

[Cite as *Kirby v. Barletto*, 2009-Ohio-5090.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James G. Kirby et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-158 (C.P.C. No. 06CVC05-6571)
Theresa E. Barletto et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 17, 2009

Robert J. Behal Law Offices, LLC, and John M. Gonzales,
for appellants.

Lane, Alton & Horst, LLC, Belinda S. Barnes, and Ray S. Pantle,
for appellee State Farm Mutual Automobile
Insurance Company.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Plaintiffs-appellants, James G. Kirby ("James") and Ella L. Kirby ("Ella") (collectively, "appellants"), appeal the January 23, 2009 judgment of the Franklin County Court of Common Pleas in favor of appellants and against defendant-appellee,

State Farm Mutual Automobile Insurance Company ("State Farm"). For the following reasons, we affirm.

{¶2} This action arises as a result of an automobile collision that occurred on May 20, 2004. On that date, Theresa Barletto ("Barletto") negligently drove the automobile she was operating into the back of appellants' vehicle, which was stopped for a school bus. It is undisputed that Barletto was negligent and that her negligence was the proximate cause of the collision. State Farm insured appellants pursuant to an automobile insurance policy that provided uninsured/underinsured motorist ("UM/UIM") coverage with limits of \$100,000 per person/\$300,000 per accident and medical payments coverage with a limit of \$100,000 per person.

{¶3} On May 18, 2006, appellants filed a complaint in the Franklin County Court of Common Pleas, alleging that they suffered injuries as a direct and proximate result of Barletto's negligence. Appellants named, as defendants, Barletto and Carol A. and Aaron Wooten, the owners of the vehicle Barletto was operating at the time of the collision. Appellants filed an amended complaint on November 7, 2006, naming State Farm as an additional defendant and alleging that State Farm was liable for appellants' damages pursuant to the terms of appellants' insurance policy.

{¶4} In February 2008, appellants executed settlement agreements and releases with respect to their claims against Barletto and the Wootens (collectively, the "settling defendants"). Appellants received \$25,000 in settlement of Ella's claims and \$20,000 in settlement of James' claims, in exchange for a complete release of the settling defendants from liability. The settlement agreements obligated appellants to

dismiss their claims against the settling defendants with prejudice, but expressly excluded appellants' claims against State Farm. The settlement agreements and releases were filed with the trial court on August 7, 2008, as attachments to the settling defendants' unopposed motion to enforce the settlement agreements. On September 8, 2008, the trial court granted the motion to enforce the settlement agreements and dismissed appellants' claims against the settling defendants with prejudice, leaving pending only appellants' claims against State Farm.

{¶5} After a multi-day trial, the jury returned a general verdict in favor of Ella and against State Farm in the amount of \$76,279, and a general verdict in favor of James and against State Farm in the amount of \$16,219. Pursuant to Loc.R. 25, appellants submitted a proposed entry, setting forth judgments in the amount of the jury verdicts, plus statutory prejudgment interest from the date that appellants filed their amended complaint. State Farm also submitted a proposed entry, setting forth judgment for Ella in the amount of \$51,279, plus statutory interest from the date that appellants executed the settlement agreements, and judgment in favor of James in the amount of \$0. The dollar figures in State Farm's proposed judgment entry are the result of State Farm's setoff of the amounts that appellants received from the settling defendants.

{¶6} The parties filed competing motions for the trial court to adopt their respective judgment entries. State Farm argued that it was entitled to set off appellants' settlement proceeds pursuant to appellants' policy and R.C. 3937.18(C). In support of its motion, State Farm submitted a copy of appellants' policy, along with a certificate

from a State Farm records custodian, and copies of appellants' executed settlement agreements and releases, which were already part of the trial court's record. Appellants argued, however, that State Farm was not entitled to a setoff because it did not plead setoff as an affirmative defense and did not present evidence at trial of its right to setoff or of the setoff amount.

