

IN THE  
SUPREME COURT OF OHIO

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| <i>State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company,</i>     | : | Case No. 2009-0122                     |
|   | : |  |
| Petitioners,  | : | On Review of Certified Question        |
|   | : | from the United States District Court, |
| v.  | : | Northern District of Ohio, Eastern     |
|   | : | Division                               |
| <i>Laura Grace, Elizabeth Garcia, Ladon Ruffin, Dorian Jones, Angela Webb, and Patricia Schwab,</i> | : |  |
|   | : |  |
| Respondents.  | : |  |

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**Reply Merit Brief of Petitioners State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company in Support of Answering Certified Question in the Affirmative**

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## **I. Introduction**

Respondents challenge application of a Non-Duplication clause in their insurance policies preventing double recovery of the same damages by excluding coverage under uninsured/underinsured motorist insurance coverage (“UM”) for medical expenses already paid under the medical payments coverage (“Med-Pay”) of the same policies. Respondents argue that R.C. 3937.18, as amended in 2001, did not abrogate an Ohio common-law prohibition against denying UM benefits by setting off Med-Pay coverage payments. In support of this argument, Respondents solely rely on outdated case law and wholly unsupported assertions of fact. More telling, Respondents’ argument as to the current status of Ohio law fails to address the current version of R.C. 3937.18, as well as the case law interpreting the current version of the statute.

Unable to demonstrate any statutory prohibition barring the Non-Duplication clause at issue, Respondents next argue that such limitations on UM coverage violate Ohio “common law” because insureds pay separate premiums for the separate coverages. However, Respondents’ “separate premiums” argument ignores prior decisions of this Court permitting insurance policy provisions limiting coverage such as precluding the stacking of UM coverages even though separate premiums were charged for those separate coverages. In short, Respondents ignore the indisputable fact that UM and Med-Pay coverages provide separate, distinct benefits and an insured who purchases Med-Pay coverage in addition to UM coverage receives substantial benefit from such Med-Pay coverage, even when precluded from receiving duplicative payment under both coverages for the same injuries.

For these reasons, and those stated more fully below, Petitioners State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, “State Farm” or “Petitioners”) respectfully ask this Court to join the majority of courts across the

country in holding that limitations precluding double-recovery under both UM and Med-Pay coverages for the same medical expenses are valid and enforceable.

## II. Law and Argument

### A. Ohio decisions interpreting prior versions of R.C. 3937.18 do not answer the certified question.

Rather than addressing the current state of Ohio law, Respondents cite a litany of Ohio cases holding that insurers must pay both UM and Med-Pay benefits for the same, single loss, all of which, save one, applied versions of R.C. 3937.18 *pre*-Am.Sub.S.B. No. 97 (“S.B. 97”). In their initial brief, Petitioners conceded there is no dispute as to Ohio law prior to the passage of S.B. 97 regarding payment of both UM and Med-Pay benefits arising from uncompensated loss. Consequently, Respondents’ string-cite of cases adds no insight into the current state of Ohio law – which is the question before the Court. See Resp. Brief at 11-12; *Lager v. Nationwide Mut. Fire Ins. Co.*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, at ¶23 (“[P]recedent from the era [when exclusions from UM coverage were void and unenforceable because they eliminated or reduced coverage required by statute] is not compelling in the area of current Ohio insurance law.”).

When addressing current, post-S.B. 97 law, Respondents completely ignore the Eighth Appellate District’s decision in *Shenyey v. Glasgow*, 2009-Ohio-1366, even though that decision addresses the *exact* Non-Duplication clause at issue here. *Id.* at ¶4. Instead, Respondents focus solely on the Fifth Appellate District’s decision in *Wayne Mut. Ins. Co. v. Bradley*, 2006-Ohio-

1517.<sup>1</sup> Although Respondents correctly cite the *Bradley* holding, they overlook the fact that *Bradley* relied upon pre-S.B. 97 case law and the fact the *Bradley* court did not have the benefit of this Court's decision in *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574. Had the *Bradley* court analyzed the Non-Duplication clause at issue under the current version of R.C. 3937.18 with the benefit of *Snyder's* guidance, as did the court in *Shenyey*, *Bradley* likely would have held as did the court in *Shenyey*.

**B. The Non-Duplication Clause in Respondents' Insurance Policies is Enforceable Under the S.B. 97 Amendments to R.C. 3937.18, as Interpreted By This Court in Snyder.**

Respondents attempt to avoid the import of this Court's decision in *Snyder* by noting that *Snyder* did not involve any interplay between Med-Pay and UM coverages. See Resp. Brief at 16-17. That is true. However, as this Court noted in *Snyder*, R.C. 3937.18, as amended, allows "terms and conditions that preclude coverage for bodily injury or deaths suffered by an insured under specified circumstances *including but not limited to . . .*" those listed in the statute. (Emphasis sic.) *Snyder*, 2007-Ohio-4004, at ¶15 (quoting R.C. 3937.18(I)). Under Respondents' proffered narrow reading of *Snyder*, this Court would have to pass seriatim upon the enforceability of *every* exclusion or limitation of UM coverage because *Snyder* addressed only a particular limitation. Respondents' argument ignores this Court's observation that the 2001 amendments contained in S.B. 97 permit policies with UM coverage "to limit or exclude

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<sup>1</sup> Citing this Court's denial of acceptance of an appeal in *Bradley*, Respondents imply that whether *Bradley* was correctly decided may be inferred from this Court's "refus[al] to revisit the issue when Ohio insurers entreated them [*sic*] to do so. . . ." Resp. Brief at 11. Of course, both by decision and by rule, "[t]he refusal of the Supreme Court to accept any case for review shall not be considered a statement of opinion as to the merits of the law stated by the trial or appellate court." *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, 894 N.E.2d 1221, at ¶25 (quoting S.Ct.R.Rep.Op.8(b)). Further, if this Court's refusal to accept the *Bradley* appeal answered the present question, the Northern District of Ohio would not have certified the question to this Court.

coverage under circumstances that are specified in the policy *even if those circumstances are not also specified in the statute.*” (Emphasis added.) *Id.* at ¶15. No where in *Snyder* did this Court ever imply the narrow interpretation argued by Respondents.

