[Cite as *Mathis v. Am. Commerce Ins. Co.*, 2004-Ohio-2021.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83433

ERMA L. MATHIS	:	
	:	ACCELERATED DOCKET
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
vs.	:	
	:	and
	:	
AMERICAN COMMERCE INSURANCE COMPANY	:	OPINION
	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT OF DECISION: April 22, 2004

CHARACTER OF PROCEEDING: Civil appeal from Court of Common Pleas Case No. CV-497242

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant: WILLIAM L. BLAKE
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For Defendant-Appellee: JOHN R. CHLYSTA

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COLLEEN CONWAY COONEY, P.J.

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶2} Plaintiff-appellant, Erma Mathis ("Mathis") appeals the trial court's granting defendant-appellee, American Commerce Insurance Company's ("ACIC") motion for summary judgment and denying Mathis' motion for summary judgment. Finding no merit to the appeal, we affirm.

{¶3} In March 1998, Mathis was a passenger in a vehicle that was involved in an automobile accident with another vehicle. Both drivers were found negligent. Each driver carried a maximum of $25,000 liability insurance, which both insurers provided to Mathis. Thus, she received $50,000 from the tortfeasors' liability carriers.

{¶4} Mathis was also insured under an automobile liability policy by ACIC which included underinsured motorist coverage ("UIM") with a limit of $50,000 per person. As a result of the accident, she incurred medical expenses which Medicare paid. Medicare subsequently asserted a lien in the amount of $11,657.23 against the settlement money received from the tortfeasors' insurance companies. Mathis reimbursed Medicare in the full amount and then asserted a claim against ACIC for $11,657.23 pursuant to her underinsured motorist provision.

{¶5} ACIC declined her claim, reasoning that Mathis had already received $50,000 from the tortfeasors' insurance companies, which was the maximum amount of her own policy. ACIC claimed that setting off the $50,000 already received exhausted the $50,000

limit available under her UIM coverage. Therefore, she was not entitled to any funds under her own UIM coverage.

{¶6} Mathis filed suit against ACIC for $11,657.23. She appeals the granting of ACIC's motion for summary judgment.

{¶7} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. La Pine Truck Sales & Equipment* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, as follows:

> **"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 1995 Ohio 286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."**

{¶8} Once the moving party satisfies its burden, 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 this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶9} In the instant case, Mathis contends that the Medicare statutory subrogation lien reduces the amount of ACIC's setoff against the amount paid by the tortfeasors and thus allows her to recover the $11,657.23 from her own UIM coverage. ACIC contends that Mathis is not entitled to reduce the setoff because the lien resulted from her own medical expenses.

{¶10} R.C. 3937.18 governs underinsured/uninsured motorist coverage. The version applicable to the instant case provides, in pertinent part:

> **"* * * 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." R.C. 3937.18(A)(2).**

{¶11} The Ohio Supreme Court has held that, for purposes of setting off the tortfeasor's liability coverage against uninsured motorist coverage limits, R.C. 3937.18(A)(2) requires "a comparison of the amounts that are actually accessible to the claimant from the tortfeasor's automobile liability insurance carrier and the claimant's own underinsured motorist coverage limits." *Clark v. Scarpelli*, 91 Ohio St.3d 271, 276, 2001-Ohio-39, 744 N.E.2d 719.

{¶12} Both parties rely on *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 425, 746 N.E.2d 1077, which involved three consolidated cases

{¶13} with relatively similar issues. Of these cases, the Court's analysis of *Karr v. Borchardt* beginning on page 433 of the *Littrell* decision is relevant to the instant case. The issue presented in *Karr* was "whether the limits of a claimant's underinsured motorist

coverage are compared to the limits of the tortfeasor's automobile liability coverage or whether they are compared to the amounts actually received by a claimant from the tortfeasor's liability policy." Id. at 429.

{¶14} In *Karr*, Helen Beddow died as a result of injuries sustained in an automobile accident. The driver at fault was insured by Westfield Insurance Company ("Westfield") with policy limits of $100,000 per person and $300,000 per occurrence. Three of the decedent's five statutory beneficiaries filed a wrongful death and survival action against the driver. The complaint also alleged that the beneficiaries were entitled to recover underinsured motorist benefits from each of their respective automobile liability insurance policies.

{¶15} Westfield subsequently paid $100,000 to the estate of Helen Beddow to satisfy the wrongful death and survival claims. Thus, each of the decedent's five statutory wrongful death beneficiaries was to receive $20,000. However, each beneficiary actually received less than $9,000, after deducting their pro rata share of expenses, attorney fees, and a statutory subrogation lien to Medicare. The beneficiaries contended that the "amount available for payment" was only $9,000, and not $20,000. Therefore, they claimed that $9,000 should be compared to the policy limits of their respective underinsured motorist policies. Their insurance companies disagreed, stating that setoff is determined by the "amount available for payment" ($20,000), not the net amount actually received.

