IN THE SUPREME COURT OF OHIO

Timothy J. Brown, Administrator of the Estate of Kourtney T. Brown, et al.,	:	08-0483
Appellants,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
Nationwide Mutual Insurance Company,	:	Court of Appeals Case No. 07-APE-07-0570
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS TIMOTHY J. BROWN, et al.

Keith M. Karr (0032412)
David W. Culley (0079399)
KARR & SHERMAN CO., LPA
One Easton Oval, Suite 550
Columbus, Ohio 43219
(614) 478-6000
Fax No. (614) 478-8130
kkarr@karrsherman.com

COUNSEL FOR APPELLANTS, TIMOTHY J. BROWN, et al.

Michael R. Henry
Matthew R. Planey
CRABBE, BROWN, & JAMES, LLP
500 South Front Street, Suite 1200
Columbus, Ohio 43215

COUNSEL FOR APPELLEE, NATIONWIDE MUTUAL INSURANCE COMPANY

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THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This case addresses fundamental issues of uninsured/underinsured motorist (UIM) coverage that require interpretation and clarification in light of the most recent amendments to R.C. § 3937.18.

The first issue relates to the basic question of when a person qualifies as an underinsured motorist. R.C. § 3937.18 provides that a claimant is underinsured when the amount available for payment from the tortfeasor is less than the claimant's own UIM coverage. In this case, however, the court of appeals disregarded the statute's plain language and instead applied a strict "limits to limits" comparison by comparing the sum of all amounts paid to the claimants collectively with the per occurrence limit of their UIM coverage. Such a "limits to limits" comparison has been rejected by several courts. See, generally, *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 744 N.E.2d 719; *Mid-American Fire & Casualty Co. v. Broughton* (2003), 154 Ohio App.3d 728, 789 N.E.2d 1109; *Luckenbill v. Hamilton Mutual Insurance Co.* (2001), 2001-Ohio-1465; and *Gleason v. Collier* (2006), 2006-Ohio-6293.

In the case at bar, the amount available for payment from the tortfeasor was $100,000 for each claimant. Appellants paid for UIM coverage of $300,000 per person and $300,000 per occurrence. Accordingly, each claimant was underinsured as a matter of law. Appellants are therefore entitled to their own individual pro rata share of the $200,000 difference.

Moreover, this issue illustrates that an amendment to R.C. § 3937.18, Am.Sub.S.B. No. 20, effective October 20, 1994, needs clarification. The statute provides, in pertinent part, that UIM 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 underinsured motorist coverage if the person or persons liable were uninsured at the time of the accident." The court of appeals interpreted this language in terms of collective rights. An interpretation more consistent with the policies behind R.C. § 3937.18 requires this language be applied on an individual basis. Such an interpretation is buttressed by the fact that the statute uses the singular form of "insured." Without clarification of this issue from this Court, there will be great uncertainty in determining if an individual is underinsured.

The court of appeals' reasoning will read a rule of collective setoff into all automobile insurance policies in Ohio, regardless of policy language. By the court's holding, an individual is not underinsured even though they receive far less than the protection afforded by their own UIM coverage. This decision will lead to countless Ohioans losing their rights to UIM coverage that they bargained and paid for. The decision dictates that UIM will depend on the total amount paid by a tortfeasor to other claimants. Such is directly contrary to the purposes and policies behind UIM coverage and will require Ohioans to seek additional umbrella coverage to obtain the coverage and protection once afforded by UIM coverage.

The second issue is whether this Court's mandate that ambiguities in an insurance contract be construed against the insurer and in favor of the insured will be should be enforced. In the case at hand, the court of appeals disregarded this well-founded mandate and construed a blatant ambiguity against the insured to find that coverage did not apply. This construction of fairly common policy language will have far reaching effects and will change the rights of countless policy holders.

Public policy considerations also require this Court's disposition. In the case at bar, a normal family of four has been ripped apart by a fatal collision with an underinsured motorist. The family lost their daughter Kourtney, and the remaining members have suffered severely from this loss and their own injuries resulting from the collision. The Brown claimants received far less than their stipulated damages and the protection afforded by their UIM coverage.

Appellants paid for UIM coverage for protection in the event they were injured by an underinsured motorist. When the family sought the benefit of their bargain, the insurance company denied coverage based on its own interpretation of the ambigious policy. It was not until this fatal accident occurred that the Browns were give notice of the insurance company's interpretation of the contract language. Similarly, Edward Walker was denied the benefit of his coverage based on the insurance company's interpretation of his policy. He too had no notice of this interpretation of the contract language until he actually sought coverage.

Accordingly, Appellants respectfully request that this Court accept their case and provide a much needed interpretation and clarification of R.C. § 3937.18 so that they, along with other Ohioans, understand the applicability of their insurance policies and receive the benefits of their consideration.

STATEMENT OF THE CASE AND FACTS

On April 30, 2004, Kimberly Brown and her two minor children, Kourtney and Joshua, were traveling northbound on Interstate 71 in Congress Township, Wayne County, Ohio. Rufus Womack was traveling southbound on I-71 when he veered left of center, crossed the median, and collided head on with the Browns. As a direct and proximate result of the crash, Kourtney Brown was killed. Kimberly Brown and Joshua Brown both suffered severe injuries.

Three separate policies of insurance issued by Nationwide were in effect at the time. The first policy was issued to Kimberly and Timothy Brown and provides UIM coverage with bodily injury limits of $300,000 per person and $300,000 per occurrence (the "Brown policy"). The policy declarations list Edward Walker, father of Kimberly Brown, as an "Additional Interest Employer." The second policy was issued to Edward Walker and provides UIM coverage with bodily injury limits of $300,000 per person and $300,000 per occurrence (the "Walker auto policy"). The third policy was issued to Edward Walker and provides an excess personal liability limit of $1,000,000 per occurrence (the "Walker umbrella policy").

Rufus Womack, the tortfeasor, was insured under a policy of automobile liability insurance issued by Allstate Insurance Company at the time of the crash. The policy contained split-policy limits of $100,000 per person and $300,000 per occurrence.

The Estate of Kourtney Brown, Joshua Brown, and Kimberly Brown each settled their claims against Womack for the $100,000 per person liability limits of his policy. The Browns provided notice of the settlements to Nationwide, which did not oppose. The Browns collectively received the per occurrence limit of $300,000.00 provided under

Womack's policy.

The parties have stipulated that the damages, injuries, and wrongful death claims sustained by each of the Browns are in excess of the individual recoveries of $100,000. Therefore, the Browns thus sought UIM coverage from Nationwide for their damages in excess of the settlements. Nationwide, the carrier of all the above policies, denied coverage. The Browns, in turn, brought this suit to interpret the provisions of Nationwide's contract of insurance and declare the Browns' rights thereunder.

On June 19, 2007, the Franklin County Court of Common Pleas granted Nationwide's motion for summary judgment. The trial court found that the Browns were not entitled to UIM coverage because they collectively recovered $300,000 from Womack's policy, which equaled the per occurrence limit under the Brown policy. The trial court further concluded that Walker was not entitled to coverage under any policy.

On August 20, 2007, the Browns filed an appeal with the Tenth District Court of Appeals. The court of appeals upheld the trial court's decision, finding the Browns were not underinsured because they collectively received as much as their own UIM per occurrence limit. The appellate court also found that that Walker was not entitled to UIM coverage because he had no required underlying coverage. It is from this decision that the Browns now appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: When determining whether a claimant is underinsured, a court should separately compare the "amount available for payment" to each claimant from the tortfeasor with the claimant's UIM coverage limits. If the amount "available for payment" to each claimant from the tortfeasor is less than the claimant's UIM policy limits, then the insured is underinsured and entitled to UIM coverage.