Respondents further contend that *Berrios*, *Shearer*, and *Lindsey* remain controlling,<sup>2</sup> despite the enactment of S.B. 97, because the Ohio General Assembly did not specifically list those cases in the Legislative Commentary to the bill. See Resp. Brief at 14, n.5. However, “when the legislature amends an existing statute, the *presumption* is that it is aware of the court’s decisions interpreting it.” (Emphasis added.) *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, 833 N.E.2d 1216, at ¶16. Moreover, this Court has held its decisions have been superseded by statute even where the General Assembly did expressly reference this Court’s decision being superseded. See, e.g., *New 52 Project, Inc. v. Proctor*, 2009-Ohio-1766, at ¶13 (noting the General Assembly “implicitly overruled by statute[]” a prior decision of this Court, even though the legislative history reveals no express reference to the earlier decision). Through passage of S.B. 97, the Ohio Legislature expressly authorized the inclusion in insurance policies of provisions that “limit or exclude coverage.” Thus, while *Berrios*, *Shearer*, and *Lindsey* prohibited limitations on UM coverage for payments made under Med-Pay coverage, those decisions have been superseded by the General Assembly with the passage of S.B. 97.

Further, the Uncodified Law section of S.B. 97 quoted by Respondents reveals the clear intent of the Legislature to “[p]rovide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorists coverage, or both . . . .” Resp. Brief at 13 (quoting S.B. 97). S.B. 97’s stated purpose was not to provide

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<sup>2</sup> *Berrios v. State Farm Ins. Co.*, 98 Ohio St.3d 109, 2002-Ohio-7715, 781 N.E.2d 149; *Shearer v. Motorists Mut. Ins. Co.* (1978), 53 Ohio St.2d 1, 371 N.E.2d 210; *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 489 N.E.2d 281.

statutory authority for the inclusion of “some” exclusionary or limiting provisions. As this Court noted in *Snyder*, S.B. 97 authorizes the inclusion of limiting or exclusionary provisions in UM insurance policies whether expressly listed in the statute or not. As a result, although the Non-Duplication clause at issue here is not listed in the statute, it is, nonetheless, authorized by R.C. 3937.18.

**C. Med-Pay Coverage is Additional Coverage, Not Duplicative of UM Coverage.**

Respondents assert that “. . . *Snyder* does not authorize insurers to sell two coverages, charge two premiums and provide only one coverage.” Resp. Brief at 17. Respondents’ statement is correct, but demonstrates Respondents’ strained interpretation of the nature of Med-Pay and UM coverages. With Med-Pay and UM, Petitioners do provide *two different* coverages. While Med-Pay and UM coverages are *sometimes* both implicated by an insured’s damages, the coverages remain, nonetheless, separate and distinct coverages.

Respondents’ fundamental misunderstanding of the nature of Med-Pay coverage is illustrated by their incorrect assertion: “[W]ith the Med Pay set off [*sic*] clause, the only time Petitioners provide the Med Pay coverage of value to the insured is in the rare circumstances when the insured’s total damages **exceed** their UMBI limits or, as the Petitioners note in their brief, where the insured is involved in an accident wherein the tortfeasor flees the scene and there is no independent witness to corroborate the insured’s story.” Resp. Brief at 8-9. To the contrary, insureds receive “Med Pay coverage of value” in *numerous* circumstances, including:

- when an insured is involved in an accident in a no-fault state, where that UM coverage is unavailable. See, e.g., *Foss v. Cincinnati Ins. Co.* (5<sup>th</sup> Dist), 2006-Ohio-1671, at ¶11-17. In this situation, Med-Pay coverage would provide benefits even though the insured is not entitled to UM coverage, despite not being at fault.
- when determining who is at fault in an accident, a predicate to application of UM coverage, takes years. See, e.g., *Scott v. Yates*, 71 Ohio St.3d 219, 1994-Ohio-462 (reversing and remanding for a new trial a judgment in an automobile accident dispute three years after the

accident). UM coverage would be unavailable until a determination of fault in the accident is made, but Med-Pay coverage would provide benefits immediately.<sup>3</sup>

- when the tortfeasor is not uninsured or underinsured, but the tortfeasor's coverage limits are exhausted before the insured is paid. See, e.g., *Shelby Mutl. Ins. Co. v. Smith* (1976), 45 Ohio St.2d 66, 69-70; 341 N.E.2d 597. In such situations, the insured may not recover UM benefits, but Med-Pay coverage would pay benefits.
- when *no* party to an accident is determined to be at fault. See, e.g., *Seeley v. Rahe* (1985), 16 Ohio St.3d 25, 26-27; 475 N.E.2d 1271. Again, in such a situation, the insured could not recover UM benefits, but Med-Pay coverage would pay benefits.
- when the party causing the insured's injuries has a defense of "sudden emergency." See, e.g., *Roman v. Estate of Gobho*, 19 Ohio St.3d 260, 2003-Ohio-3655, 791 N.E.2d 422, at ¶48. An insured cannot recover UM benefits, even though not at fault in the accident, when the person causing the accident suffers from a sudden emergency. *Id.* That same insured, though, would receive Med-Pay coverage benefits *if* he or she has such coverage.
- when the insured's injury is caused by the insured's spouse. See, e.g., *Kelly v. Auto Owners Ins. Co.* (1<sup>st</sup> Dist.), 2006-Ohio-3599, at ¶10-12. While such an insured may not recover UM coverage if the insured's policy contains an "exclusion to injury of family members" exclusion, that same insured would receive benefits under a Med-Pay provision.
- when the at-fault driver causing the insured's damages enjoys statutory immunity. See, e.g., *Snyder*, 2007-Ohio-4004. The insured in *Snyder* could not recover UM benefits because the person causing the action was statutorily immune and, therefore, the insured was not "entitled to recover" from the person causing the insured's injuries and UM coverage was, therefore, excluded. The plaintiff in *Snyder*, though, would receive compensation for medical expenses incurred as a result of that accident *if* the plaintiff had separate Med-Pay coverage.

In each of the above examples, which by no means are exhaustive, as well as in the situation acknowledged by Respondents, in which an insured's damages exceed the insured's

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<sup>3</sup> That determining fault in an accident can take such long periods of time reveals the fallacy of Respondents' assertion that "Petitioners, as well as other insurers, typically do not incur Med. Pay. losses where an accident is incurred by a tortfeasor with insurance [] . . . because they assert subrogation rights against the tortfeasor's liability insurance for any Med. Pay. benefits that they may have paid." Resp. Brief at 3. Med-Pay benefits are paid upon proof that the insured incurred the expense – regardless of fault. If insurers ultimately recover amounts paid through assertion of subrogation rights, they recover *the amount paid*, but have still suffered the loss of the interest on the amount paid months or even years prior to the subrogation recovery, and do not recoup the costs incurred in pursuing the subrogation claim.