{¶7} The trial court adopted State Farm's proposed entry, stating that, pursuant to R.C. 3937.18(C), a plaintiff's recovery under a UIM policy must be reduced by amounts paid to the plaintiff by the tortfeasor or the tortfeasor's insurer. The trial court entered final judgment in favor of Ella in the amount of \$51,279, plus statutory interest of \$3,076.74, and in favor of James in the amount of \$0.

{¶8} Appellants filed a timely notice of appeal and now assert the following assignments of error:

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRE[D] BY ENTERING JUDGMENT IN FAVOR OF THE [APPELLANTS] FOR AN AMOUNT LESS THAN THE JURY VERDICTS[.]

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF STATE FARM'S PAYMENT OF [APPELLANTS'] MEDICAL EXPENSES PURSUANT TO THE MEDICAL PAYMENT PROVISIONS OF THE AUTOMOBILE INSURANCE POLICY ISS[U]ED TO [APPELLANTS.]

{¶9} We begin with appellants' first assignment of error, by which they contend that the trial court erred by entering judgment in an amount less than the jury verdicts. Appellants maintain that the trial court lacked authority to enter a judgment different

from the jury's general verdict absent an inconsistency with the jury interrogatories and where State Farm neither asserted setoff as an affirmative defense in its answer nor presented evidence demonstrating its right to setoff at trial. To the contrary, State Farm maintains that R.C. 3937.18(C) and Ohio case law mandate setoff.

{¶10} Appellants first maintain that a trial court may not enter judgment that differs from a general jury verdict absent an inconsistency between the general verdict and answers to jury interrogatories. Appellants premise their argument on Civ.R. 49(B), which states that, "[w]hen the general verdict and the answers [to jury interrogatories] are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58." We reject appellants' argument. First, Ohio courts, including this court, have repeatedly affirmed post-jury-verdict setoffs in UIM cases with no indication of any inconsistency between the verdicts and jury interrogatories. See, e.g., *Fickes v. Kirk*, 11th Dist. No. 2006-T-0094, 2007-Ohio-6011, ¶18 ("[m]otions for setoff of a jury's verdict are routinely considered by courts"); *Leisure v. State Farm Mut. Auto. Ins. Co.*, 5th Dist. No. 2002CA00277, 2003-Ohio-2491; *Ruiz v. GEICO*, 10th Dist. No. 08AP-955, 2009-Ohio-2759. In addition to UIM cases, Ohio courts have also approved post-verdict reductions of jury awards in other contexts. See, e.g., *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St.3d 260, 270 (post-verdict deduction of collateral benefits pursuant to R.C. 2744.05(B)); *Bryan v. Brown* (Mar. 3, 1994), 10th Dist. No. 93AP-1061 (affirming post-verdict reduction based on plaintiff's receipt of collateral benefits pursuant to R.C. 2317.45); *Howard v. City Loan & Sav.* (Mar. 27, 1989), 2d Dist. No. 88-CA-39 (approving reduction of jury award to amount prayed for in

complaint, although reversing judgment for other reasons). While the jury in this case determined the total amount of appellants' damages proximately caused by the accident, that amount does not necessarily reflect State Farm's liability under the terms of appellants' policy. Accordingly, we conclude that Civ.R. 49(B) does not preclude the trial court's setoff of the amounts appellants received in settlement of their claims against the settling defendants.

{¶11} We next consider the statutory and contractual bases for State Farm's claimed setoff. R.C. 3937.18(C) states that, when an insurance policy includes UIM coverage, "[t]he policy limits of the [UIM] 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 setoff, "amounts available for payment" means "the amounts actually accessible to and recoverable by" a UIM claimant. *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, syllabus. In interpreting the setoff language now contained in R.C. 3937.18(C), the Supreme Court of Ohio recognized the statutory indication 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* at 430, citing *Clark* at 276. Indeed, R.C. 3937.18(C) expressly provides that UIM coverage "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." Accordingly, State Farm argues that R.C. 3937.18(C) mandated the trial court's deduction of amounts that appellants actually received from the settling defendants and that the trial court therefore appropriately deducted those amounts from the jury award when entering judgment.