The Brown policy defines an "underinsured motorist" as "a motor vehicle for which bodily injury liability coverage limits or other security bonds are in effect; however, their total amount available for payment is less than the limits of this coverage." In other words, a claimant is underinsured if the "amount available for payment" to each claimant is less than the amount of UIM coverage available. "Amounts available for payment" are those moneys actually accessible to and recoverable by the claimant. *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271 at syllabus, 744 N.E.2d 719.

In the instant case, each claimant could actually access and recover the per person limit of Womack's policy - $100,000. The claimants' UIM coverage provided for $300,000 per person and $300,000 per occurrence in coverage. Clearly, the amounts available for payment to each claimant were less than the amount provided by UIM coverage; thus, each claimant was underinsured. As a matter of law, Mr. Womack was driving an underinsured motor vehicle.

It has been stipulated that each family members' damages exceed the $100,000 received from Womack's insurance policy. Appellants are individually entitled to a pro rata share of the difference between the amount available for payment to each ($100,000) under Womack's coverage and per person coverage provided by the Brown UIM policy ($300,000), less any applicable setoff. Accordingly, Appellants are entitled to a

individual pro rata share of the $200,000 difference.

The court of appeals incorrectly compared the per occurrence limit of the tortfeasor's insurance policy, $300,000, to the per occurrence limit of the Brown's UIM coverage, $300,000 to reach the conclusion that the Browns were not underinsured. Such a "limits to limits" comparison has been expressly rejected by Ohio courts. *Mid-American Fire & Casualty Co. v. Broughton* (2003), 154 Ohio App.3d 728, 733, 789 N.E.2d 1109. In so doing, the lower courts collectively setoff the claims of all the members of the Brown family together. This directly violates the principle that "UM/UIM coverage [is] not reduced merely because the tortfeasor's coverage paid the expenses of another party." *Mid-American Fire*, 154 Ohio App.3d at 733.

The court of appeals decision relies heavily on a passage from R.C. § 3937.18, as amended by Am.Sub.S.B. No. 20, effective October 20, 1994, which provides that UIM 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 underinsured motorist coverage if the person or persons liable were uninsured at the time of the accident." However, the court of appeals reads into this passage that the recoveries of multiple individual claimants will be combined. The court mistakenly focuses on what the claimants would collectively have received – not what the individual claimants would have received.

The proper analysis is to determine if any individual claimant would be provided more insurance than had the tortfeasor been uninsured. In this case, for example, Kimberly Brown received $100,000 but had $300,000 available UIM coverage. Accordingly, Kimberly Brown would have received up to an additional $200,000 had Womack been uninsured. The recovery sought by the Browns is consistent with R.C. §

3937.18. It should be noted that Appellants do not each seek a total of $200,000 in UIM coverage; such a result is contrary to controlling law. However, each is entitled to their own pro rata share of the $200,000 difference.

Such analysis is consistent with the policies underlying UIM coverage. The intentions of the General Assembly in enacting R.C. § 3937.18(A)(2) was not to permit an insurer to offset the amounts that a tortfeasor's liability insurance carrier had paid to other injured parties. See *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271. Instead, UIM coverage is to be determined on a person by person basis. Otherwise, a person will never truly know the extent of their UIM coverage until an accident occurs and they can determine what other amounts the tortfeasor is paying out.

The Ohio Uninsured Motorists laws, as stated in R.C. § 3937.18, aim "to protect persons from losses which, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated." *Davidson v. Motorists Mutual Insurance Co.* (2001), 91 Ohio St.3d 262, 269, 744 N.E.2d 713. It is this protection the Browns sought and were denied. The court of appeals, however, misapplied R.C. § 3937.18 and applicable case law to hold that a person's UIM coverage is now completely dependent on the amounts available for payment to other claimants.

In *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, 589 N.E.2d 1278, this Court established what insurance companies could legally setoff from each claim. Specifically:

> The insurer must consider all claims separately and may not simply apply a collective setoff against the total limit of underinsured motorist coverage.

Derr, 63 Ohio St.3d at 541. Under this guidance, Nationwide may not use the amounts recovered by any one individual claimant to offset the claim of another individual

claimant, as was done here. The court of appeals disregarded this mandate and instead considered all of the Browns' claims collectively.

Not only is collective setoff prohibited at law, but the actual Nationwide policy language does not provide for such. Nowhere does Nationwide's contractual language in the Brown policy permit a collective setoff. At no point does the Nationwide provision make mention of multiple claimants under the same policy. Nor does Nationwide explain how to calculate the amount available for payment when there are multiple claims. The policy lacks guiding language for the situation at hand.

The setoff provision in the policies at issue allows Nationwide to setoff the amounts recovered against the individual claims that they accompany. However, the subject policy does not detail the ability to make a collective setoff by combining separate claims of all claimants. Notably, this condition is based on the same "amounts available for payment" language that Ohio courts have interpreted to include only individual claims. As this Court is aware, such a collective setoff is not permitted when the contact language does not unambiguously call for it. *Derr*, 63 Ohio St.3d at 541.

No subsequent amendment to R.C. § 3937.18 has altered the reasoning set forth above. See *De Leon v. Western Reserve Mut. Cas. Co.* (1999), 1999 WL 84653, at *5 (the holding in *Derr* was based on principles of contract interpretation and not an expanded view of the rights afforded by the underinsured motorist law). The pertinent case law supports the Brown's position that setoff is not granted unless it is specifically contracted for; and to have a complete setoff, the tortfeasor must have per person policy limits that are at least equivalent to that of the UIM coverage held by the injured

claimant. *Gleason v. Collier* (2006), 2006-Ohio-6293, 2008 WL 171062; and *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271.

Further, *Littrell v. Wiggleworth* (2001), 91 Ohio St.3d 425, 746 N.E.2d 1077 and *Luckenbill v. Hamilton Mutual Insurance Co.* (2001), 2001-Ohio-1465, 2001 WL 991957 cannot support the court of appeals' encompassing view in allowable setoff. Rather, these cases yield the unremarkable proposition that when there are multiple claimants, the "amount available for payment" (and setoff) is the tortfeasor's per person policy limit for a single claimant. Both comport with this Court's decision in *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537.

Directly on point is *Gleason v. Collier* (2006), 2006-Ohio-6293; however, the court of appeals misconstrued this case. There, as here, the claimants were covered by an UIM policy of $300,000 each person/$300,000 each occurrence. There, as here, each of the claimants received the per-person limit of $100,000 from a tortfeasor with a policy for $100,000 per person and $300,000 per occurrence. The sole distinction that keeps this case from being identical with *Gleason* is the very thing that the Browns have argued they are entitled to all along – the underinsurance carrier Auto Owners paid an additional $200,000 to the multiple claimants because the carrier knew it was liable up to the full $300,000 of the policy, minus the individual offset for each claim. The carrier's liability in each claim logically flows from the Court's statement that,

> In this case, there are two limits of liability specified for UIM coverage, $300,000 "each person" and $300,000 "each occurrence." Pursuant to the terms of the policy, because Mr. Gleason and Mrs. Clemons both suffered bodily injury, two individual claims for UIM coverage exist. Since UIM coverage "applies separately to each injured person," we find that, pursuant to the terms of the policy, each insured is entitled to UIM coverage up to the

> $300,000 "each person" limit in liability, subject to the "each occurrence" limit.

