecessary litigation."

{¶9} By letter, Calvert advised Bales and Willey of the "potential for excess liability [exposure]" from the accident and of their right to hire counsel to protect their personal interest. Calvert explained the company's intention to file an interpleader action and United Ohio's hope that it could "distribute the funds and extinguish the claims against [them]." He cautioned them that there was no guarantee the claimants would accept the court's distribution without pursuing excess liability claims against them personally. Calvert also asked them to ascertain whether Willey had insurance coverage from any additional sources; Willey did not.

{¶10} VanHouten similarly advised Bales and Willey. In addition, he informed them that a potential conflict of interest existed because of the "low amounts of coverage for this case." He also advised them to seek advice from personal counsel on the potential conflict, which they did not do for financial reasons.

{¶11} Eventually, United Ohio filed a complaint for interpleader and declaratory

relief in Highland County Common Pleas Court case number 04CV032, naming Willey, Captain, Harp, and the administrator or executor for the estates of Everhart and Waddell as defendants. United Ohio sought to deposit the $25,000 policy limit with the court and have the court (1) issue an order allocating the money to the appropriate persons, and (2) issue an order discharging United Ohio "from any obligation to make further payments under the liability provisions of the policy * * * and to further defend James Willey[.]" VanHouten testified that he thought the interpleader action would extinguish the claims against Willey. He thought the claimants knew "that [Willey] didn't have much, if at all[,]" so he did not think they would seek excess judgments. He also thought the policy language supported the declaratory judgment action.

{¶12} After Harp and the estates of Everhart and Waddell filed Answers, United Ohio tendered the $25,000 to the court's registry. Next, the court dismissed United Ohio from the suit "with prejudice" and found that the company's "duties to defend and indemnify James Willey and/or Stephanie Bales have been discharged."

{¶13} Then, over United Ohio's objection, the trial court allowed Captain to file a belated Answer to the complaint for interpleader and declaratory relief. He also filed a cross-claim against Willey seeking $1,000,000 in damages. Before the trial court ruled on this cross-claim, the claimants agreed on a distribution of the interpleaded funds. After the court adopted this agreement, Captain and the estates of Waddell and Everhart each received $7,000, and Harp received $4,000.

{¶14} Next, Everhart's estate also filed a cross-claim against Willey seeking a judgment in excess of $25,000. Bruce Curry, the attorney United Ohio hired to defend Willey in the cross-claims, unsuccessfully sought releases from Captain and Everhart's

estate. Their attorneys, John Smalley and Ray Critchett, respectively, explained that their clients had no incentive to sign a release. Willey previously had little or no assets. But Smalley and Critchett felt that based on the way United Ohio handled the interpleader and declaratory judgment action, Willey now had a valuable bad faith claim against the company that could be used to compensate their clients. After a trial on the cross-claims, the court awarded Captain $1,200,000 and the estate $1,000,000. At some point, Willey purportedly assigned his right to make a bad faith claim against United Ohio to Captain and Everhart's estate.

{¶15} Finally, Willey, Captain, and Everhart's estate filed a complaint in the Hamilton County Common Pleas Court alleging that United Ohio acted in bad faith, resulting in the excess judgments against Willey. Subsequently, the Hamilton County court transferred the case to the Highland County Common Pleas Court on the Appellants' motion. After the parties conducted a number of depositions, United Ohio filed a motion for summary judgment.

{¶16} United Ohio denied acting in bad faith, argued that res judicata barred the Appellants' claims, and claimed that Willey failed to properly assign his right to make a bad faith claim to Everhart's estate and Captain. In response, the Appellants argued that United Ohio acted in bad faith by filing the interpleader action without making any attempt to negotiate a settlement and by filing the declaratory judgment action without providing Willey independent counsel. They also claimed that the assignment was valid and that res judicata did not defeat their claims.

{¶17} The trial court found that the case "could not settle, with releases, prior to the interpleader action" and that United Ohio did not act in bad faith by filing the action.