{¶12} This court recently considered the R.C. 3937.18(C) setoff language in *Ruiz*, an appeal involving the trial court's reduction of a jury verdict in an action for UIM benefits. Like here, after the jury returned a verdict, the parties disagreed over the UIM insurer's entitlement to a setoff and could not agree on a judgment entry. The *Ruiz* trial court reduced the \$25,104.35 jury verdict by \$6,250, representing the amount of the tortfeasor's coverage limit that the plaintiffs-appellants received. On appeal, the appellants argued that the plain language of R.C. 3937.18(C) permitted a setoff only against the UIM policy limits, not against the jury award. This court agreed with the appellants' construction of R.C. 3937.18(C) and stated that the "statutory language was only implicated to the extent that, prior to the jury's determination regarding damages, appellee was obligated to pay no more than \$43,750—representing the \$50,000 [UIM] policy limits * * * minus the amount paid on behalf of the tortfeasor by his insurance company." *Id.* at ¶7. Nevertheless, we affirmed the setoff in that case based on the language of the applicable UIM policy, submitted as an exhibit to the insurance company's post-trial brief regarding setoff. The UIM policy in *Ruiz* stated that "[t]he amount payable under this Coverage will be reduced by all amounts: (a) paid by or for all persons or organizations liable for the injury.'" *Id.* at ¶6. We held that the clear and unambiguous policy language required that the damages payable, i.e., the jury verdict,

be reduced by the amount paid to appellants by the tortfeasor's insurance company. We also stated that setoff was consistent with R.C. 3937.18(C)'s statement that UIM coverage may not provide a UIM claimant greater protection than that which would be available under the insured's UM coverage had the tortfeasor been uninsured. We noted that, had the tortfeasor been uninsured, the appellants could have only collected the \$25,104.35 jury award under their UM coverage. Thus, had the trial court not permitted a setoff, the appellants would have recovered more than they could have recovered if the tortfeasor had been uninsured, in contravention of R.C. 3937.18(C).

{¶13} Appellants' State Farm policy provides that the most State Farm will pay for "all damages arising out of and due to **bodily injury** to one **person** is the lesser of" the following:

- a. the difference between the "each person" limit of liability of this coverage and the total amount of all liability coverage available to or for all **persons** or organizations who are or who may be held legally liable for damages arising out of and due to that **bodily injury**; or
- b. the difference between the amount of damages arising out of and due to that **bodily injury** and the total amount of all liability coverage available to or for all **persons** or organizations who are or who may be held legally liable for damages arising out of and due to that **bodily injury**.

(Emphasis sic.) While the first subsection limits State Farm's liability based on a setoff from the UIM coverage limit, the second subsection limits State Farm's liability based on a setoff from the insured's damages. Thus, the policy limits UIM benefits to the difference between appellants' damages, as determined by the jury award, and the amounts appellants received in settlement of their claims against the settling

defendants. Like in *Ruiz*, this limitation is consistent with R.C. 3937.18(C)'s mandate that a UIM claimant not recover more than the claimant would have recovered had the tortfeasor been uninsured. Absent setoff, appellants' recovery would exceed the jury verdict, which represents the total amount appellants could have recovered in a UM claim.

{¶14} In support of their argument that the trial court lacked authority to permit a setoff, appellants rely on the Seventh District Court of Appeals' opinion in *Jordan v. Westfield Ins. Co.*, 7th Dist. No. 07 MA 18, 2008-Ohio-1542, an action arising out of an automobile collision caused by an uninsured motorist. When the plaintiffs' UM carrier denied coverage, they sued the tortfeasor and their UM carrier. When entering judgment, the trial court deducted from the jury verdict the amount of the plaintiffs' medical bills that had been paid by other insurers, including Anthem Blue Cross Blue Shield ("Anthem"). The plaintiffs appealed, challenging the setoff, and the court reversed. Contrary to appellants' assertion, however, *Jordan* is readily distinguishable and does not preclude setoff in this case.