Gleason, 2006-Ohio-6293 at ¶28. Because each insured is entitled up to the UIM coverage limit, the court properly restricted itself to viewing each claim independently, not collectively.

In the final analysis, Appellants have maintained the necessary policies and followed all the rules required of them to recover under the above-mentioned policies. A contrary conclusion would exalt the rights of the insurer over the rights of the insured and would be in direct conflict with pertinent Ohio common law. The court of appeals' holding would read into every policy for automobile insurance a rule of collective setoff and abandon this Court's mandate for determining if and when a claimant is underinsured. As such, Appellants should have been awarded their pro rata share of the $200,000 difference between the amount available for payment to each by the tortfeasor and their UIM coverage. It is for these reasons that the case should be reversed and remanded.

Proposition of Law No. II: An umbrella insurance policy with an applicable underlying policy must be construed strictly against the insurer and liberally in favor of the insured.

The Walker umbrella policy was triggered by the events underlying this case. Walker complied with all the requirements to trigger coverage under his umbrella policy. The court of appeals, however, construed several ambiguities in favor of Nationwide to reach the conclusion that the umbrella policy was not applicable.

The court of appeals focused on a single phrase of the policy – that it "is subject to the terms and conditions of the uninsured motorists coverage included in an underlying policy or policies of insurance described in the Declarations page except as modified

herein" to reach a conclusion in favor of Nationwide. There are other references to the "underlying coverage," as set forth below, but none include the phrase "described in the Declarations page." It is from the single use of this phrase, surrounded by other references without this phrase, that the court of appeals interpreted the contract as a whole.

Of special importance is the phrase "except as modified herein." The policy, by its own language, later modifies the terms and extends the umbrella coverage to "losses payable that are payable by your underlying coverage." The "described in the Declarations page" language is conspicuously omitted. In so doing, Nationwide expressly modified the contract in favor of more expansive coverage.

In the case at bar, the policy did not clearly and unambiguously require that the underlying coverage be listed on the policy declarations page. Yet the court of appeals read such a requirement into the policy. In so doing, the lower courts misinterpreted the ambiguities in the Nationwide policy in favor of the insurer and offended Ohio law in interpreting insurance contracts.

The court of appeals read into the policy another requirement that does not exist – that the UIM coverage must be available from the underlying policy described in the declarations. The policy limits its application solely to what coverage is necessary for those policies listed on the declarations page. It is undisputed that Walker maintained the policies described in the declarations. It is axiomatic that these policies also contained the underlying limits that are located next to them on the declarations sheet.

Nationwide itself uses the term "underlying coverage" to refer to underlying coverage for a policy that is not listed anywhere in the umbrella's declarations. The

policy states: "another insurance carrier providing underlying coverage will not cause the Insurance provided by this policy to replace such underlying coverage. The coverage provided by this policy will apply as if the underlying coverage was valid and collectible." Walker could maintain underlying coverage with another insurance provider which would not be listed in the declarations but would, by the policy's own language, act as the required underlying coverage.

Moreover, principles of insurance policy construction require the case be reversed and remanded. "In the construction of insurance contracts, where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from operation of such contract is included in the operation thereof." *Home Indemn. Co. v. Plymouth* (1995), 146 Ohio St. 96, 64 N.E.2d 248. The court of appeals should have first determined what the phrase "underlying coverage" means as it pertains to the four-corners of the Walker Umbrella Policy.

The Walker umbrella coverage endorsement uses three different phrases to describe three different levels of coverage: (1) "underlying policy or policies of insurance described in the Declarations"; (2) "required underlying uninsured motorists coverage"; and (3) "underlying coverage." The fact that "underlying coverage" is alone and unmodified by any words, including "required" or "described in the Declarations" is dispositive. As a result, this more generalized use must confer a more inclusive/broader meaning than the other modified terms. Otherwise, the more specific modifiers mean nothing and are superfluous when the contract is read as a whole – an intention not lightly ascribed to contracts in general and even less so to insurance policies, which are strictly

construed against the insurer.

Application of this canon further establishes that the Brown policy is the requisite "underlying coverage" for Edward Walker. The Brown policy declarations establish that the coverage is subject to Endorsement 3020, the "Additional Interest – Employer" endorsement. The declarations provides that Edward Walker is an "Additional Interest Employer" under the coverage; this endorsement extends the UIM coverage of the associated policy to the interest of the named party. There are no associated definitions, exclusions, or limitations with the endorsement. As explained above, Edward Walker's interest in this case is his wrongful death claim against the uninsured motorist. As such, the UIM coverage is extended to Mr. Walker's wrongful death claim.

The court of appeals was equally wrong to hold that Walker's Personal Umbrella Policy is only triggered if there is underinsured coverage from the Walker Auto Policy. For this proposition, the court focused on pat 2(a) of the Uninsured Motorists Coverage Endorsement page, which provides: (2) We shall be liable only for damages in excess of the sum of (a) the amount received from your required underlying insurance motorists coverage; and (b) the total amount received because of the loss from, on or behalf of, the liable party; but not less than the amount of such underlying limits.

Here, Edward Walker has not received anything from his "required underlying insurance motorists coverage". Nor has he received anything from the liable party, Rufus Womack; although $100,000 was recovered by the Estate of Kourtney Brown as a result of her wrongful death. Lastly, the total amount cannot be less than the amount of such "underlying limits."

Notably, Nationwide has chosen not to modify "underlying limits" with the word

"required", as it conspicuously did on the declarations page. This terminology, or lack thereof, confuses which policy limit sets the floor of Nationwide's liability: is it the Walker Auto Policy? Is it the Brown Auto Policy? Or is it the tortfeasor, Rufus Womack's policy? The court of appeals could only guess. And when courts must guess, this Court has ruled that is must do so in favor of the insured, Edward Walker, and against the interest of the insurer, Nationwide. Absent the court of appeals' construction of the policy language, Walker's umbrella policy should have applied. It is this coverage that the Browns sought and were denied.

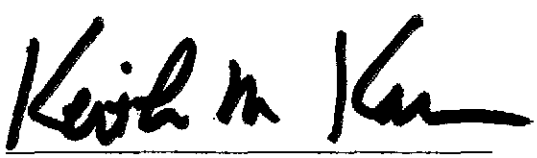
CONCLUSION

This case involves matters of public and great general interest and a substantial constitutional question. The most recent additions to R.C. § 3937.18 must be clarified as they apply to determining when an individual is underinsured. Further, the mandate that ambiguities in an insurance contract be construed in favor of an insured and against the insured must be reaffirmed.

Appellants request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

KARR & SHERMAN CO., LPA

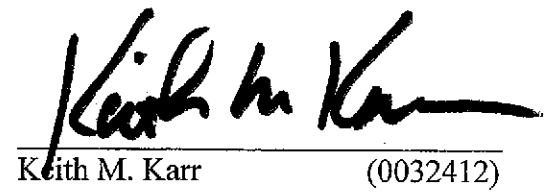


Keith M. Karr (0032412)

COUNSEL FOR APPELLANTS,
TIMOTHY J. BROWN, et al.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee, Michael R. Henry and Matthew R. Planey, 500 South Front St., Suite 1200, Columbus, Ohio 43215 on March 5, 2008.



Keith M. Karr (0032412)

COUNSEL FOR APPELLANTS,
TIMOTHY J. BROWN et al.

