[Cite as *Lukasiewicz v. Proudfoot Assoc. of Toledo*, 2004-Ohio-5245.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Patrick Lukasiewicz,
Administrator of the Estate of
Georgia Lukasiewicz, et al.

Appellant

v.

Proudfoot Associates
of Toledo, et al.

Appellees

Court of Appeals No. L-03-1296

Trial Court No. CI-02-1707

DECISION AND JUDGMENT ENTRY

Decided: September 24, 2004

* * * * *

Michael J. Zychowicz, for appellant.

James L. Schuler and Allison M. Taylor, for appellees.

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KNEPPER, J.

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas which granted the Grange Mutual Insurance Company's ("Grange") motion for summary judgment against appellant, Patrick Lukasiewicz. In its October 10, 2003, decision, the trial court found that appellant was not entitled to receive underinsured motorist ("UM") coverage from Grange because appellant's share of the settlement with

the tortfeasor's insurer was equal to the limits of UM coverage provided for in his policy with Grange. For the reasons that follow, we reverse the decision of the trial court.

{¶ 2} On September 8, 2000, Georgia Lukasiewicz, appellant's mother, was a pedestrian when she was struck by an automobile driven by Thomas Anderson. Ms. Lukasiewicz died as a result of the collision. Anderson was insured by American Family Insurance ("American Family"). American Family paid $100,000 to Ms. Lukasiewicz's estate in settlement of all claims against Anderson. The $100,000 was allocated by the probate court as follows: $17,900.13 toward medical expenses; $36,123.39 in attorney fees and case expenses; $22,988.09 to appellant; and $22,988.09 to Georgia Lukasiewicz's daughter, Susan Lukasiewicz. Appellant and his sister were equal beneficiaries to their mother's estate.

{¶ 3} Appellant was insured by Grange and had UM coverage limits of $50,000 per person and $100,000 per accident. Appellant and Susan Lukasiewicz brought this action against Grange and others.[1] Appellant sought to recover from Grange $27,011.91,

{¶ 4} representing the difference between his $50,000 UM policy limits and the $22,988.09 he

received from the tortfeasor through his mother's estate. Grange moved for summary judgment, asserting that, pursuant to *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, and

[1]Proudfoot Associates of Toledo, U.S. Utility, Grange, Erie Insurance Group, and St. Paul Mercury Insurance Company, were each sued by appellant and his sister. Erie was dismissed from the case on February 25, 2003. Summary judgment was granted on October 10, 2003, to the remaining defendants. Appellant only appeals the judgment

Littrell v. Wigglesworth (2001), 91 Ohio St.3d 425, appellant was not entitled to collect UM benefits. The trial court granted Grange's motion for summary judgment.

{¶ 5} On appeal, appellant raises the following as his sole assignment of error:

{¶ 6} "In granting appellee, Grange Mutual Insurance Company's motion for summary judgment, the trial court erred in holding that appellant, Patrick Lukasiewicz, was not entitled to underinsured motorist benefits in an amount equal to the difference between the amount he actually received from the tortfeasor's insurer and the amount he was entitled to receive under his policy with Grange."

{¶ 7} This court notes at the outset that in reviewing a motion for summary judgment, we must apply the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 8} The version of R.C. 3937.18(A)(2), in effect in September 2000, at the time of Ms. Lukasiewicz's death stated:

{¶ 9} "(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor

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granted in favor of Grange.

vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy for loss due to bodily injury or death suffered by such insureds: ***

{¶ 10} "(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder against loss for bodily injury, sickness, or disease, including death, suffered by any person 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 insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford 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 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."

{¶ 11} Prior versions of R.C. 3937.18 incorporated the phrase "amounts actually recovered," whereas, the applicable version includes the phrase "amounts available for payment." In *Clark v. Scarpelli*, 91 Ohio St.3d 271, the Ohio Supreme Court thoroughly considered the meaning of "amounts available for payment," as set forth in R.C.

3937.18(A)(2), and held:

{¶ 12} "For the purpose of setoff, the 'amounts available for payment' language in R.C. 3937.18(A)(2) 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)." Id. at syllabus.

{¶ 13} The court, however, emphasized that UM coverage "shall be provided only to afford 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 were uninsured at the time of the accident." Id. at 273-274. In determining the amount of UM coverage available to an insured, the court specifically rejected a "policy-limits-to-policy-limits" comparison approach, and held:

{¶ 14} "*** It would be manifestly absurd to interpret the S.B. 20 amendments to R.C. 3937.18(A)(2) as permitting an insurer to offset, against its own insured, those amounts that a tortfeasor's automobile liability insurance carrier has paid to *other* injured parties. In circumstances involving matching limits and multiple claimants, if an insurer were able to set off payments made to injured parties other than its own insureds, in many if not most instances, an insured would receive no compensation from the tortfeasor and would also be unable to collect underinsured motorist benefits. We cannot and do not believe

{¶ 15} that that is what the General Assembly intended when it enacted R.C. 3937.18(A)(2)." Id. at 279.