The court explained that "[a]n interpleader action is a recognized appropriate action for an insurance company to file when the claims exceed its policy limits." Additionally, the court found that United Ohio's failure to obtain releases of its insured did not amount to bad faith. The court explained that in an interpleader action, the trial court has full control of the funds. And because United Ohio had no control over the interpleaded funds, it could not have bargained for releases. The court also found that United Ohio did not abandon Willey during or after the interpleader action. The court did not address United Ohio's arguments about the validity of the assignment or the doctrine of res judicata.

{¶18} After the trial court granted United Ohio's motion for summary judgment, this appeal followed.

II. Assignments of Error

{¶19} Appellants presents the following assignments of error for our review:

> Assignment of Error 1: The trial [c]ourt erred in granting summary judgment in favor of United Ohio when there was substantial, credible evidence upon which reasonable minds can find that United Ohio Insurance Company acted in bad faith including, but not limited to, direct expert testimony.
>
> Assignment of Error 2: The lower court erred in finding as a matter of law that a company may file an interpleader action without attempting to obtain releases for its insured.
>
> Assignment of Error 3: The lower [c]ourt erred in granting summary judgment when United Ohio Insurance Company's acts and omissions, including but not limited to paying insurance proceeds without securing a release, failing to investigate the availability of underinsured motorist coverage for the claimants which would have assured that a release would have been obtained, and failing to provide independent counsel to its insured[ ] for the interpleader lawsuit evidenced bad faith handling of its [insured's] claim.

III. Standard of Review

{¶20} When reviewing a trial court's decision on a summary judgment motion, we conduct a de novo review. *Timberlake v. Sayre*, Scioto App. No. 09CA3269, 2009-Ohio-6005, at ¶17, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, we must independently review the record to determine whether summary judgment was appropriate and do not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153. Summary judgment is appropriate when the movant has established: (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party, with the evidence against that party being construed most strongly in its favor, and (3) the moving party is entitled to judgment as a matter of law. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. See Civ.R. 56(C).

{¶21} The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 1996-Ohio-107, 662 N.E.2d 264. To meet its burden, the moving party must specifically refer to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any," which affirmatively demonstrate that the non-moving party has no evidence to support the non-moving party's claims. Civ.R. 56(C); See, also, *Hansen v. Wal-Mart Stores, Inc.*, Ross App. No. 07CA2990, 2008-Ohio-2477, at ¶8. Once the movant supports the motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by

affidavit or as otherwise provided in [Civ.R. 56], must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). "If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Id.

IV. Standard for Bad Faith Claims

A. Reasonable Justification

{¶22} "[A]n insurer has the duty to act in good faith in the handling and payment of the claims of its insured." *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 452 N.E.2d 1315, at paragraph one of the syllabus, following and extending *Hart v. Mut. Ins. Co.* (1949), 152 Ohio St. 185, 87 N.E.2d 347. A breach of this duty gives rise to a tort action. Id. In a "bad faith" action, the insurer's liability is not dependent on a breach of the insurance contract. Id. at 276. "Rather, the liability arises from the breach of the positive legal duty imposed by law due to the relationships of the parties." Id.

{¶23} Here, it is undisputed that United Ohio fulfilled its obligation to indemnify Willey and defend him against third-party claims. However, the Appellants argue that United Ohio acted in bad faith when it filed the interpleader action. They claim that the company could have negotiated a global settlement that distributed the insurance money among the claimants in exchange for releases that would have protected Willey from the excess judgments Everhart's estate and Captain obtained. They also contend that United Ohio acted in bad faith when it filed the declaratory judgment action without providing Willey independent counsel.

{¶24} We have found no Ohio precedent that discusses the requirements for a successful bad faith action based on the unique allegations made in this case. Much of the caselaw deals with the insurer's refusal to settle a claim or failure to defend its

insured in an action brought by a third-party. However, we believe the appropriate inquiry is whether United Ohio lacked a reasonable justification for its actions (or inaction) in handling the claims against Willey.

{¶25} In *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397, the insured's barn was destroyed in a fire. He brought a first-party claim against his insurance company, alleging the company acted in bad faith by refusing to pay his claim after it concluded that he participated in setting the fire. In determining the appropriate standard for a bad faith claim, the Court noted that in *Motorists Mut. Ins. Co. v. Said,* 63 Ohio St.3d 690, 1992-Ohio-94, 590 N.E.2d 1228, at paragraph three of the syllabus (emphasis added), it held that:

> A cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by *intentionally* refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with *actual knowledge* of that fact or (2) an *intentional* failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim.