Keith M. Karr

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Timothy J. Brown, Administrator of the Estate of Kourtney T. Brown, Timothy J. Brown et al.,	:	
Plaintiffs-Appellants,	:	No. 07AP-570 (C.P.C. No. 05CVC04-3901)
v.	:	(REGULAR CALENDAR)
Nationwide Mutual Insurance Company,	:	
Defendant-Appellee.	:	

O P I N I O N

Rendered on January 22, 2008

Karr & Sherman Co., L.P.A., and *Keith M. Karr*, for appellants.

Crabbe, Brown & James, LLP, *Michael R. Henry*, and *Matthew R. Planey*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiffs-appellants, Timothy J. Brown, individually and as administrator of the Estate of Kourtney T. Brown, Kimberly A. Brown, Joshua W. Brown, and Edward Walker (collectively, "appellants"), appeal from the Franklin County Court of Common Pleas' entry of summary judgment in favor of defendant-appellee, Nationwide Mutual Fire Insurance Company ("Nationwide"), on appellants' claims for declaratory judgment,

breach of contract, and bad faith. Finding no error in the trial court's entry of summary judgment, we affirm.

{¶2} On April 30, 2004, appellant Kimberly Brown ("Kimberly") was operating a 2004 Pontiac Grand Prix northbound on Interstate 71 in Wayne County, Ohio, with her two minor children, Kourtney T. Brown ("Kourtney") and appellant Joshua Brown ("Joshua"), as her passengers. Kimberly's father, appellant Edward Walker, leased the 2004 Pontiac Grand Prix from GMAC, and Kimberly was driving the vehicle with Walker's permission. This action arises out of a collision that resulted when a motor vehicle operated by Rufus V. Womack ("Womack") crossed the median from the southbound lanes of Interstate 71 and collided with the vehicle that Kimberly was driving. As a result of the collision, Kimberly and Joshua suffered injuries, and Kourtney died. Appellant Timothy Brown ("Timothy") is Kourtney and Joshua's father.

{¶3} Womack was insured under an automobile insurance policy issued by Allstate Insurance Company ("Allstate") with liability limits of $100,000 per person and $300,000 per occurrence. As administrator of Kourtney's estate, Timothy settled the wrongful death claim against Womack for the per person limit of $100,000 in Womack's Allstate policy. As Joshua's parent and natural guardian, Timothy settled Joshua's personal injury claim against Womack for the per person limit of $100,000 in Womack's Allstate policy. Similarly, Kimberly settled her own personal injury claim against Womack for the per person limit of $100,000 in Womack's Allstate policy. By their settlements with Allstate, appellants collectively received the per occurrence limit of $300,000 provided by Womack's policy. Appellants provided notice of their settlements to Nationwide, their own insurer, and Nationwide did not oppose.

{¶4} The parties have stipulated that the damages, injuries, and wrongful death that appellants sustained as a result of the subject automobile collision exceed their settlement recoveries from Womack's Allstate policy. Appellants thus sought underinsured motorist ("UIM") coverage from Nationwide for their damages in excess of the Womack settlements.

{¶5} Appellants' claims for UIM coverage concern three separate policies of insurance issued by Nationwide, each of which was in effect on April 30, 2004. First is Nationwide Auto Policy No. 92 34 N 330281, issued to Timothy and Kimberly (the "Brown policy"). The Brown policy declarations list the 2004 Pontiac Grand Prix as a scheduled vehicle, and the policy provides uninsured/underinsured motorist ("UM/UIM") coverage with bodily injury limits of $300,000 per person and $300,000 per occurrence. The Brown policy declarations list Walker as an "Additional Interest Employer" with respect to the 2004 Pontiac Grand Prix.[1]

{¶6} The second policy at issue is Nationwide Auto Policy No. 92 34 H 802561, issued to Walker ("Walker auto policy"). Like the Brown policy, the Walker auto policy contains UM/UIM coverage with bodily injury limits of $300,000 per person and $300,000 per occurrence.

{¶7} The final policy at issue is Nationwide Personal Umbrella Policy No. 92 34 PU 035597, issued to Walker ("Walker umbrella policy"). The Walker umbrella policy contains an excess personal liability limit of $1,000,000 per occurrence. The Walker umbrella policy declarations list Walker's required underlying insurance coverages,

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[1] Endorsement 3020, Additional Interest – Employer provides:
"This endorsement extends the coverages stated below to the Interest of the named employer. * * *
"All other provisions of the policy remain unchanged. The naming of this additional interest does not increase the policy limits."

limits, and policy numbers, which include the Walker auto policy (and the UM/UIM coverage provided thereby) and a Nationwide homeowner's policy, but not the Brown policy.

{¶8} Nationwide denied appellants' claims for UIM coverage, and appellants subsequently filed suit in the Franklin County Court of Common Pleas on February 5, 2005. In their second amended complaint, appellants assert claims for declaratory relief regarding their entitlement to UIM coverage under the above-described policies and claims for breach of contract and bad faith, arising out of Nationwide's refusal to pay UIM benefits.

{¶9} On June 27, 2006, appellants and Nationwide filed cross-motions for summary judgment. On June 19, 2007, the trial court granted Nationwide's motion for summary judgment and denied appellants' motion for summary judgment. The trial court concluded that appellants were not entitled to UIM coverage under the Brown policy because they collectively recovered $300,000 from Womack's Allstate policy, which equaled the most they would have collectively been entitled to recover under the Brown policy's per occurrence limit of $300,000. In support of its judgment, the trial court noted the Supreme Court of Ohio's statement that "a person injured by an underinsured motorist should never be afforded greater coverage than that which would be available had the tortfeasor been uninsured." *Littrell v. Wigglesworth*, 91 Ohio St.3d 425, 430, 2001-Ohio-87, citing *Clark v. Scarpelli*, 91 Ohio St.3d 271, 276, 2001-Ohio-39. The trial court further concluded that neither Walker nor the Brown appellants were entitled to UIM coverage under the Walker umbrella policy. Lastly, the trial court concluded, as a matter of law, that Nationwide did not act in bad faith by denying

appellants' claims for UIM benefits. Accordingly, the trial court entered summary judgment in favor of Nationwide on all of appellants' claims.

{¶10} From the trial court's entry of summary judgment, appellants filed a timely notice of appeal. Appellants assert three assignments of error for our review:

> ASSIGNMENT OF ERROR 1 – THE TRIAL COURT PREJUDICIALLY ERRED BY CONCLUDING THAT THE ESTATE OF KOURTNEY BROWN, TIMOTHY BROWN, KIMBERLY BROWN, AND JOSHUA BROWN ARE NOT ENTITLED TO [UM/UIM] COVERAGE UNDER THE BROWN AUTO POLICY.
>
> ASSIGNMENT OF ERROR 2 – THE TRIAL COURT PREJUDICIALLY ERRED BY CONCLUDING THAT THE [sic] EDWARD WALKER IS NOT ENTITLED TO [UM/UIM] COVERAGE UNDER THE WALKER UMBRELLA POLICY AND THE BROWN AUTO POLICY.
>
> ASSIGNMENT OF ERROR 3 – THE TRIAL COURT PREJUDICIALLY ERRED BY GRANTING SUMMARY JUDGMENT ON APPELLANTS' BAD FAITH CLAIM.

Each of appellants' assignments of error stems from the trial court's entry of summary judgment, and we will address each assignment of error in turn.