UM coverage limit, Med-Pay coverage provides *additional* coverage.<sup>4</sup> Med-Pay does not, and is never intended to, provide a double-recovery for the same loss.<sup>5</sup>

While Respondents pay separate premiums for these separate coverages, they receive the *exact* protection provided by the coverage, with exclusions, for which they paid. See 10/22/08 Decision granting State Farm’s motion for partial summary judgment, *Galloway v. Henry* (2008), Montgomery Cty. Ct. of Common Pleas, Case No. 07-CV-10521, at 12-13 (interpreting the identical Non-Duplication clause at issue here) (Appendix A). Thus, contrary to Respondents’ unsupported assertion, the effect of the Non-Duplication clause is *not* that Petitioners “sell two coverages, charge two premiums and provide only one coverage.” Resp. Brief at 17. Rather, insureds, such as Respondents, purchase two coverages with separate premiums, which provide separate coverages, and which afford insureds *different* protections but which must be integrated to prevent double recovery.

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<sup>4</sup> Depending upon the particular UM policy at issue, an insured may be covered under one or more of these examples. That the UM coverage at issue in these examples precluded coverage, though, illustrates the separate value of Med Pay coverage.

<sup>5</sup> In each of these examples as well, an insured with only Med-Pay coverage would receive the same payment as an insured with both Med-Pay and UM coverage – the inverse of the hypothetical examples listed in Respondents’ brief at pages 6-8. This would *not* mean that insureds who purchased both Med-Pay and UM received no additional protection by purchasing UM coverage, only that the conditions for receiving payment under the UM coverage had not been met. Conversely, in the hypotheticals proffered by Respondents, that an insured who purchased only UM would receive the same payment on a specific claim as an insured who purchased both UM and Med-Pay coverage does not mean the insured received no benefit from the purchase of both coverages – the benefit of the coverages is insurance for the *covered risk*, as defined in the policy. In Respondents’ hypotheticals, the circumstances for payment of the full coverage amounts under both coverages simply are not met. As applied here, damages “paid or payable” under Med-Pay coverage are not a *covered risk* under the UM coverage because of the limitation of coverage provided in the Non-Duplication clause.

**D. Separate Premiums Charged For UM and Med-Pay Coverages Do Not Preclude Enforcement of the Non-Duplication Clause.**

R.C. 3937.18(F) provides: “Any policy of insurance that includes [UM Coverage] may, *without regard to any premiums involved*, include terms that preclude any and all stacking of such coverages . . . .” (Emphasis added.) Despite this clear expression of the Legislature’s approval of limitations on UM coverage regardless of the number of premiums charged, Respondents argue the pre-S.B. 97 *Berrios*, *Shearer*, and *Lindsey* decisions preclude enforcement of the Non-Duplication clause because Respondents paid separate premiums for the separate coverages.

Respondents do not dispute that double-recovery of damages may properly be precluded by anti-stacking provisions that bar the stacking of separate Med-Pay coverages, even though separate premiums are paid for such separate coverages. See *Karabin v. State Automobile Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 166; 462 N.E.2d 403. Similarly, Respondents do not dispute that double-recovery of damages may properly be precluded by anti-stacking provisions that bar intra-family or inter-family stacking of coverages, even though separate premiums are paid for those coverages. See e.g. *Bebout v. Tindall* (10<sup>th</sup> Dist.), 2004-Ohio-3936, at ¶15. However, despite the holdings in *Karabin* and *Bebout*, Respondents still attempt to cling to their separate premium arguments. In doing so Respondents offer no justification or rationale as to why analysis of payment of separate UM and Med-Pay premiums should be treated differently than anti-stacking provisions.

Moreover, Respondents’ reliance upon *Berrios*, *Shearer*, and *Lindsey* ignores that those cases were decided under pre-S.B. 97 law mandating the offering of UM coverage and were “about forcing UM/UIM insurers to meet the *public policy* expectations of their *statutorily mandated coverage*.” (Emphasis added.) *Berrios*, 2002-Ohio-7115, at ¶42. To the extent those

cases discuss, in dicta, the payment of separate premiums as a basis for permitting double-recovery by insureds, they do so in the context of the then existing public policy mandated by the statute – a public policy that no longer exists following the passage of S.B. 97.

Lastly, Respondents complain that their premiums were not reduced as a result of adding the Non-Duplication clause to their policies. Resp. Brief at 5. They also note that, although S.B. 97 became effective in 2001, the Non-Duplication clause did not become part of Petitioners' insurance policies until 2005. Petitioners' rates were filed with the Ohio Department of Insurance, as required by R.C. 3937.03. "The intent of the legislature in enacting the requirement that insurers file rating plans, which indicate the character and extent of coverage, see R.C. 3937.03, was to enable the superintendent of insurance to determine whether *rates* proposed to be charged are 'excessive, inadequate, or unfairly discriminatory' in light of certain, specified factors relating to risk experience." (Emphasis sic). *Goodyear Tire & Rubber Co. v. Aetna Casualty & Sur. Co.* (9<sup>th</sup> Dist. 1995), 1995 Ohio App. LEXIS 2975 at \*25.

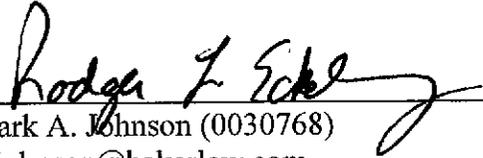
Moreover, and contrary to Respondents' gratuitous and unsupported references to value-laden phrases such as "premium gold mine" and "profit scheme," Petitioners fail to acknowledge that, while their premiums were not reduced as a consequence of the Non-Duplication clause, nor were their rates *increased*. Between 2001, when the Legislature amended R.C. 3937.18, and 2005, when Petitioners included the Non-Duplication clause in Respondents' insurance policies, expenditures in the United States for hospital care and physician services increased from \$764 billion, to \$1.029 *trillion* dollars – a 35% increase. See Table of National Health Expenditures 1960-2006 at Table 124, available at <http://www.census.gov/compendia/statab/tables/09s0124.pdf>. Such increases in healthcare costs increase the average cost per claim for both UM and Med-Pay coverages – increasing the

likelihood that a given claim will approach, or exceed, coverage limits. The effect of the Non-Duplication clause was not to reduce the coverage limits of either UM or Med-Pay coverages but, rather, merely to preclude paying for the exact same damages *twice*. Although insureds could no longer receive a double-recovery, they were still covered for the same total amount of *actual loss*, and without a premium increase despite the substantial increase in healthcare costs associated with UM and Med-Pay claims. As noted by the First District Court of Appeals, in eliminating the mandatory offering of UM coverage, “[t]he legislature appears to have swapped an interest in providing compensation for ‘uninsured’ motorists with an interest in providing reasonable rates.” *Kelly*, 2006-Ohio-3599, at ¶12.