Zoppo at 554.

{¶26} The *Zoppo* Court went on to find that:

> Rather than clarify the standard of proof required in the area of bad faith litigation as the *Said* decision set out to do, this court has caused greater confusion by erroneously making intent an element of the tort of bad faith.
>
> Until *Said*, the element of intent had been notably absent from this court's definition of when an insurer acts in bad faith. In fact, with the exception of *Said* and the four-to-three decision of *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 21 O.O.2d 420, 187 N.E.2d 45, over the past forty-five years this court has consistently applied the "reasonable justification" standard to bad faith cases. According to this standard, first announced in 1949 in the case of *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 39 O.O. 465, 87 N.E.2d 347, and reaffirmed in *Hoskins*

> *v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 6 OBR 337, 452 N.E.2d 1315, and *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, 525 N.E.2d 783, "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Id.* at 303, 525 N.E.2d at 788. Intent is *not* and has never been an element of the reasonable justification standard. Hence, in deciding *Said*, supra, and in relying upon the erroneous *Slater* decision, this court departed from forty-five years of precedent.

Id. at 554-555. The Court concluded that "[a]n insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo* at paragraph one of the syllabus, citing with approval and following *Hart* and *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, 525 N.E.2d 783. Thus, the Court overruled *Slater* at paragraph two of the syllabus and overruled *Said* to the extent it was inconsistent with *Zoppo.* Id.

{¶27} Notably, in *Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630, 1996-Ohio-101, 665 N.E.2d 664, the Court applied the wrongful intent standard from *Said* to a claim that an insurer acted in bad faith by failing to defend its insureds against a third-party claim. *Roberts* at 633. The Court explained that it "decline[d] to extend *Zoppo* to this particular case of bad faith failure to defend, as *Zoppo* was decided after the trial court's and court of appeals' decisions in this case. This case has been litigated for over ten years and should come to final resolution before this court." Id. The Court indicated that it would "leave it open as to whether *Zoppo* may be applied to future cases." Id. at 633, fn. 1. Thus, although the Court declined to remand *Roberts* for a determination under the reasonable justification standard, it did not endorse the continued use of the *Said* intent-based standard in certain bad faith cases.

{¶28} Since *Roberts*, the Supreme Court of Ohio has not considered whether the *Zoppo* reasonable justification standard applies to bad faith "duty to defend" cases. However, several Ohio appellate courts have extended the reasonable justification standard to such cases. See *Chiropractic Clinic of Solon, Inc. v. Natl. Chiropractic Mut. Ins. Co.* (Dec. 10, 1998), Cuyahoga App. No. 73584, 1998 WL 855623; *American States Ins. Co. v. Sovereign Chemical Co.*, Summit App. No. 20794, 2002-Ohio-3180; *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381, 787 N.E.2d 82, at ¶28.

{¶29} Thus it appears that with *Zoppo*, the Court intended to move away from an intent-based standard and resume use of the "reasonable justification" standard in bad faith cases – regardless of whether the allegations are predicated on the insurer's refusal to pay a claim, refusal to defend its insured against a third-party claim, or other action or inaction in handling a claim. Therefore, we conclude that the "reasonable justification" standard applies to the particular allegations made in this case. So to prevail on their bad faith claim, the Appellants would ultimately have to show that United Ohio lacked a reasonable justification for the manner in which it handled the claims against Willey.

{¶30} An insurer lacks reasonable justification when it acts in an arbitrary or capricious manner. *Hoskins*, supra, at 277, citing *Hart*, supra, at 188. Thus, to withstand United Ohio's properly supported motion for summary judgment, the Appellants had to oppose the motion with evidence tending to show United Ohio arbitrarily or capriciously handled the claims against Willey. The term "arbitrary" means "without fair, solid, and substantial cause and without reason given; without any

reasonable cause; * * * fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." *4D Investments, Inc. v. City of Oxford* (Jan. 11, 1999), Warren App. No. CA98-04-082, 1999 WL 8357, at *2, quoting *Thomas v. Mills* (1927), 117 Ohio St. 114, 121, 157 N.E. 488. Similarly, "caprice" is defined as: "Whim, arbitrary, seemingly unfounded motivation * * *." Id., quoting Black's Law Dictionary (5 Ed.Rev.1979) 192.