{¶11} Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶12} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶13} By their first assignment of error, appellants argue that the trial court erred by concluding that the Brown appellants are not entitled to UM/UIM coverage under the Brown policy. The Brown appellants assert three claims under the Brown policy: (1) Kimberly's bodily injury claim; (2) Joshua's bodily injury claim; and (3) a single claim for all damages arising out of Kourtney's bodily injuries, including all of the statutory wrongful death beneficiaries' claims. The parties agree, as did the trial court, that each of the Brown appellants is an insured under the Brown policy, either as a named insured or as a relative living in the same household. The parties further agree that, at most, appellants collectively are entitled to UM/UIM benefits of $200,000, thus conceding that Nationwide is entitled to set off at least $100,000 from its per occurrence limit.

{¶14} The sole issue under appellants' first assignment of error is whether, having collectively recovered $300,000 from Womack's Allstate policy, appellants are entitled to recover UIM benefits under the Brown policy, which contains the same per

occurrence limit, but a higher per person limit, than the Allstate policy. That issue, however, implicates questions regarding whether Womack was an underinsured motorist, regarding Nationwide's right to set off the proceeds appellants received from the tortfeasor's liability policy, and regarding whether appellants may collectively recover more than they would have recovered had Womack been uninsured.

{¶15} In pertinent part, the Brown policy defines an "uninsured motor vehicle" as "one which is underinsured. This is a **motor vehicle** for which bodily injury liability coverage limits or other security or bonds are in effect; however, their total amount available for payment is less than the limits of this coverage." (Emphasis sic.) The Limits and Conditions of Payment in the Brown policy's UM endorsement provide, in part:

> **Our** obligation to pay Uninsured Motorists – Bodily Injury losses is limited to the amounts per person and per occurrence stated in the policy Declarations. The following conditions apply to these limits:
>
> 1. The limit shown:
>
> a) for **bodily injury** for any one person applies to one person's **bodily injury**, including death, and includes all claims resulting from or arising out of that one person's **bodily injury**, including death. Any and all claims, including but not limited to any claim for loss of consortium or injury to the relationship arising from this **bodily injury**, including death, shall be included in this limit. This per person policy limit shall be enforceable regardless of the number of **insureds**, claims made, vehicles or premiums shown in the Declarations or policy, or vehicles involved in the accident.
>
> b) or **bodily injury** for each occurrence is, subject to the per person limit described in paragraph a) above, the total limit of **our** liability for all covered damages when two or more persons sustain **bodily injury**, including death, as a result of one occurrence. Any and all claims, including any claim for loss of consortium or injury to the relationship arising from

> this **bodily injury**, including death, shall be included in this limit. This per occurrence policy limit shall be enforceable regardless of the number of **insureds**, claims made, vehicles or premiums shown in the Declarations or policy, or vehicles involved in the accident.

(Emphasis sic.) As stated above, the Brown policy declarations provide both per person and per occurrence limits of $300,000. The Limits and Conditions of Payment go on to provide:

> 3. The limits of this coverage will be reduced by any amounts available for payment by or on behalf of any liable parties for all claims, including claims for **bodily injury**, loss of consortium, injury to the relationship, and any and all other claims.
>
> * * *
>
> 6. No payment will be made until the limits of all other liability insurance and bonds that apply have been exhausted by payments.

(Emphasis sic.)

{¶16} The parties here couch their arguments primarily in terms of set off. While appellants argue that Nationwide is entitled to set off only $100,000 from its $300,000 per occurrence limit, entitling appellants to an additional $200,000 in UIM coverage, Nationwide contends that it is entitled to set off the entire $300,000 that appellants received from Allstate, thus eliminating appellants' entitlement to UIM benefits.

{¶17} In support of their position, appellants rely heavily on *Derr v. Westfield Cos.* (1992), 63 Ohio St.3d 537, an action that arose from Diana L. Derr's death as a result of injuries she sustained in a motor vehicle collision. As executor of Diana's estate, Edgar C. Derr ("Derr") filed a wrongful death action on behalf of himself and he and Diana's two minor children. Derr recovered the $100,000 limit of the tortfeasor's

liability coverage, and, after payment of expenses, the probate court ordered the settlement proceeds distributed in three equal shares to Derr and his two children. Derr also sought UIM coverage under a policy issued to him by Westfield Companies ("Westfield"), with single-limit UIM coverage of $400,000. Westfield conceded that it owed $300,000, which it paid. Thereafter, Derr brought a declaratory judgment action, alleging that Westfield was obligated to pay its full $400,000 policy limit despite the $100,000 payment from the tortfeasor's insurer. On cross-motions for summary judgment, the trial court determined that Westfield properly deducted the $100,000 settlement proceeds from its $400,000 limit. The court of appeals affirmed in a split decision and certified a conflict to the Supreme Court of Ohio.

{¶18} The Supreme Court stated the certified issue as " '[w]hether an insurer on a single-limit underinsured motorist policy may set off against that single limit of liability the total amount paid by a tortfeasor's insurance, when the claims of each of the claimants taken individually do not reach that limit as reduced by the amount paid to each claimant by the tortfeasor.' " Id. at 539. Based on its decision in *Wood v. Shepard* (1988), 38 Ohio St.3d 86, the court first found that Derr and his two children had separate wrongful death claims that could not be subjected to a single per person limit.

{¶19} After determining that Derr and his children each maintained a separate wrongful death claim, the Supreme Court proceeded to consider the issue of setoff. The Supreme Court acknowledged an insurer's right to set off amounts that its insured receives from the tortfeasor, quoting *James v. Michigan Mut. Ins. Co.* (1985), 18 Ohio St.3d 386, paragraph two of the syllabus:

> "An insurer may apply payments made by or on behalf of an underinsured motorist as a setoff directly against the limits of

> its underinsured motorist coverage, so long as such setoff (1) is clearly set forth in the terms of the underinsured motorist coverage and (2) does not lead to a result wherein the insured receives a total amount of compensation that is less than the amount of compensation that he would have received if he had been injured by an uninsured motorist."

Derr at 540. After examining the Westfield policy's setoff language, the Supreme Court found ambiguity regarding the manner in which setoff was to be effectuated where multiple claimants present claims for UIM coverage. Construing the policy language in favor of the insureds, the Supreme Court held that Westfield was entitled to set off proceeds from the tortfeasor against the individual wrongful death claims only to the extent of each claimant's proportional share of those proceeds. In so holding, the Supreme Court endorsed a setoff approach similar to that implemented in *Zelko v. Parsons* (1985), 29 Ohio App.3d 302, where the Eighth District Court of Appeals "held that the insurer must consider all claims separately and may not simply apply a collective setoff against the total limit of [UIM] coverage." *Derr* at 541.

{¶20} Under the Supreme Court's calculation in *Derr*, Westfield was required to pay its $400,000 per occurrence policy limit even though its insureds had already collectively recovered $100,000 from the tortfeasor. Accordingly, the plaintiffs collectively received a total of $500,000 from the tortfeasor and Westfield, $100,000 more than they would have been entitled to had the tortfeasor been uninsured. Nevertheless, the Supreme Court stated that such a recovery did not run afoul of prior case law or public policy, quoting the following passage from *Zelko* at 304:

> "The language in *James* is interesting from the viewpoint the Supreme Court states the insured should receive no less than he would have received if he had been injured by an uninsured motorist. The Supreme Court chose the phrase 'less than' instead of the phrase 'more than' in limiting

> compensation to the insured in *James, supra*, thereby leaving the door open when multiple insureds are involved." * * *

Derr at 542.

{¶21} Based on *Derr*, appellants contend that Nationwide was required to consider each of the three claims under the Brown policy separately and that Nationwide was permitted to set off against each individual claim only the settlement proceeds apportioned thereto. To the contrary, Nationwide argues that appellants' reliance on *Derr* is misplaced under the facts of this case and the present status of the law. More specifically, Nationwide contends that the enactment of Am.Sub.S.B. No. 20 ("S.B. 20"), effective October 20, 1994, and subsequent case law have discredited the analysis in *Derr* and provide support for the trial court's analysis and ultimate entry of summary judgment.