#### **IV. Conclusion**

Respondents received the precise coverage for which they paid. Their policies of insurance contained clear, unambiguous Non-Duplication clauses advising them of the limitation on their UM coverage that precluded payment for damages “paid or payable” under their separate Med-Pay coverage. That limitation is authorized by R.C. 3937.18(I), and there is no public policy basis for not enforcing the parties’ contracts as written. For these reasons, Petitioners respectfully request that the Court answer the question certified by the United States District Court for the Northern District of Ohio in the affirmative.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 10, 2009, the foregoing was served upon the persons listed below by first class U.S. Mail, postage prepaid:

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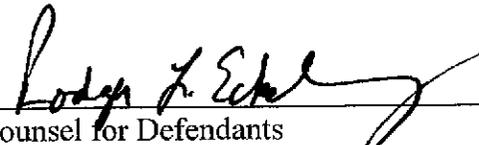
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## LEXSTAT OHIO REVISED CODE ANN 3937.03

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED  
 WITH THE SECRETARY OF STATE THROUGH JUNE 1, 2009 \*\*\*  
 \*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 \*\*\*  
 \*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 \*\*\*

TITLE 39. INSURANCE  
 CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

**Go to the Ohio Code Archive Directory**

*ORC Ann. 3937.03 (2009)*

§ 3937.03. Classifications; rules; rates; rating plan

(A) Every insurer shall file with the superintendent of insurance every form of a policy, endorsement, rider, manual of classifications, rules, and rates, every rating plan, and every modification of any of them which it proposes to use. Every such filing shall state any proposed effective date and indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the superintendent does not have sufficient information to determine whether such filing complies with *sections 3937.01 to 3937.17 of the Revised Code*, he may require such insurer to furnish the information upon which it supports such filing. Any filing may be supported by the experience or judgment of the insurer or rating organization making the filing, the experience of other insurers or rating organizations, or any other factors which the insurer or rating organization considers relevant. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

(B) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the superintendent to accept such filings on its behalf. *Sections 3937.01 to 3937.17 of the Revised Code* do not require an insurer to become a member of or a subscriber to any rating organization.

(C) (1) For purposes of this division:

(a) "Commercial insurance" means any commercial casualty or commercial liability insurance except sickness and accident, fidelity and surety, and automobile insurance as defined in *section 3937.30 of the Revised Code*.

(b) "Personal lines coverage" means any policy of insurance issued to a natural person for personal or family protection, including, but not limited to, personal automobile, homeowner's, tenant's, and personal umbrella liability coverages.

(2) Except as provided in division (C)(3) of this section, each filing shall become effective immediately upon its filing and is deemed to comply with such sections, unless disapproved by the superintendent as provided in this section or *section 3937.04 of the Revised Code*.

(3) Whenever the superintendent declares by rule pursuant to Chapter 119. of the Revised Code that a degree of competition that will assure that rates are not excessive does not exist in the market for a line of commercial insurance, or that the market is conducted in a manner that may result in inadequate rates or be destructive of competition or detrimental to solvency of insurers, he shall provide that every filing that would result in an increase or decrease of rates for any coverages for that line of commercial insurance shall be subject to this division. Such filing shall be on file for a waiting period of thirty days before it becomes effective, which period may be extended by the superintendent for one additional period not to exceed fifteen days, if he gives written notice within such initial waiting period to the insurer or

rating bureau that he needs such additional time for the consideration of such filing. A filing is deemed to comply with *sections 3937.04 to 3937.17 of the Revised Code* unless disapproved by the superintendent within the waiting period or its extension. Upon written application by such insurer or rating bureau, the superintendent may authorize a filing that he has reviewed to become effective before the expiration of the initial waiting period or its extension. If, during the initial waiting period or extension, the superintendent finds the filing to which *sections 3937.04 to 3937.17 of the Revised Code* apply does not comply with the sections, he shall disapprove the filing by sending written notice to the person who made the filing, specifying therein the reasons the filing fails to comply with the sections. Upon notice of disapproval, the person who made such a filing may request a hearing pursuant to *section 3937.15 of the Revised Code*.

(4) In determining whether circumstances exist in a market for a line of commercial insurance as required in division (C)(3) of this section, the superintendent shall consider all relevant structural factors in determining the conditions of the market, including: the number of insurers actively engaged in providing coverage; market shares; changes in market shares; and ease of entry.

(5) This division does not apply to any filings required under Chapter 3937. of the Revised Code for personal lines coverage.

(6) Any rule adopted by the superintendent under this division shall expire one year after its issuance unless rescinded earlier or extended by rule adopted by the superintendent.

(D) A special filing may be made with respect to a surety or guaranty bond required by law, by court or executive order, or by order, rule, or regulation of a public body not covered by a previous filing.

(E) Special filings may be made at any time with respect to any individual or special risks whose size, classification, degree of exposure to loss, previous loss experience, or other relevant factors call for the exercise of sound underwriting judgment in the promulgation of rates appropriate to such individual or special risks. The superintendent may make such examination as he considers advisable to ascertain whether such rates meet the standards set forth in division (D) of *section 3937.02 of the Revised Code*.

(F) The superintendent may, by written order, suspend or modify the requirement of filing as to any kind of insurance, subdivision, or combination thereof, or as to classes of risks, the rates for which cannot practicably be filed before they are used. Such orders shall be made known to insurers and rating organizations affected thereby. The superintendent may make such examination as he considers advisable to ascertain whether any rates affected by such order meet the standards set forth in division (D) of *section 3937.02 of the Revised Code*.

