[Cite as *Clark v. Boddie*, 2004-Ohio-2605.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ALFRED T. CLARK :

Plaintiff-Appellee : C.A. CASE NO. 20339

v. : T.C. NO. 2002-CV-07316

MARK BODDIE, et al. : (Civil Appeal from Common Pleas Court)

Defendants-Appellants :

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OPINION

Rendered on the 21st day of May, 2004.

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CARMINE M. GAROFALO, Atty. Reg. No. 0005818, 131 North Ludlow Street, Suite 1400, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee

ERIC L. DAUBER, Atty. Reg. No. 0063061, 130 West Second Street, Suite 410, Dayton, Ohio 45402
Attorney for Defendant-Appellant Nationwide Insurance Company

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WOLFF, J.

{¶1} This case is before the court on Defendant-Appellant Nationwide Insurance Company's (Nationwide) direct appeal from a December 30, 2003 trial court judgment granting summary judgment in favor of Plaintiff-Appellee Alfred Clark.

{¶2} On November 30, 2001 Clark and Mark Boddie were involved in an

automobile accident allegedly caused by Boddie's negligence. Clark was insured by Nationwide, and his policy carried underinsured/uninsured (UIM) motorist coverage with limits of $12,500 per person and $25,000 per accident. Boddie also had a policy with limits of $12,500/$25,000. Clark filed a lawsuit against Boddie and Nationwide. Clark received Boddie's $12,500 policy limits in settlement of his claims against Boddie, who was then dismissed from the action.

{¶3} Remaining before the trial court was the question of whether Clark was also entitled to UIM coverage from Nationwide. Clark and Nationwide each filed motions for summary judgment. Clark argued that Boddie's $12,500 policy limits were not entirely "amounts available for payment" under R.C. §3937.18(A)(2) due to a $7,112 subrogation lien by the Veterans Administration Medical Center (VA) for medical services provided to Clark. Nationwide, on the other hand, argued that the lien did not reduce the "amounts available for payment" and that because Nationwide's limits were equal to Boddie's, UIM coverage was not available to Clark. The trial court granted summary judgment in favor of Clark, ruling that he was entitled to $7112 in UIM benefits under the Nationwide policy. Nationwide appealed.

{¶4} Nationwide's assignment of error:

{¶5} "THE TRIAL COURT ERRED WHEN IT OVERRULED NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT AND GRANTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND HELD THAT THE PLAINTIFF WAS ENTITLED TO UNDERINSURANCE BENEFITS FROM THE NATIONWIDE AUTOMOBILE INSURANCE POLICY TO THE EXTENT OF THE SUBROGATION LIEN ASSERTED BY THE UNITED STATES OF AMERICA FOR MEDICAL SERVICES PROVIDED TO

THE PLAINTIFF BY THE VETERANS ADMINISTRATION CENTER."

{¶6} Nationwide's only argument on appeal is that the trial court should not have granted summary judgment in favor of Clark. For the following reasons, we hold that when a motorist seeks to claim underinsured motorist proceeds under his own automobile insurance policy after exhausting the limits of the tortfeasor's policy, he is not entitled to a setoff for a statutory subrogation lien resulting from medical services provided on his own behalf. To hold otherwise would cause the motorist to be put into a better position than he would have been in had the tortfeasor been uninsured, contrary to R.C. §3937.18 and public policy. Accordingly, we agree with Nationwide that the trial court erred in granting summary judgment in favor of Clark.

{¶7} Summary judgment pursuant to Civ.R. 56 should be granted only if no genuine issue of fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. When considering a motion for summary judgment, the evidence must be construed in favor of the nonmoving party. Id. Moreover, it is well established that an appellate court reviews summary judgments de novo, independently and without deference to the trial court's determination. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, 641 N.E.2d 265.

{¶8} Relevant to this appeal is R.C. §3937.18(C), which states in part: "If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, 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. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist 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." Emphasis added. Specifically, at issue on appeal is the meaning of the phrase "amounts available for payment" in the last sentence of that statute.

{¶9} Nationwide insists that the trial court incorrectly applied the *Karr v. Borchardt* portion of *Littrell v. Wigglesworth,* 91 Ohio St.3d 425, 2001-Ohio-87. On the other hand, Clark believes that the trial court correctly applied the case law. As we have noted before, *Littrell* disappointingly left us with many unanswered questions in this area of law that "is so filled with contradiction, tortured analysis, and legal confusion that consistent decisions may no longer be possible." *Luckenbill v. Hamilton Mut. Ins. Co.,* Darke App. No. 1524, 2001-Ohio-1465. Not surprisingly, then, subsequent cases have applied *Littrell*, yet reached opposing conclusions. See, e.g., *Mathis v. American Commerce Ins. Co.,* Cuyahoga App. No. 83433, 2004-Ohio-2021; *Mid-American Fire & Casualty Co. v. Broughton,* Belmont App. No. 02 BE 54, 2003-Ohio-5305*; Rucker v. Davis,* Ross App. No. 02CA2670, 2003-Ohio-3192.