{¶16} The Ohio Supreme Court preliminarily held:

> **"* * * [e]xpenses 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." Id. at 434.**

{¶17} Therefore, each beneficiary was entitled to reduce the "amount available for payment" ($20,000) by their pro rata share of the Medicare lien because the lien was not an expense of each insured beneficiary.

{¶18} The Seventh District Court of Appeals recently addressed a similar issue in *Mid-American Fire & Cas. Co. v. Broughton,* 154 Ohio App.3d 728, 2003-Ohio-5305, wherein the court clarified the *Littrell* decision, stating:

> **"* * *an insured cannot recover expenses from her UM/UIM insurer that she incurred that are related to her claims against the tortfeasor* * ***
>
> **In *Littrell*, the claimants were insured by distinct insurance policies containing separate UM/UIM coverage. The court stated that the attorney fees incurred by the insureds when prosecuting their claims for UM/UIM coverage should not reduce the 'amounts available for payment' from the tortfeasor's liability carrier because these fees were expenses of the insureds. * * * But it found that a statutory subrogation lien to Medicare should be considered when determining the amounts available for payment from the tortfeasor because that lien was an expense of the estate, which was not an insured under the policies in question." Id. at 733.**

{¶19} In applying *Littrell* and *Broughton* to the instant case, Mathis is not entitled to reduce the amounts available for payment from the tortfeasors because the Medicare lien was an expense of the insured, Mathis. While she is correct in stating that the "party that received payment" is obligated to reimburse Medicare, citing 42 CFR Section 411.37(a), neither *Littrell* nor *Broughton* indicated that this was the authority which allowed the reduction. The reduction was appropriate in *Littrell* because the Medicare lien was an expense of the estate and not an expense of the insured beneficiaries. In the instant case, the Medicare lien was an expense of Mathis, the insured, and therefore she is not entitled to reduce the "amount available for payment" from the tortfeasors.

{¶20} Accordingly, we find that the trial court properly granted ACIC's motion for summary judgment.

{¶21} The sole assignment of error is overruled.

{¶22} The judgment is affirmed.

Judgment affirmed.

ANTHONY O. CALABRESE, JR., J. CONCURS.

SEAN C. GALLAGHER, J. DISSENTS. (SEE SEPARATE DISSENTING OPINION.)

SEAN C. GALLAGHER, J., DISSENTING.

{¶23} I respectfully dissent from the holding of the majority. I would find the statutory Medicare lien in the amount of $11,657.23 is not an expense of the insured and allow Mathis to recover that amount from her own UIM coverage.

{¶24} I respectfully disagree with the majority analysis that because the statutory Medicare lien was directly charged to Mathis as an insured, it was an expense that she was not entitled to reduce as "amounts available for payment" from the tortfeasors. There is a clear split among jurisdictions on this issue. The majority relies on the holding in *Mid-American Fire & Cas. Co. v. Broughton,* 154 Ohio App.3d 728, from the Seventh District, which, in my view, did not properly apply the *Littrell* standard. Drawing a distinction between a Medicare lien applied to an insured from one applied to an estate ignores the very nature of a statutory

Medicare lien and how it impacts the "amounts available for payment."

{¶25} There is a clear distinction between a Medicare statutory lien and an expense such as the attorney's fees of a claimant. *Littrell* said as much with the language "* * * 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." *Littrell*, 91 Ohio St.3d at 434.

{¶26} Whether statutory Medicare liens are attributed to beneficiaries of an estate or an actual insured, they are mandatory and are never "available" to either the beneficiaries of an estate or the actual insured. I believe the analysis of the Fourth District in *Rucker v. Davis*, Ross App. No. 02CA2670, 2003-Ohio-3192, is persuasive. In *Rucker*, the court held that a $50,000 payment by the tortfeasor was not available to the husband because of a lien. Id. The court was clear in its analysis stating: "* * * there is no genuine issue of material fact that the amounts paid by the tortfeasors, the Davis family, were not available to Mr. Rucker because of the CIGNA lien. We see no difference between the statutory Medicare lien in *Littrell* and the

CIGNA lien here. Thus, we find that the fifty thousand dollars paid by the Davis family was not actually accessible to and recoverable by Mr. Rucker." Id.

{¶27} I would apply the same analysis to the instant case. Because the $11,657.23 was never available or accessible to Mathis because of the Medicare lien, that amount should be available for recovery under her UIM coverage.

It is ordered that appellee recover of appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

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

PRESIDING JUDGE
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).