{¶22} S.B. 20 amended R.C. 3937.18 to add the following provision:

> (H) Any automobile liability or motor vehicle liability policy of insurance that includes [UM/UIM] coverages * * * and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

S.B. 20 also amended R.C. 3937.18(A)(2) to provide, in 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.

(Emphasis added.)[2]

{¶23} This court expressed doubts about the continuing validity of *Derr* following the enactment of S.B. 20 in *Stewart v. State Auto. Mut. Ins. Co.* (Oct. 7, 1999), Franklin App. No. 98AP-1601. There, the plaintiff, as administrator of her deceased husband's estate, sought UIM coverage for the decedent's next of kin, who were insured under two insurance policies. The trial court concluded that the terms of the automobile policy at issue limited all next of kin to a single claim against the policy's $100,000 per person limit, less a setoff of $50,000, representing the collective recovery from the tortfeasor's liability insurer. In reliance on *Derr*, the plaintiff argued that the trial court should have treated each next of kin as having a separate claim against the policy's $100,000 per person limit, subject to setoff only in the amount of each claimant's proportional share of the proceeds from the tortfeasor's insurer. This court rejected the plaintiff's argument and affirmed, stating:

> * * * [T]he holding in *Derr* is completely discredited by [S.B. 20]. By expressly superceding *Savoie* [*v. Grange Mut. Ins.*

[2] The version of R.C. 3937.18 applicable to the policies at issue herein similarly provides, in subsection (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. 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."

> *Co.* (1993), 67 Ohio St.3d 500], [S.B. 20] discredited *Wood*, which provided the foundation for both *Savoie* and *Derr*. Further, by its terms, [S.B. 20] overruled the premise upon which the *Derr* set-off rationale 'hinges': that irrespective of unambiguous language in an insurance policy to the contrary, each person who is legally entitled to recover damages for wrongful death under R.C. 2125.02 has a separate claim against the per person limit of liability of the decedent's [UM/UIM] coverage.

We found that the policy in *Stewart* consolidated all claims arising out of the death of one person and subjected that claim to the per person limit of liability, set off by any money paid by the tortfeasor or the tortfeasor's insurance company.

{¶24} Here, the parties agree that the Brown policy validly consolidates all claims arising out of Kourtney's death to a single claim, subject to the per person limit of $300,000. Thus, although *Stewart* expresses the view that S.B. 20 discredited *Derr*, despite the fact that *Derr* has not been expressly overruled, *Stewart* does not answer the question before us.

{¶25} Nevertheless, we similarly note that S.B. 20 discredits the Supreme Court's analysis in *Derr* because the court's analysis in *Derr* resulted in the UIM claimants recovering more than they would have recovered had the tortfeasor been uninsured. In *Derr*, the Supreme Court noted that *James* mandated only that an insured receive no less in UIM coverage than he would have received had he been injured by an uninsured motorist, but did not preclude the insured from receiving *more* compensation than if he had been injured by an uninsured motorist. As amended by S.B. 20, R.C. 3937.18(A)(2) expressly precluded such a result, stating that UIM coverage shall not provide protection "greater than that which would be available under

the insured's [UM] coverage if the person or persons liable were uninsured at the time of the accident."

{¶26} In disregarding *Derr* and finding that appellants were not entitled to UIM coverage under the Brown policy, the trial court relied on the Ohio Supreme Court's opinion in *Littrell*, in which the Supreme Court decided three pending cases involving issues of statutory setoff against UIM coverage. For purposes of our discussion here, we focus on the first of those cases, *Littrell*, which arose from an automobile collision between a vehicle driven by John Littrell, Jr. and owned by Stella Pratt and a vehicle driven by tortfeasor Jeffrey Wigglesworth. Littrell, Pratt, and Wigglesworth were killed in the accident. As occupants of the Pratt vehicle, Littrell's wife, Ina, and children, Dennis and Suzanne, suffered injuries. Wigglesworth had $1,300,000 in available liability coverage, which was tendered and accepted in settlement of all claims against Wigglesworth and his insurer. The $1,300,000 was allocated to the five occupants of the Pratt vehicle, who also sought UIM coverage under an automobile policy issued by Westfield Insurance Company, which contained a single policy limit of $500,000 per accident.[3]

{¶27} Before reviewing the *Littrell* plaintiffs' entitlement to UIM coverage, the Supreme Court reviewed its then-recent holding in *Clark*. In *Clark*, the plaintiff sought UIM coverage on behalf of herself and other statutory wrongful death beneficiaries for damages arising out of her son's death in a one-car collision. The plaintiff's UIM policy had limits of $100,000 per person and $300,000 per occurrence, and the tortfeasor's

[3] From the settlement proceeds, the Estate of John Littrell, Jr. received $415,000, the Estate of Stella Pratt received $275,000, Ina Littrell received $460,000 on her personal injury claim, and Dennis and Suzanne Littrell each received $75,000 on their personal injury claims.

liability carrier settled for the $100,000 per person limits of its policy. Like the trial court and the court of appeals, the Supreme Court found that the plaintiff's UIM policy unambiguously restricted all wrongful death claims to a single per person limit. Thus, the Supreme Court faced the issue of setoff under the S.B. 20 version of R.C. 3937.18 where the per person limit of the tortfeasor's liability coverage equaled the per person limit of the plaintiff's UIM coverage. The Supreme Court held that, "[f]or 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)." *Clark*, syllabus. The court noted that the original purpose of UIM coverage was to ensure that a UIM claimant would receive at least the same amount of total compensation as he would have received had he been injured by an uninsured motorist. The court also emphasized that the statutory language of R.C. 3937.18(A)(2), as amended by S.B. 20, ensures "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. Because the wrongful death beneficiaries collectively received $100,000 from the tortfeasor's insurer, that amount was set off from the UIM policy's per person limit of $100,000, precluding access to UIM benefits.

{¶28} In *Littrell*, the Supreme Court resolved questions regarding entitlement to UIM benefits "[i]n light of the reasoning concerning R.C. 3937.18(A)(2) set forth in *Clark*." *Littrell* at 430. In its consideration of UIM coverage under the Westfield policy for the occupants of the Pratt vehicle, the Supreme Court began with the proposition

that, "[h]ad the tortfeasor been an uninsured motorist, the maximum amount available to the five occupants of the Pratt [vehicle] would have been $500,000," the single limit of the Westfield UIM policy. Id. at 431. The court then considered the "amount available for payment" from the tortfeasor and, in doing so, considered the collective recovery of the *Littrell* plaintiffs claiming under the Westfield policy. Because claimants recovered $1,300,000 from Wigglesworth's liability carrier, the court found that $1,300,000 was the amount available for payment. The court held that, "as [the $1,300,000 available for payment from Wigglesworth's insurer] exceeds the amount available from the Westfield policy, the occupants of the Pratt [vehicle] are not entitled to underinsured motorist benefits from Westfield."[4] Id.; see, also, *Kuchmar v. Nationwide Mut. Ins. Co.*, Hamilton App. No. C-060866, 2007-Ohio-6336 (setting off total amount of plaintiffs' collective recovery from tortfeasor from per occurrence UIM limit). Such analysis is consistent with the General Assembly's mandate that an insured's recovery be equal whether he was injured by an uninsured motorist or an underinsured motorist. See *Clark* at 279, fn. 3.