B. Creation of a Per Se Rule

{¶31} In their second assignment of error, the Appellants contend that the trial court erred in finding "as a matter of law that * * * a company may file an interpleader action without attempting to obtain releases for its insured." They essentially argue that the court utilized an improper legal standard to decide United Ohio's summary judgment motion, i.e. it adopted a per se rule that filing an interpleader action is not bad faith. Instead, they argue the court should have considered whether the Appellants' opposed the summary judgment motion with evidence tending to show United Ohio lacked a reasonable justification for its actions. Appellants claim that this per se rule is bad public policy because it allows an insurance company to file an interpleader action, deposit the policy limit into the court's registry, and abandon its insured.

{¶32} The trial court did not explicitly find that insurance companies always act in good faith when filing interpleader actions. However, the court's decision is ambiguous. The court specifically found that this case "could not settle, with releases, prior to the interpleader action" – a finding that is relevant to whether United Ohio had a

reasonable justification for its actions. However, the court never mentions the reasonable justification standard in its decision. And the court found that "[a]n interpleader action is a recognized appropriate action for an insurance company to file when the claims exceed[ ] its policy limits" before finding that "[a]s a matter of law, there was no bad faith in filing the interpleader action." So its decision could be read as creating a rule that filing an interpleader action is not bad faith when the potential claims exceed the policy limit. Thus, we will assume, without deciding, that the trial court erred to the extent that it adopted a per se rule and failed to consider whether the Appellants opposed the summary judgment motion with evidence tending to show United Ohio acted in an arbitrary or capricious manner. However, we conclude that error was harmless.

{¶33} "[W]hen a trial court has stated an erroneous basis for its judgment, an appellate court must affirm the judgment if it is legally correct on other grounds, that is, it achieves the right result for the wrong reason, because such an error is not prejudicial." *State v. Sebastian*, Highland App. No. 08CA19, 2009-Ohio-3117, at ¶25, quoting *Reynolds v. Budzik* (1999), 134 Ohio App.3d 844, 846, fn.3, 732 N.E.2d 485. Here, the Appellants failed to put forth summary judgment evidence creating a genuine issue of material fact as to whether United Ohio lacked reasonable justification for its actions, thus United Ohio was entitled to judgment as a matter of law. See our discussion below of the first and third assignments of error where we conclude the Appellants failed to meet their burden under Civ.R. 56. Therefore, although we assume the trial court used the wrong legal standard to decide the summary judgment motion, this error did not prejudice the Appellants based upon the state of the summary judgment evidence in the

record before us. Accordingly, we overrule the Appellants' second assignment of error.

V. Bad Faith Analysis

{¶34} In their first and third assignments of error, the Appellants contend that they put forward sufficient evidence to create a genuine issue of material fact about whether United Ohio had a reasonable justification for filing the interpleader action. Specifically, the Appellants claim that substantial evidence shows that the company could have negotiated a global settlement that distributed a pro rata share of the insurance money to each claimant in exchange for releases that protected Willey from excess judgments. But instead, the company elected to protect its own interests by filing the interpleader and declaratory judgment action to avoid defense costs.

{¶35} Initially, the Appellants argue that United Ohio could have used the fact that Captain and Hart had underinsured motorist ("UIM") coverage to facilitate a settlement. Appellants suggest that in exchange for releasing Willey from additional liability, Harp and Captain would have accepted $1000 each from Willey's liability policy because they would receive additional money from their UIM carriers, and the estates of Everhart and Waddell could have split the remaining $23,000. But the record does not support a finding that the claimants were amenable to this hypothetical division. The record contains no deposition testimony or affidavits from two of the claimants – the administrator of Waddell's estate and Harp. Moreover, in the interpleader action, all of the claimants agreed to a different division of the insurance proceeds in spite of the presence of UIM coverage.

{¶36} In addition, we disagree with the Appellants' general contention that the presence of UIM coverage simplified negotiations in this matter. UIM coverage protects

an insured for bodily injuries "where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage." R.C. 3937.18(C). It is not "excess coverage to other applicable liability coverages[.]" Id. And the UIM carrier is entitled to a setoff, i.e. the policy limits of UIM coverage "shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured." Id.