{¶15} The most glaring and significant distinguishing factor in *Jordan* is that the jury there was presented with evidence of the plaintiffs' medical bills and the amounts paid by third-party providers to cover those bills. Despite the presentation of that evidence to the jury, however, the trial court gave no jury instruction to explain the significance of the third-party provider payments or to explain that the court would make a post-verdict setoff of those amounts. The plaintiffs argued, on appeal, that the setoff was error because the trial court did not inform the jury that the court would reduce the

jury's award of damages after trial. The court noted that, where the record contained evidence of the third-party provider payments, it was impossible to discern from a general verdict how the jury handled the payments, especially since the trial court did not instruct the jury to disregard them. The appellate court was primarily concerned that the record reflected no basis for concluding that the jury itself had not calculated the setoff in reaching its general verdict, stating "it must be presumed absent any evidence to the contrary that the jury considered the payments made by Anthem or any other collateral source and adjusted its verdict accordingly." *Id.* at ¶36. Therefore, the court concluded that the UM insurer was "not permitted to have those amounts deducted a *second time* by the trial judge after the jury rendered its verdict." *Id.* at ¶44 (emphasis added).

{¶16} In *Jordan*, the court distinguished *Roberts v. State Farm Mut. Auto. Ins. Co.*, 155 Ohio App.3d 535, 2003-Ohio-5398. In *Roberts*, the plaintiff had UM/UIM coverage under policies issued by National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and State Farm. Roberts' claim for UM/UIM coverage against National Union was tried to a jury, which returned a verdict in favor of Roberts in the amount of \$92,000. After trial, the court granted National Union's motion for a modified verdict and ordered a setoff of \$100,000, representing the amount that State Farm paid in settlement of Roberts' UM/UIM claims under the State Farm policy. The Second District Court of Appeals affirmed the reduced judgment, noting that the jury did not receive evidence regarding State Farm's payment and, therefore, did not consider State Farm's payment in determining Roberts' damages. The court stated that it would

be improper to place an insured in a position better than she was in before the accident because the purpose of UM/UIM coverage is to compensate the insured, not to permit a windfall. *Id.* at ¶70, citing *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, 123. Applying that rationale, the court continued, at ¶71, as follows:

* * * The jury determined that Roberts was injured and that her injuries could be made whole by compensating her in the amount of \$92,000. Given that Roberts had already received compensation in the amount of \$100,000 from State Farm, the jury's award establishes that she has already been fully compensated. To fail to reduce Roberts's verdict against National Union by the amount of the settlement with State Farm would result in Roberts's receiving compensation in an amount double the value the jury placed upon her loss-i.e., a windfall.

{¶17} This case is far more similar to *Roberts* than to *Jordan*. Like in *Roberts*, the jury here did not receive evidence of the amount that appellants received in settlement of their claims against the settling defendants. In *Jordan*, at ¶43, the court stated that, "[b]ecause the jury in the *Roberts* case did not receive evidence of the collateral payments, it obviously did not deduct those payments from the damage award. Thus, the trial judge had the basis for making the post-verdict setoff." Likewise, the jury here obviously did not deduct appellants' settlement funds from the damage award because it had no evidence upon which to base a deduction. To fail to reduce the jury verdict would result in appellants' receipt of compensation in excess of the value the jury assigned to their loss and in excess of what they could have received in a UM claim, contrary to R.C. 3937.18(C). Accordingly, we reject appellants' reliance on *Jordan* and conclude that the trial court had an adequate basis for making the setoff.

{¶18} Appellants' first assignment of error also touches on the following additional questions regarding the propriety of the setoff in this case: (1) whether State Farm's failure to plead setoff as an affirmative defense and failure to present evidence supporting its right to setoff at trial preclude setoff; and (2) whether the setoff violated appellants' right to a trial by jury. We answer both questions in the negative.

{¶19} Especially in light of the pleadings and the trial court proceedings here, we reject appellants' suggestion that State Farm waived its right to a setoff from appellants' total damages, as determined by the jury, by not pleading setoff as an affirmative defense. "Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional." *Glidden Co. v. Lumbersmens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶49.