{¶29} The Supreme Court followed *Littrell* in its recent decision in *Webb v. McCarty*, 114 Ohio St.3d 292, 2007-Ohio-4162. There, William Webb ("Webb"), individually and as Executor of the Estate of Deborah Ann Webb, sought UIM coverage under a policy with limits of $100,000 per person and $300,000 per occurrence. Webb settled his individual personal injury claim against the tortfeasor for $25,000. Webb also

[4] The Supreme Court also noted that the availability of UIM coverage might have been different had the occupants of the Pratt vehicle been insured under separate policies rather than the single Westfield policy, stating:

"This case illustrates well the *multiple*-policies issue. If each of the five occupants of the Pratt [vehicle] had had a separate policy of insurance, then each would have had coverage under his or her own policy up to the single policy limit less any sums received from the tortfeasor's policy." *Littrell* at 431, fn. 7.

settled the Estate's claims against the tortfeasor for $269,836.08, which was paid from the tortfeasor's automobile liability policy and was divided equally between Webb and his two children. The tortfeasor's policy contained a coverage limit of $300,000 per accident. Based on *Littrell*, the Supreme Court summarily rejected a limits-to-limits comparison and stated that, "in a case involving multiple claimants, UM coverage would be compared to the amount paid under an automobile liability policy." Id. at ¶4. While the court was unable to determine how they reached the number, the parties agreed that the amount paid under the tortfeasor's policy was $269,836.08, which the court found was the amount available for payment. The Supreme Court did not consider the individual wrongful death beneficiaries' claims, nor did it discuss the division of the settlement proceeds among the wrongful death claimants. Rather, the Supreme Court compared the total amount paid under the tortfeasor's policy with the per accident limit of the UIM coverage. Accordingly, the Supreme Court determined that "Webb and other claimants under his policy are underinsured to the extent that his UM policy's per-accident limit, $300,000, exceeds the amount available for payment," subject to the policy's per person limit of $100,000. Id. at ¶5.

{¶30} Even were we to agree that *Derr* still validly stands for the proposition that, at least as a starting point, separate claims must be treated separately, and that an insurer facing multiple claims for UIM benefits under a single policy may set off only each claimant's actual proportion of the recovery from the tortfeasor from that claimant's per person UIM limit, the S.B. 20 amendments to R.C. 3937.18(A)(2) and *Littrell* nevertheless require affirmation of the trial court's entry of summary judgment. In a case such as this, where the claimants' recovery, either individually or collectively,

would exceed the amount that they would have recovered had their injuries been caused by an uninsured motorist, we must conclude, as a matter of law, that no UIM coverage is available.

{¶31} Various post-*Littrell* appellate court decisions, including *Luckenbill v. Hamilton Mut. Ins. Co.*, Darke App. No. 1524, 2001-Ohio-1465, and *Gleason v. Collier*, Erie App. No. E-06-019, 2006-Ohio-6293, upon which the trial court relied, support our conclusion here. In *Luckenbill*, the Second District Court of Appeals extensively and carefully reviewed the Supreme Court's opinions in *Derr*, *Clark*, and *Littrell* in its consideration of whether collective setoff applied to claims for UIM benefits by multiple claimants under a single-limit UIM policy. The Second District described the Supreme Court's treatment of the *Littrell* claims as "perplexing because the Court appears to have considered the claims of multiple parties (even those with individual and separate claims, as opposed to derivative claims) as a collective entity, based solely on whether the claims were asserted under a single policy of insurance." The Second District found the court's approach in *Littrell* to be inconsistent with the Supreme Court's earlier analysis in *Derr* and *Motorist Mut. Ins. Co. v. Andrews*, 65 Ohio St.3d 362, 1992-Ohio-21. Ultimately, however, despite its emphatic disagreement with *Littrell*, the court stated: "[W]e feel compelled to follow the most recent decision of the Ohio Supreme Court." Accordingly, the court applied *Littrell* and held that the claimants were not entitled to recover UIM benefits because they had collectively received from the tortfeasor's insurers the amount they would have collectively received had the tortfeasor been uninsured.

{¶32} In *Gleason*, the Sixth District Court of Appeals addressed a scenario quite similar to that presently before this court. *Gleason* involved two claims for UIM benefits under a single policy issued by Auto Owners Insurance Company with UIM limits of $300,000 per person and $300,000 per occurrence. Each claimant had already recovered the $100,000 per person limit from the tortfeasor's liability insurer. Auto Owners also paid each of the claimants an additional $100,000, but the claimants argued they were entitled to another $100,000 in UIM benefits from Auto Owners.

{¶33} On appeal, the Sixth District considered the insureds' claims separately and determined that each was entitled to coverage up to the $300,000 per person limit of the UIM coverage. The court then reduced the $300,000 per person limit for each insured by the $100,000 that each insured received from the tortfeasor and found that each would be entitled to recover up to $200,000 in UIM coverage, subject to the policy's per occurrence limit of $300,000. "Hence, pursuant to the terms of the policy, even though the [claimants] seemingly would each be entitled to $200,000 of UIM coverage, their recovery is capped by the 'each occurrence' limit of $300,000. Therefore, the actual balance of UIM coverage available to appellants to share is $300,000, or $150,000 each." Id. at ¶29.

{¶34} The Sixth District did not end its analysis there, however, stating: "Despite the foregoing, we find that, statutorily, Auto Owners is not required to pay any further UIM benefits to appellants." Id. at ¶30. The court reiterated the Ohio Supreme Court's statement in *Clark* that the S.B. 20 version of R.C. 3937.18 ensures that a person injured by an underinsured motorist should not be afforded greater protection than that which would have been available had he been injured by an uninsured motorist.

Therefore, the court determined that, had the tortfeasor been uninsured, the claimants could have received, at most, the $300,000 per occurrence policy limit, or $150,000 when divided between them. Because the claimants had already recovered more than $150,000 each ($100,000 each from the tortfeasor and an additional $100,000 each from Auto Owners), the court found that Auto Owners was not required to pay any further UIM benefits.

{¶35} Although appellants attempt to distinguish *Gleason* by arguing that the claimants there were entitled to no further UIM benefits only because Auto Owners had already paid $200,000, the same amount that appellants seek here, the court's opinion does not support appellants' argument. Nowhere does the Sixth District suggest that the claimants in *Gleason* were, in fact, entitled to the $200,000 that Auto Owners paid. Rather, the court concluded that the claimants were only entitled to split $100,000 in addition to the collective $200,000 paid by the tortfeasor so that their recovery would not exceed what they could have received had the tortfeasor been uninsured. Thus, we are unpersuaded by appellants' attempt to distinguish *Gleason*.

{¶36} Upon review, we find ourselves compelled to apply the analysis set forth in *Littrell* and subsequently applied in various appellate cases, including *Luckenbill* and *Gleason*. Had Womack been uninsured, appellants, collectively, could have recovered up to $300,000 in UM benefits, representing the Brown policy's per occurrence limit. Appellants have already recovered $300,000 from the Womack Allstate policy. Any further recovery of UIM benefits would blatantly disregard the Supreme Court's analysis in *Littrell* and *Webb*. Accordingly, we find no error in the trial court's entry of summary

judgment in favor of Nationwide on appellants' claims for UIM benefits under the Brown policy. Thus, we overrule appellants' first assignment of error.

{¶37} By their second assignment of error, appellants contend that the trial court erred by concluding that Walker is not entitled to UM/UIM coverage under the Walker umbrella policy and the Brown policy.