{¶37} The Supreme Court of Ohio has found that "[f]or the purpose of setoff, the 'amounts available for payment' language * * * means the amounts actually accessible to and recoverable by an underinsured motorist claimant from all bodily injury liability bonds and insurance policies (including from the tortfeasor's liability carrier)." *Webb v. McCarty*, 114 Ohio St.3d 292, 2007-Ohio-4162, 871 N.E.2d 1164, at ¶4 (plurality opinion), quoting *Littrell v. Wigglesworth*, 91 Ohio St.3d 425, 2001-Ohio-87, 746 N.E.2d 1077, at syllabus. Thus, in a case involving multiple claimants, UIM coverage is "compared to the amount paid under an automobile liability policy, not to the limit of the automobile liability policy." Id., citing *Littell* 428-435. Although *Webb* and *Littrell* interpreted former R.C. 3937.18(A)(2), the provision now appears almost verbatim in R.C. 3937.18(C).

{¶38} Therefore, a UIM carrier has an interest in its insured receiving the maximum amount payable under a tortfeasor's automobile liability policy in order to increase the setoff amount. Although the record does not include copies of the UIM polices Harp and Captain had, such policies frequently contain consent-to-settle or other subrogation-related provisions to protect the UIM carrier's interests. And an

insurer "is released from the obligation to provide UIM coverage when the insurer is prejudiced * * * by the insured's failure to obtain consent to settle prior to the insured's settlement with and release of the tortfeasor." *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, at ¶1.

{¶39} We find it unlikely that a person injured in an accident involving multiple claimants would risk the loss of UIM coverage by agreeing, without the UIM carrier's consent, to release a tortfeasor for a clearly disproportionate share of the liability proceeds to aid claimants who lack UIM coverage. We find it equally unlikely that a UIM carrier would consent to an agreement in such clear conflict with its own fiscal interests. Therefore, we reject the Appellants' contention that United Ohio acted arbitrarily or capriciously by not attempting to orchestrate a settlement using UIM coverage in the manner they propose.

{¶40} Regardless of the presence of UIM coverage, the Appellants claim that United Ohio lacked reasonable justification for filing the interpleader action based on other summary evidence that demonstrates the claimants' willingness to settle. Specifically, they point to the fact that: 1.) Captain and the administrator of Everhart's estate testified that they would have signed releases if their attorneys advised them to do so; and 2.) Smalley and Critchett both testified that they would have advised their clients to sign releases before the interpleader action was filed. Both attorneys explained that given economic realities, it made little sense to spend money litigating a claim against a judgment proof tortfeasor.

{¶41} However, there is no evidence that the claimants expressed any desire to settle to United Ohio before it filed the interpleader action. In fact, Calvert's

uncontroverted testimony was that the parties to the claim "seemed to be relatively hostile toward the company." Specifically, he testified that when he told Waddell's father and Phipps that United Ohio's coverage totaled $25,000, "both of them became agitated." Calvert also testified that the father of either Everhart or Waddell cursed him out over the phone. And contrary to the Appellants' assertion, Calvert's log notes, which briefly summarize his communications related to the claims, do not contradict his testimony simply because the notes omit these details. Calvert could not recall whether he recorded this information.

{¶42} But even if we assume that all of the claimants would have agreed to a global settlement, that fact only reinforces the reasonableness of United Ohio's decision. It is undisputed that Willey has few or no assets. VanHouten testified that he believed the interpleader action would extinguish the claims against Willey. Although VanHouten recognized that an excess judgment was possible, he thought it was unlikely that any of the claimants would sue Willey since he thought they knew "that [Willey] didn't have much, if at all." The Appellants essentially agree with that statement. They argue that the claimants would have preferred signing releases for a share of the insurance money to pursuing expensive litigation to obtain an excess judgment Willey could not pay. Thus, even without signed releases, there was little risk of the claimants filing lawsuits against Willey so long as they obtained a fair share of the $25,000. And presumably, the claimants were satisfied with the distribution as the trial court in the interpleader action adopted their agreement.