{¶ 16} A month after *Clark*, the Ohio Supreme Court released *Littrell*, 91 Ohio St.3d 425, wherein the court applied the decision in *Clark* to a number of pending cases. In pertinent part to this case, the Ohio Supreme Court held that although expenses and attorney fees do not reduce the "amounts available for payment" from a tortfeasor, medical expenses which are not the insured's responsibility to pay should reduce the "amounts available for payment." See *Littrell* at 434, wherein the court held:

{¶ 17} "As a preliminary matter, we hold that expenses and attorney fees are not part of the setoff equation. Such fees are an expense of an 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."

{¶ 18} After *Littrell*, a number of appellate courts have held that where the medical expenses have been incurred by the insured, or are the responsibility of the insured, medical expenses should not act to reduce the "amounts available for payment" from the tortfeasor, and, instead should be considered an expense of the case. See *Clark v. Boddie*, 2d Dist. No. 20339, 2004-Ohio-2605; *Mathis v. American Commerce Ins. Co.*, 8th Dist. No. 83433, 2004-Ohio-2021; *Mid-American Fire & Casualty Co. v. Broughton* (2003),

{¶ 19} 154 Ohio App.3d 728. The medical expenses in this case, however, are not the responsibility of the insured. As such, we find that these appellate court cases are inapplicable.

{¶ 20} In settlement of the claims against Anderson, American Family paid $100,000 to Ms. Lukasiewicz's estate. Because appellant was one of two equal beneficiaries, Grange asserts that $50,000 was therefore available to appellant from this settlement. Insofar as the limits of appellant's UM coverage were only $50,000, Grange argues that appellant's share of the American Family settlement entirely offsets the amount of UM coverage available to appellant. We disagree.

{¶ 21} The medical expenses paid by the estate for the care and treatment of appellant's mother were the estate's obligation to pay, not appellant's. Had Anderson been uninsured, appellant would have recovered the full $50,000 from his UM policy, less expenses and attorney fees, and appellant would not have been obligated to pay his mother's medical bills. Thus, pursuant to *Littrell*, supra, we find that although the expenses and attorney fees paid out of the settlement with the tortfeasor do not reduce the "amounts available for payment" to appellant, the medical expenses, which were not appellant's responsibility to pay, do reduce the "amounts available for payment." See *Littrell* at 434.

{¶ 22} As one of two equal beneficiaries, appellant's pro-rata share of the medical bills paid by the estate was $8,950.07. See *Littrell* at 434. Pursuant to *Littrell*, we find that the "amounts available for payment" to appellant from the tortfeasor must be reduced by the $8,950.07 paid for medical expenses. Thus, the amount available for payment to appellant was only $41,049.93 ($50,000 less $8,950.07), not $50,000, as held by the trial court. The "amounts available for payment," however, cannot be reduced by any other

expenses or attorney fees, as appellant would have been obligated to pay these fees himself when pursuing his UM claim. See *Littrell* at 434.

{¶ 23} Insofar as appellant had $50,000 UM coverage, and only $41,049.93 was available to him through the tortfeasor's insurance, we find that appellant is entitled to recover $8,950.07 from Grange pursuant to his UM policy. To this extent, we find that the trial court erred in granting summary judgment on behalf of Grange. Appellant's assignment of error is therefore found well-taken.

{¶ 24} Ordinarily, Civ. R. 56 does not authorize courts to enter summary judgment in favor of a non-moving party. *Marshall v. Aaron* (1984), 15 Ohio St.3d 48, syllabus. However, "an entry of summary judgment against the moving party does not prejudice his due process rights where all relevant evidence is before the court, no genuine issue as to any material fact exists, and the non-moving party is entitled to judgment as a matter of law." *Cuyahoga Cty. Hosp. v. Bur. of Workers' Comp.* (1986), 27 Ohio St. 3d 25, 28, citing, *Houk v. Ross* (1973), 34 Ohio St.2d 77, paragraph one of the syllabus. See, also, *State ex rel. Lowery v. Cleveland* (1993), 67 Ohio St.3d 126, 128; and *State ex rel. Newell v. Cuyahoga County Court of Common Pleas* (1997), 77 Ohio St.3d 269, 270.

{¶ 25} In this case, the facts are not contested, there is no issue of fact and a settlement of the legal questions is determinative of the dispute. Accordingly, we find that appellant is entitled to judgment against Grange in the amount of $8,950.07, pursuant to his UM policy.

{¶ 26} On consideration whereof, the court finds substantial justice has not been done the party complaining and the judgment of the Lucas County Court of Common Pleas is reversed. Pursuant to App.R. 12(B), this court hereby enters judgment in favor of appellant, Patrick Lukasiewicz, against Grange Mutual Insurance Company, in the amount of $8,950.07. Pursuant to App.R. 24, costs are assessed to Grange Mutual Insurance Company.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Judith Ann Lanzinger, J. _____
CONCUR.
JUDGE