{¶38} The Walker umbrella policy's UM endorsement provides, in part:

> It is agreed that this endorsement is subject to the terms and conditions of the uninsured motorists coverage included in an underlying policy or policies of insurance described in the Declarations except as modified herein.
>
> We will pay up to your Personal Umbrella policy's limit of liability the amount that an insured is legally entitled to recover from the owner or driver of an uninsured motor vehicle. Damages must result from an accident arising out of the ownership, maintenance, or use of the uninsured motor vehicle. The following conditions apply:
>
> 1. You must maintain an underlying insurance policy or policies described in the Declarations which provide uninsured motorists coverage with the listed underlying limits.
>
> 2. We shall be liable only for damages in excess of the sum of:
>
> a. the amount received from your required underlying uninsured motorists coverage; and
>
> b. the total amount received because of the loss from, or on behalf of, the liable party; but not less than the amount of such underlying limits.
>
> 3. The total limit of our liability for the coverage provided in this endorsement shall be as shown in the Declarations.
>
> 4. This coverage will apply only to losses that are payable by your underlying coverage.

> 5. If the insured dies, we will pay this amount to the insured's legal representative.

{¶39} The Walker umbrella policy declarations include a Schedule of Required Underlying Insurances, which lists the Walker auto policy and a homeowner's policy but does not list the Brown policy. It is undisputed that neither the Walker auto policy nor the homeowner's policy provides coverage for the subject accident. Nevertheless, appellants argue that, because section four limits coverage to losses "payable by your underlying coverage" but does not refer to "required" underlying coverage or coverage "described in the Declarations," the Brown policy provides Walker with underlying coverage that triggers coverage under the Walker umbrella policy.

{¶40} The trial court rejected appellants' position. First, having concluded that no UIM coverage was available to any insured under the Brown policy, the trial court found that Walker was not entitled to recover under the Brown policy. Based on our reasoning with respect to appellants' first assignment of error, we concur that Walker was not entitled to recover under the Brown policy. Second, viewing the Walker umbrella policy as a whole and finding no ambiguity in its UM endorsement, the trial court found that the underlying coverage referred to in section four is the required UM/UIM coverage in the Walker auto policy, as listed in the policy declarations. Because the Walker auto policy concededly provides no UIM coverage in this case, the trial court determined that Walker was not entitled to UIM coverage under his umbrella policy.

{¶41} On appeal, appellants argue that the trial court erred by failing to construe the Walker umbrella policy in favor of appellants and by reading into the UM endorsement a requirement that UM/UIM coverage in an underlying policy described in

the declarations must apply before the umbrella policy's excess coverage becomes available. Nationwide, on the other hand, contends that the Walker umbrella policy unambiguously requires that, before excess coverage becomes available, the loss must be covered under one of the required coverages listed in the policy declarations. Upon review of the parties' arguments and the relevant policy language, we agree with Nationwide and find no error in the trial court's analysis.

{¶42} First, the Walker umbrella policy provides that UM coverage thereunder "is subject to the terms and conditions of the [UM] coverage included in an underlying policy or policies of insurance *described in the Declarations* except as modified [by the UM endorsement]." (Emphasis added.) Next, the Walker umbrella policy's UM endorsement expressly provides coverage only for damages in excess of "the amount received from your *required* underlying [UM] coverage." (Emphasis added.) While appellants argue that such language merely establishes a contractual floor for Nationwide's liability, we find that the cited condition necessarily presupposes the availability of coverage for the loss from the required underlying UM/UIM coverage. In this case, the required underlying UM/UIM coverage, as set forth in the Walker umbrella policy declarations, stems solely from the Walker auto policy, which provides no coverage applicable to the subject accident. Reading the Walker umbrella policy and, specifically, its UM endorsement in its entirety, it is clear that coverage arises thereunder only where the loss was first payable by the underlying coverages listed in the policy declarations. The policy requires the insured to maintain the policies set forth in the declarations with specified limits, limits coverage to an amount in excess of the

coverage obtained under the policies set forth in the declarations, and generally makes coverage subject to the terms and conditions of the policies set forth in the declarations.

{¶43} The fact that section four refers to "underlying coverage" rather than "required" coverage or coverage "described in the Declarations" does not create ambiguity in the UM endorsement. Nor does that condition modify the requirement that UIM coverage under the umbrella policy is subject to the terms and conditions of the UIM coverage provided by the underlying policies described in the declarations. Lastly, appellants' reference to the Bankruptcy policy condition in the Walker umbrella policy does not create ambiguity about the meaning of "underlying coverage." The Bankruptcy provision provides, in part, that "Bankruptcy or Insolvency of * * * another insurance carrier providing underlying coverage will not cause the Insurance provided by this policy to replace such underlying coverage. The coverage provided by this policy will apply as if the underlying coverage was valid and collectible." While that provision indicates that another insurer may issue underlying coverage, it does not support appellants' argument that such coverage need not be listed in the Schedule of Required Underlying Insurances in the Walker umbrella policy declarations before such an underlying policy provides a basis for the extension of excess coverage.

{¶44} Appellants identify, and this court's research reveals, no Ohio case law finding ambiguity in the language utilized in the Walker umbrella policy's UM endorsement. To the contrary, this court has previously considered the language contained in the Walker umbrella policy and concluded that UIM coverage under the umbrella policy arises only where the plaintiffs are first entitled to UIM coverage under one of the underlying policies listed in the umbrella policy's declarations. See *Pyros v.*

Loparo, Franklin App. No. 03AP-1146, 2005-Ohio-577, at ¶24. Finding no ambiguity in the Walker umbrella policy, we apply the plain meaning of the contractual language. See *Wallace v. State Farm Mut. Ins. Co.*, Fulton App. No. F-07-012, 2007-Ohio-6373, at ¶15, citing *Moccabee v. Progressive Ins. Co.* (Oct. 9, 1998), Huron App. No. L-98-1069. Here, because neither of the underlying policies listed in the Walker umbrella policy's declarations provides coverage for the subject accident, no coverage under the Walker umbrella policy is triggered. Accordingly, we find no error in the trial court's grant of summary judgment on appellants' claims regarding entitlement to coverage under the Walker umbrella policy. As such, we overrule appellants' second assignment of error.

{¶45} Lastly, in their third assignment of error, appellants contend that the trial court erred by entering summary judgment in favor of Nationwide on appellants' bad faith claim. An insurer fails to act in good faith where it denies a claim and such denial "is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, paragraph one of the syllabus. A lack of reasonable justification exists where an insurer refuses to pay a claim in an arbitrary or capricious manner. *Nationwide Ins. Ent. v. Progressive Specialty Ins. Co.*, Franklin App. No. 01AP-1223, 2002-Ohio-3070, at ¶19, citing *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 188. Having determined that appellants were not entitled to UIM coverage under the Nationwide policies at issue here, and that Nationwide appropriately denied coverage, we find no error in the trial court's entry of summary judgment in favor of Nationwide on appellants' claims for bad faith. Accordingly, we overrule appellants' third assignment of error.

{¶46} Having overruled appellants' three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

McGRATH, P.J., and BROWN, J., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Timothy J. Brown, Administrator of the Estate of Kourtney T. Brown, Timothy J. Brown et al.,	:	
Plaintiffs-Appellants,	:	No. 07AP-570 (C.P.C. No. 05CVC04-3901)
v.	:	(REGULAR CALENDAR)
Nationwide Mutual Insurance Company,	:	
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on January 22, 2008, appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

FRENCH, J., McGRATH, P.J., and BROWN, J.

By Judith French
Judge Judith L. French