{¶43} At its core, Appellants' argument is that United Ohio acted arbitrarily and capriciously by not obtaining releases for its insured, which would have legally

prevented the claimants from suing a person they admittedly had no desire to sue in the first place. But faced with a claim involving: 1.) catastrophic injuries; 2.) woefully inadequate policy limits; 3.) a judgment proof insured; 4.) hostile claimants; and 5.) little risk of lawsuits against the insured so long as the claimants received a fair share of the insurance proceeds, United Ohio had reasonable justification for filing an interpleader action. And the Appellants' summary judgment evidence does not create a genuine issue of material fact about whether United Ohio acted in an arbitrary or capricious manner by filing the action.

{¶44} We acknowledge that the Appellants contend the trial court improperly disregarded the affidavits submitted by their expert witnesses, Smalley and Ralph DeFabio, a former insurance adjuster. Both experts opined that United Ohio acted in bad faith, but they failed to set forth specific facts to support their conclusions. For instance, Smalley principally avers that United Ohio acted in bad faith because a settlement with releases was possible. But as we already explained, even if we accepted such a statement as fact, it enhances the reasonableness of the company's actions. And DeFabio primarily argues that United Ohio's actions must be bad faith because 1.) it is uncommon for an insurance company to release funds without a release, and 2.) the company acted "without any real consideration" for Willey's welfare. But "[c]onclusory allegations are insufficient to overcome a properly supported summary judgment motion." *White v. Turner*, Scioto App. No. 01CA2802, 2002-Ohio-116, 2002 WL 59632, at *4. Therefore, the trial court properly disregarded these affidavits.

{¶45} The Appellants also argue that United Ohio should have retained independent counsel for Willey before filing the interpleader action. According to the

Appellants, "[i]t is abundantly clear that this attorney would have sought other means to obtain releases before turning to an interpleader action." This statement amounts to conjecture. Moreover, we have already determined that United Ohio had a reasonable justification to file the interpleader action. Thus we fail to see how United Ohio acted arbitrarily or capriciously by not hiring an attorney who might have proceeded in a different manner.

{¶46} The Appellants also contend that United Ohio's declaratory judgment action demonstrates its bad faith because it tried to abandon its insured to save on defense costs. They argue that the company should have provided Willey with independent counsel to protect his interests in that action. We are not convinced that an insurance company can extinguish its duty to defend its insured by filing an interpleader action and depositing the policy limits into a court registry. But the mere fact that United Ohio filed the declaratory judgment action without hiring independent counsel for Willey does not make its actions "arbitrary or capricious."

{¶47} When United Ohio filed the action: 1.) no claimant had filed a lawsuit against Willey, so United Ohio had nothing to defend; and 2.) there was little or no risk that the claimants would file a lawsuit against Willey, thus United Ohio did not anticipate that it would have a suit to defend in the future. Moreover, VanHouten testified that he thought the language of Willey's policy provided that United Ohio's duty to defend ended when it paid the policy limits. VanHouten acknowledged that he thought that even if United Ohio obtained a declaration that its duty to defend was discharged, there was "still a conflict in Ohio whether that's true or not[.]" So when the unlikely cross-claims became a reality, it is undisputed that United Ohio defended Willey against those

claims. The Appellants point to no deficiencies in that representation.

{¶48} We conclude that the Appellants failed to put forth summary judgment evidence demonstrating that United Ohio acted arbitrarily or capriciously when it filed the declaratory judgment action without hiring Willey independent counsel. United Ohio's attorney thought that the company might be legally entitled to such a judgment under the insurance contract. Moreover, it was unlikely that Willey would suffer any detriment from the action since it was doubtful that any of the claimants would sue him after the interpleaded funds were disbursed.

{¶49} In sum, the Appellants failed to produce any summary judgment evidence creating a genuine issue of material fact about whether United Ohio lacked a reasonable justification for any its actions. Thus, the trial court correctly found that United Ohio was entitled to judgment as a matter of law. Accordingly, we overrule the Appellants' first and third assignments of error.[1]

Conclusion

{¶50} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[1] We need not address United Ohio's additional arguments that res judicata prevents the Appellants' claims or that Willey failed to properly assign his bad faith action to Captain and Everhart's estate.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.