(G) Upon the written application of the insured, stating his reasons therefor, filed with and approved by the superintendent, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

(H) No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in *sections 3937.01 to 3937.17 of the Revised Code*.

## LEXSTAT OHIO REV CODE ANN 3937.18

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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
 WITH THE SECRETARY OF STATE THROUGH APRIL 21, 2009 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 \*\*\*

TITLE 39. INSURANCE  
 CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

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*ORC Ann. 3937.18 (2009)*

§ 3937.18. Uninsured and underinsured motorist coverage

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures 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, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an "uninsured motorist" is the owner or operator of a motor vehicle if any of the following conditions applies:

- (1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.
- (2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency proceedings in any state.
- (3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.
- (4) The owner or operator has diplomatic immunity.
- (5) The owner or operator has immunity under Chapter 2744. of the Revised Code.

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured. For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of 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.

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later.

(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after the effective date of this amendment. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); 145 v S 20 (Eff 10-20-94); 147 v H 261 (Eff 9-3-97); 148 v S 57 (Eff 11-2-99); 148 v S 267 (Eff 9-21-2000); 149 v S 97. Eff 10-31-2001.

#### Section Notes

The provisions of § 3 of SB 97 (149 v --) read as follows:

**SECTION 3.** In enacting this act, it is the intent of the General Assembly to do all of the following:

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

(B) Express the public policy of the state to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

(5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of *section 3937.181 of the Revised Code*, as amended by this act, that make uninsured motorist property damage coverage available under limited conditions.

(C) Provide statutory authority for provisions limiting the time period within which an insured may make a claim under uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages to three years after the date of the accident causing the injury;

(D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by Am. Sub. S.B. 20 of the 120th General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 123rd General Assembly;

(E) To supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America* (2000), 90 Ohio St.3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St.3d 358, *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565, and their progeny.

The provisions of §§ 3, 4 of SB 267 (148 v --) read as follows:

**SECTION 3.** *It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in Sexton v. State Farm Mut. Auto. Ins. Co. (1982), 69 Ohio St.2d 431, and Moore v. State Auto. Mut. Ins. Co. (2000), 88 Ohio St.3d 27, that division (A)(1) of section 3937.18 of the Revised Code does not permit an insurer to limit uninsured or underinsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, death or disease for any other insured to recover from the insurer.*

**SECTION 4.** *It is the intent of the General Assembly in amending division (C) of section 3937.18 of the Revised Code to make it clear that new rejections of uninsured and underinsured motorist coverages or decisions to accept lower limits of coverages need not be obtained from an insured or applicant at the beginning of each policy period in which the policy provides continuing coverage to the named insured or applicant, regardless of whether a new, replacement, or renewal policy that provides continuing coverage to the named insured or applicant is issued by the insurer or affiliate of that insurer with or without new policy terms or new policy numbers.*

#### Related Statutes & Rules

##### Cross-References to Related Statutes

Coverage for punitive or exemplary damages prohibited, *RC § 3937.18.2.*

Property damage coverage as part of uninsured motorist insurance, *RC § 3937.18.1.*

##### OH Administrative Code

Underinsured motorist coverage. OAC 3901-1-39.

##### Comparative Legislation

UNINSURED MOTORIST COVERAGE: CA--*Cal Ins Code § 11580.2 et seq*

FL--*Fla. Stat. §§ 324.011 et seq, 627.413 et seq*

IL--*215 ILCS § 5/143a*

IN--*Burns Ind. Code Ann. § 27-7-5-2 et seq*

KY--*KRS §§ 304.20-020, 304.39-320*

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 MONTGOMERY COUNTY, OHIO

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO**

**CIVIL DIVISION**

|                                  |   |                               |
|----------------------------------|---|-------------------------------|
| <b>RICHARD GALLOWAY, et al.,</b> | : | <b>Case No. 07-CV-10521</b>   |
|                                  | : | <b>Judge Dennis J. Langer</b> |
| <b>Plaintiffs,</b>               | : |                               |
|                                  | : |                               |
| <b>v.</b>                        | : | <b>DECISION, ORDER AND</b>    |
|                                  | : | <b>ENTRY SUSTAINING</b>       |
| <b>PAMELA K. HENRY, et al.,</b>  | : | <b>DEFENDANT STATE FARM</b>   |
|                                  | : | <b>MUTUAL AUTOMOBILE</b>      |
| <b>Defendants.</b>               | : | <b>INSURANCE COMPANY'S</b>    |
|                                  | : | <b>PARTIAL MOTION FOR</b>     |
|                                  | : | <b>SUMMARY JUDGMENT</b>       |

This matter is before the Court on *Defendant, State Farm Mutual Automobile Insurance Company's Partial Motion for Summary Judgment* (hereinafter "*Motion*") filed on August 25, 2008. On September 15, 2008, Plaintiff Paul Snowden (hereinafter "*Snowden*") filed a *Response*. On October 3, 2008, Defendant State Farm Mutual Automobile Insurance (hereinafter "*State Farm*") filed a *Reply*. This matter is properly before the Court.

**I. FACTS & PROCEDURAL HISTORY**

On December 24, 2006, Plaintiff Richard Galloway (hereinafter "*Galloway*") was driving in the northbound direction on North Paul Dunbar Street in Dayton, Ohio. *Complaint* at ¶1. Snowden was a passenger in the car. *Id.* At the same time, Defendant Pamela Henry (hereinafter "*Henry*"), an uninsured motorist, was traveling in the eastbound direction on

West Third Street. *Id.* At the intersection of North Paul Dunbar Street, Henry allegedly caused an accident by driving her vehicle into Galloway's vehicle. *Id.*

After the accident, State Farm paid \$8,995.54 in medical bills on Snowden's behalf. *Affidavit of Edward Beaty*, ¶ 6, attached as Exhibit A to *Motion* (hereinafter "*Affidavit of Beaty*").

On December 17, 2007, Plaintiffs Galloway and Snowden brought a personal injury action against, among others, Henry, GEICO General Insurance Company (GEICO) (Galloway's automobile insurer), and State Farm (Snowden's automobile insurer). See generally *Complaint*.