{¶10} It must be remembered that "given different fact patterns, the law, as applied to cases with differing facts, will also be different when *all* of the language of R.C. 3937.18 is considered and when R.C. 2125.01 and 2125.02 are factored into the equation." *Savoie v. Grange Mutual Ins. Co.* (1993), 67 Ohio St.3d 500, 510, 620 N.E.2d 809, Douglas, J., concurring. *Littrell* is factually distinguishable from this case. The *Littrell* court held that "expenses and attorney fees are not part of the setoff equation. Such fees are an expense of the insured and should not act, in order to increase underinsured motorist benefits, to reduce the 'amounts available for payment' from the tortfeasor's automobile liability carrier. Conversely, a statutory subrogation lien to Medicare should be considered when determining the amounts available for payment from the tortfeasor. Such a lien is not an expense of an insured." *Littrell,* supra, at 434.

{¶11} Notwithstanding the potential breadth of this quoted passage, we must limit the application of *Littrell* to the factual context within which it arose. *Littrell* involved a wrongful death action in which the insureds were three family members of a deceased automobile accident victim. The Medicare lien was for medical services rendered to the victim rather than to the insureds themselves. However, the Seventh and Eighth District Courts of Appeals have since held that no setoff is warranted for a statutory medical lien incurred as a result of medical services rendered to the insured himself. *Broughton,* supra; *Mathis,* supra, at ¶¶18-19, citing *Littrell,* supra, and *Broughton,* supra. As the *Broughton* court stated, "there is no real distinction between attorney fees, a statutory lien, or the funeral and headstone expenses when these expenses are considered in the abstract. Each is an expense of an insured. <u>The salient question is which insured?</u>" *Broughton,* supra, at ¶15, emphasis added.

{¶12} On the other hand, the Fourth District Court of Appeals, in effect, expanded *Littrell* to include deductions for liens for medical services rendered to the insured. *Rucker,* supra, at ¶20. However, we believe that the *Rucker* court failed to distinguish between liens for medical services rendered to the insured himself as opposed to liens for medical services rendered to a decedent. More significantly, the *Rucker* court failed to address the argument that they were putting the insured into a better position than if he had been injured by an uninsured motorist. Accordingly, we decline to follow *Rucker* and chose instead to follow *Broughton* and *Mathis.*

{¶13} In this case Clark himself received the medical treatments that were the bases of the medical lien. The statutory subrogation lien was an expense of the insured himself, and it must not be used to reduce the "amounts available for payment" from Boddie's insurer. To conclude otherwise would put Clark into a better position than he would have been in if Boddie had been uninsured.

{¶14} Our decision today is in keeping with the well-established policy not to enrich tort victims. The original motivation behind the enactment of R.C. §3937.18 was to assure that a person injured by an underinsured motorist would receive at least the same compensation that he would have received if he was injured by an uninsured motorist. *Clark v. Scarpelli,* 91 Ohio St.3d 271, 275-76, 2001-Ohio-39, citations omitted. However, "the statute was [also] intended to ensure that a person injured by an underinsured motorist should never be afforded greater protection than that which would have been available had the tortfeasor been uninsured." Id. at 276. See, also, *Littrell,* supra, at 430, citations omitted; *Motorist Mut. Ins. Co. v. Andrews,* 65 Ohio St.3d 362, 365, 1992-Ohio-21; R.C. §3937.18(C) ("Underinsured motorist coverage in this

state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident.”). If we were to follow *Rucker,* Clark would be put into a better position than he would have been in had Boddie been uninsured.

{¶15} Accordingly, we hold that when a motorist seeks to claim underinsured motorist proceeds under his own automobile insurance policy after exhausting the limits of the tortfeasor’s policy, he is not entitled to a setoff for a statutory subrogation lien resulting from medical services provided on his own behalf. To hold otherwise would cause the motorist to be put into a better position than he would have been in had the tortfeasor been uninsured, contrary to R.C. §3937.18 and public policy.

{¶16} Therefore, we find that the trial court erred in granting summary judgment in favor of Clark. Boddie’s assignment of error is sustained. The judgment of the trial court will be reversed, and the matter will be remanded for further proceedings consistent with this opinion.

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FAIN, P.J. and GRADY, J., concur.

Copies mailed to:

Carmine M. Garofalo
Eric L. Dauber
Hon. Jeffrey E. Froelich