Defendant Snowden's contract with State Farm for insurance included medical payments coverage and uninsured motorist coverage (hereinafter "UM coverage"). *Complaint* at ¶¶20 & 29. Snowden began contracting with State Farm for insurance in May of 2004. *Affidavit of Beaty* at ¶ 4. At the time of accident, Snowden had a Policy Number 149 0386-E06-35A insurance contract (hereinafter "Policy") with State Farm. *Id.* at ¶2. This Policy provided UM coverage in the amount of \$100,000 per person, and medical payments coverage in the amount of \$25,000 per person. *Id.* at ¶3. The Policy included a "6083VV Uninsured Motor Vehicle – Coverage U" endorsement. This endorsement included a nonduplication clause that provided:

We will not pay under Uninsured Motor Vehicle Coverage any medical expenses paid or payable under:

1. Medical Payments Coverage of this policy; or
2. the medical payments coverage, no fault coverage, personal injury protection, or other similar coverage of any other motor vehicle policy.

*Id.* at ¶5. See also *Exhibit 1* attached to *Motion*.

This matter is now before this Court on State Farm's *Motion*, asserting that Snowden is not entitled to payment for his medical bills under UM coverage when State Farm has already paid these medical bills under his medical payments coverage.

## I. LAW AND ANALYSIS

### A. Summary Judgment Standard

"Trial courts should award summary judgment with caution." *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269. In *Harless v. Willis Day Warehousing Inc.* (1978), the Ohio Supreme Court stated in order for summary judgment to be appropriate, it must appear that:

- (1) There is no genuine issue as to any 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 party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

54 Ohio St.2d 64, 66.

The moving party bears the initial burden of informing the court of the basis of the motion and identifying those portions of the pleadings, depositions and other such material which it believes demonstrates the absence of a genuine issue of material fact. *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112, 114; *Harless*, 54 Ohio St.2d at 66. The burden on the moving party may be satisfied by "showing" that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323-325. Thus, "if the movant is able to demonstrate that the non-moving party's case lacks the necessary evidence to support its claims, he has successfully discharged his burden." *Pack v. Christman* (Nov. 9, 2000), 2<sup>nd</sup> Dist. No. 18291, 2000 Ohio App. LEXIS 5189, 5.

Furthermore, any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Leibreich*, 67 Ohio St.3d 266, 269; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152.

Thereafter, the non-moving party bears the burden of coming forward with specific facts and evidence showing that there is a genuine issue of material fact for trial. *Van Fossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 117. The non-moving party has the burden "to produce evidence on any issue for which that party bears the burden of production at trial." *Leibreich*, 67 Ohio St.3d at 269; *Wing v. Anchor Media, Ltd.* (1991) 59 Ohio St.3d 108, 111 (citing *Celotex Corp.*, 477 U.S. 317, 322-323). Therefore, the non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86. The non-moving party must respond with affidavits or other appropriate evidence to controvert the facts established by the moving party. *Id.* Further, the non-moving party must do more than show there is some metaphysical doubt as to the material facts of the case. *Matsushita Electric Ind. Co. v. Zenith Radio* (1980), 475 U.S. 574.

Notably, the non-movant's reciprocal burden is only applicable when the movant has satisfied the initial burden. Ohio courts have cautioned that when the movant fails to meet the initial burden, summary judgment is not proper, regardless of whether an opposing memorandum is filed by the non-movant. *Brandimarte v. Packard* (May 18, 1995), 8th Dist. Case No. 67872, 1995 Ohio App. LEXIS 2095, \*4 (citing *Glick v. Dolin* (1992), 80 App. 3d 592, 595) ("[W]hen the movant's evidentiary materials do not establish the absence of a genuine issue of material fact, summary judgment must be denied even if no opposing evidentiary matter is presented."); *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St. 3d 45,

47; *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St. 3d 157, 161) (“[T]he nonmoving party’s failure to respond, by itself, does not mandate granting summary judgment because the moving party bears the burden of showing that all of the requirements of Civ. R. 56(C) are satisfied.)

**B. Caselaw and Statutory History regarding UM Coverage.**

The Supreme Court of Ohio addressed an issue similar to that before the Court, under the prior version of R.C. 3937.18, in *Berrios v. State Farm Ins. Co.* (2002), 98 Ohio St.3d 109, 2002-Ohio-7115, 781 N.E.2d 149. Under the prior version of R.C. 3937.18 (1999 Senate Bill 267) (hereinafter “S.B. 267”), insurance companies were required to offer UM and underinsured motorist (hereinafter “UIM”) coverage with every automobile liability insurance policy.

In the case, *Berrios* was involved in an automobile accident and suffered damages that included \$6,354 in medical bills. *Id.* at ¶1. At the time of the accident, *Berrios* was insured under an automobile insurance policy with State Farm. *Id.* at ¶2. *Berrios*’ insurance policy provided \$100,000 per person in UIM<sup>1</sup> coverage and \$25,000 in medical payments coverage. *Id.* at ¶2. *Berrios* paid separate premiums for the UIM coverage and medical payments coverage. The medical payments coverage policy provided that the insurance company had a right of subrogation over medical payments paid. *Id.* at ¶10. State Farm paid \$6,354.37 for *Berrios*’ medical bills under the medical payments coverage. *Id.* at ¶17. Thereafter, *Berrios* filed a declaratory judgment action with regard to “the question of whether State Farm could enforce a right of subrogation for the medical payments from the

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<sup>1</sup> Although *Berrios* involves UIM coverage, the Court finds this case still applicable based on *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 276, 2001 Ohio 39, 744 N.E.2d 719 (finding beneficiaries of UIM and UM coverage are entitled to the same final result”).

proceeds of Barrios' settlement with the tortfeasor in light of the fact that State Farm had also paid Barrios' UIM coverage benefits." *Id.* at ¶20. The trial court granted State Farm's motion for summary judgment and denied that of Berrios. *Id.* at ¶21. The Tenth District Court of Appeals affirmed the trial court.

However, the Supreme Court of Ohio reversed the judgment of the court of appeals. The Court found the contractual setoff to be in derogation of the public policy and purpose underlying S.B. 267, because the setoff was "a whittling away of the underinsured motorist protection insurers were required to provide." *Id.* at ¶22-23 (citing *Shearer v. Motorists Mut. Ins. Co.* (1978), 53 Ohio St.2d 1, 7 O.O.3d 1, 371 N.E.2d 210). Moreover, the Court noted:

In addition to the public-policy reasoning behind *Shearer* was a more practical issue - that people who pay separate premiums for separate coverages should get what they pay for: "[A] policy provision which the insured considers to be additional protection and for which he pays a premium with such extra protection in mind cannot be transposed by the insurer into the reduction of the mandatory minimum coverage." *Id.*

*Id.* at ¶26. In support of its decision, the Court analyzed the case of *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 22 OBR 228, 489 N.E.2d 281:

In *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 22 OBR 228, 489 N.E.2d 281, this court considered whether a subrogation clause, rather than a setoff clause as in *Shearer*, could allow insurers to reduce UM coverage payments by the amount paid under medical payments coverage.

In *Lindsey*, the insured was injured in an automobile collision caused by an uninsured motorist. The insurer paid the insured's medical bills pursuant to his medical payment coverage. The insured's UM claim went to arbitration. The arbitrator arrived at an award well within the policy limits. The insurer sought to reduce the amount of the arbitration award by the amount it had previously paid under the medical payments coverage. The insurer argued that its case was different from the insurer in *Shearer* because of the subrogation clause, which had been lacking in *Shearer*. This court, concerned less with terminology than with the practical effect of the subrogation clause, rejected that distinction:

"An insurance policy clause which provides to the insurer a contractual right of subrogation as to payments made under the medical payments portion of the policy does not enable the insurer to avoid obligations it incurs pursuant to the uninsured motorists provision of the same insurance policy. Thus, even where the policy provides for subrogation as to payments made as medical payments coverage, a contract provision which would, in essence, enable the insurer to set off such medical payments against amounts due to the insured pursuant to uninsured motorist coverage is void as in derogation of the public policy and purpose underlying R.C. 3937.18."

The court in *Lindsey* realized that, as in *Shearer*, its decision resulted in a "double recovery" -- i.e., recovery under both the UM and medical payments policy provisions -- for the insured. *Lindsey*, 22 Ohio St.3d at 155, 22 OBR 228, 489 N.E.2d 281. Double recovery did not trouble the court. Instead, it was more concerned that insurers would use subrogation clauses to avoid their obligations to provide full coverage:

"We cannot accept [the] argument that the presence of a subrogation clause prevents the medical payments coverage provided under one portion of an insurance policy from being considered as 'collateral' to uninsured motorist coverage provided under a separate portion of the same policy.\* \* \*

"Permitting offsets of any type would allow insurers, by contract, to alter the provisions of the statute and to escape all or part of the liability which the Legislature intended they should provide. \* \* \*" *Bacchus v. Farmers Ins. Group Exchange* (1970), 106 Ariz. 280, 282, 475 P.2d 264." *Lindsey*, 22 Ohio St.3d at 155-156, 22 OBR 228, 489 N.E.2d 281.

The court concluded that "so long as the insured pays separate premiums for medical payments coverage and uninsured motorist coverage, each of which the insured considers to be additional protection, the mere inclusion of a subrogation clause within the policy, which will enable the insurer to pursue collection from the tortfeasor of both types of payments made, does not alter the result mandated by *Shearer*." *Id.* at 156, 22 OBR 228, 489 N.E.2d 281.

*Id.* at ¶¶27-33. Thus, the Court held that *Berrios* was entitled to recover under both the medical payments coverage and the UIM coverage, because of the payment of separate premiums as well as the applicability of *Shearer* and *Lindsey*. *Id.* at ¶40.

R.C. 3937.18 was amended in 2001 S.B. 97 (hereinafter "S.B. 97"), effective October 31, 2001. S.B. 97 eliminated any requirement of mandatory offering of UM or UIM coverage. See R.C. 3937.18(A).

In *Wayne Mutual Insurance Co. v. Bradley*, Stark County App. No. 2005 CA00200, 2006-Ohio-1517, the Fifth Appellate District declined to find that the *Berrios* decision was overruled by the enactment of S.B. 97. In the case, the Bradleys were struck in their vehicle by an uninsured motorist. *Id.* at ¶3. The Bradleys' policy with the insurance company, Wayne Mutual Insurance Co. (hereinafter "Wayne Mutual"), provided both UM coverage and medical payments coverage. *Id.* at ¶4. After the Bradleys completed the required forms, Wayne Mutual paid the Bradleys' medical bills under the medical payments coverage. *Id.* at ¶5. The Bradleys then submitted their UM claim and a dispute arose regarding whether Wayne Mutual was entitled to set-off of medical payments coverage. *Id.* at ¶6. Wayne Mutual filed a declaratory judgment action regarding this issue, and the trial court granted the Bradleys' motion for summary judgment, finding that Wayne Mutual was not entitled to set-off the amount of medical payments coverage under UM coverage. *Id.* at ¶9-11. On appeal, Wayne Mutual appealed "the trial court's rejection of its argument that S.B. 97, which became effective October 31, 2001, overruled the cases upon which the trial court relied in finding that the set-off was [not] proper in the case sub judice," those cases being *Berrios*, *Lindsey*, and *Shearer*. *Id.* at ¶24. The Fifth Appellate District affirmed the decision of the trial court, finding:

Upon review, we find that like the insurer in *Lindsey*, Wayne Mutual treated UM coverage separately from medical payments coverage by setting out separate conditions for payment under the contract and charging separate premiums.

We therefore find that the trial court did not err in finding that [Wayne Mutual] was not entitled to a set-off in this matter.

*Id.* at ¶36 & 38.

**C. Summary Judgment is proper with regard to this motion as a matter of law. State Farm is entitled to a set-off of the UM claim based on amount paid under the medical payments coverage.**

State Farm moves for partial summary judgment on Snowden's uninsured motorist claim. State Farm asserts that the Policy excludes coverage for payment of medical bills under UM coverage when State Farm has already paid the medical bills under the medical payments coverage. State Farm maintains that the nonduplication clause was in effect at the time of the accident and is applicable to the facts at bar.

State Farm contends that the nonduplication clause is enforceable. State Farm asserts that this Court should enforce the Policy's plain terms. State Farm argues that the public policy discussed in *Berrios* no longer exists, because Senate Bill 97 eliminated the requirement for insurers to offer UM coverage with every offer of automobile liability insurance. State Farm also argues that *Berrios* is distinguishable, because the "*Berrios* contract contained a subrogation clause stating that the insurer was entitled to reimbursement" while the Policy in the case at bar "excluded coverage for Mr. Snowden's bills already paid under the medical payments coverage." *Motion* at 8. Thus, State Farm asserts that the "*Berrios* court's public policy reasons for striking the contract's medical subrogation provision do not apply to this case." *Motion* at 9.

In the *Response*, Snowden argues that summary judgment is not proper on this issue as a matter of law. Snowden asserts, "the nonduplication clause is contrary to Ohio law," "void," and "inapplicable to this case," because of public policy. *Response* at 4. Snowden asserts that in *Berrios* the Court also held, "it is against public policy for policy holders to pay two separate premiums for two separate coverages and to then not receive the benefit of

both of these coverages.” Id. at 5. Snowden maintains that this public policy reason for the voiding of such provisions remains applicable. State Farm notes that Snowden paid two separate premiums for the medical payments coverage and the UM coverage. Snowden also notes that State Farm failed “to reduce Snowden’s premium for Uninsured Motorists coverage when the nonduplication clause went into effect, which allowed an offset for the amounts up to \$25,000 paid under the medical payments coverage.” Id. at 7. Snowden asserts that this was “clearly unfair to the policy holder and against public policy.” Id.

In the *Reply*, State Farm contends that “the nonduplication clause is consistent with Ohio’s public policy under R.C. 3937.18, as amended through Senate Bill 97.” *Reply* at 1. State Farm contends that *Berrios* is no longer applicable, because the current version of R.C. 3937.18 no longer requires insurance companies to offer UM coverage with every automobile liability insurance. State Farm noted that the purpose behind R.C. 3937.18(F) was to allow insurance companies to contractually eliminate insurance stacking. State Farm argues, “Paul Snowden agreed to a contract and already received his benefit from the bargain.” Id. at 6. State Farm contends Senate Bill 97 allows insurers, in their policies terms and conditions, to eliminate stacking and preclude coverage under specific circumstances. Thus, State Farm argues that the terms of the contract should be enforced and State Farm should not be liable under UM coverage for medical payments that State Farm already paid under medical payment coverage.

This Court finds that State Farm is entitled to set-off the UM claim by the amount paid under the medical payments coverage. The applicable nonduplication clause is unambiguous and an enforceable contract provision.

Under Ohio law, an insurance policy is considered a contract between the insurer and the insured. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St. 3d 107, 109. A Court, therefore, may interpret an insurance policy as a matter of law. *Ambrose v. State Farm Fire & Cas.* (1990), 70 Ohio App. 3d 797, 799; 592 N.E.2d 868. Generally, the contract should be interpreted to give effect to the words' plain meanings. *Cleveland Elec. Illuminating Co. v. Cleveland* (1988), 37 Ohio St. 3d 50. Where the plain meaning of the contract is clear, the Court need not go beyond the text of the contract. *Seringetti Constr. Co. v. Cincinnati* (1988), 51 Ohio App. 3d 1, 5, 553 N.E.2d 1371.

According to the clauses' plain terms, State Farm will not pay medical expenses under UM coverage that have already been paid under medical payments coverage. This clause is enforceable and not against public policy.

The Court is not convinced that *Berrios* decision is applicable to the case at bar, because the public policy reason for the voiding of nonduplication clauses is no longer applicable. The decision of the Supreme Court of Ohio in *Berrios* is based on the premise that Ohio law, specifically R.C. 3937.18, mandates UM coverage with every automobile liability insurance policy.

However, S.B. 97 changed this mandate and eliminated any requirement of a mandatory offering of UM coverage. "The legislature appears to have swapped an interest in providing compensation for 'uninsured' motorists with an interest in providing reasonable rates." *Howard v. Howard*, Pike App. No. 06CA755, 2007-Ohio-3940, ¶20. See also Section 3(A) of S.B. 97. Under S.B. 97, UM coverage "may include any terms and conditions precluding coverage, as long as these circumstances are specified in the policy." *Kelly v. Auto-Owners Ins. Co.*, Hamilton App. No. C-050450, 2006-Ohio-3599, ¶7 (citing

R.C. 3937.18(I)<sup>2</sup>. See also *Howard*, ¶18 (finding that “R.C. 3937.18(I) contains a non-exhaustive list of terms and conditions that insurers may include in their policies to preclude coverage for bodily injury or injury that an insured suffers”); *Green v. Westfield Ins. Co.*, Medina App. No. 06CA0025-M, 2006-Ohio-5057, ¶16. Moreover, the Court notes that the Ohio General Assembly expressly noted, in enacting R.C. 3937.18, that it was its intent to “provide statutory authority for the inclusion of exclusionary or limiting provisions in [UM] coverage, [UIM] coverage, or both [UM] and [UIM] coverages. Section 3(B)(3) of S.B. 97.

The Court is not persuaded by the Plaintiff’s argument that the *Berrios* case is binding, regardless of the changes in R.C. 3937.18, because of the following language in *Berrios*:

In addition to the public-policy reasoning behind *Shearer* was a more practical issue - that people who pay separate premiums for separate coverages should get what they pay for: “[A] policy provision which the insured considers to be additional protection and for which he pays a premium with such extra protection in mind cannot be transposed by the insurer into the reduction of the mandatory minimum coverage.”  
Id.

Id. at ¶26. First, this reasoning ends with the phrase, “cannot be transposed by the insurer into the reduction of the mandatory minimum coverage.” As discussed above, there is not mandatory minimum UM coverage now. Second, although Snowden paid separate premiums for separate coverages, the Court finds Snowden is getting what he paid for: UM coverage, excluding payment paid or payable under other coverages as provided by the

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<sup>2</sup> The first part of R.C. 3937.18(I) provides:

Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

The five circumstances enumerated following this section are not applicable to the case at bar.

nonduplication clause. State Farm is permitted to enforce the nonduplication clause, because UM coverage is no longer mandatory. Moreover, based on the reasoning discussed above, the Court is not persuaded by the *Wayne Mutual Ins. Co.* case.

Finally, the Court is not persuaded by Snowden's argument that it is unfair and against public policy to change the Policy to allow for offset under UM coverage while, at the same time, failing to reduce the premium for UM coverage. Snowden failed to cite any case law in support of this assertion that the State Farm was required to reduce the premium in this situation.

### III. CONCLUSION

Based on the foregoing, Defendant State Farm's *Motion for Partial Summary Judgment* is sustained.

SO ORDERED:

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Dennis J. Langer, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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