{¶20} When appellants amended their complaint to add State Farm as a defendant, they did not add a claim for declaratory relief regarding their entitlement to UIM benefits nor did they amend their prayer for relief to request a judgment directly against State Farm. Rather, appellants demanded judgment solely against the settling defendants, jointly and severally, with no mention of State Farm in their prayer for relief. Appellants' amended complaint simply alleged their tort claims against the settling defendants and added an allegation that "State Farm is liable to Plaintiffs *pursuant to the terms of the Plaintiffs' insurance policy* for Plaintiffs' damages set forth hereinafter." (Emphasis added.) Thus, by their amended complaint, appellants admit that State Farm's liability to appellants stems from and is controlled by the terms of their policy,

which includes a limitation of State Farm's liability via setoff. Given appellants' admission that State Farm was liable only pursuant to the terms of its policy, we do not believe that State Farm was required to assert an affirmative defense to limit its liability pursuant to those terms or that its failure to assert an affirmative defense to that effect could be viewed as a voluntary relinquishment of its right to enforce the terms of the policy.

{¶21} In *Fickes*, the Eleventh District Court of Appeals affirmed a post-jury-trial setoff despite the defendant's failure to raise setoff as an affirmative defense in her answer to the plaintiffs' complaint. In that case, a suit against an insured tortfeasor for personal injury and loss of services, the trial court reduced the jury verdict in favor of the plaintiffs by the amount paid by the tortfeasor's liability insurer to reimburse the plaintiffs' insurer for payment of the plaintiffs' medical expenses. The plaintiffs-appellants argued that the trial court erred in ordering a setoff, in part because the defendant did not raise setoff as an affirmative defense, but the appellate court affirmed. By affirming the setoff, the appellate court necessarily rejected any contention that the failure to raise setoff as an affirmative defense in an answer waives the right to a post-trial setoff.

{¶22} Courts of other states have similarly rejected challenges to setoffs based solely on a defendant's failure to raise setoff as an affirmative defense. See, e.g., *Giesie v. Gen. Cas. Co. of Wisconsin*, 287 Wis.2d 829, 2005 WI App 233, ¶13 ("[s]ince pleading a setoff or filing a counterclaim is not necessary to receive a setoff after a jury verdict, we are also satisfied that failing to take these actions at an arbitration hearing does not constitute a waiver of right to a setoff"); *Broome v. Watts* (1995), 319 S.C. 337,

342, ("[s]et-off was statutorily mandated, was not a matter properly triable to the jury, and therefore was not a matter constituting an affirmative defense which [the UIM carrier] was under a duty to plead and prove").

{¶23} We further conclude that the absence of evidence regarding setoff in the jury trial does not bar the trial court's setoff. Consistent with appellants' complaint, the trial court proceeded as if trying a tort claim, in which appellants were required to establish negligence (which was conceded), proximate cause, and damages, with State Farm standing in the shoes of Barletto. As a practical matter, an insured must prove his or her case as if proceeding against the tortfeasor before being entitled to UIM benefits. See *Gaul v. Westfield Natl. Ins. Co.* (Aug. 20, 1999), 11th Dist. No. 97-L-278. In *Gaul*, the court rejected an assertion of error based on the trial court proceeding on a tort theory of liability when trying a UIM claim. That court further stated that the parties' insurance contract was irrelevant to the tort issues being tried where "*[t]he jury's only role was to determine proximate cause and the extent of any personal injury damage sustained by appellant as a result of the accident.*" (Emphasis sic.) Here, counsel agreed that the jury would be instructed that the issue for the jury's determination was the amount of money, if any, that would fully and fairly compensate appellants for their actual injuries and damages. Like the trial court in *Gaul*, the trial court here excluded any evidence of appellants' State Farm policy as irrelevant. We find no error in the trial court's proceeding on a tort theory of liability or in the court's exclusion of evidence regarding the State Farm policy, which necessarily encompasses State Farm's contractual right to a setoff. Nor does the trial court's exclusion of evidence regarding

the policy bar State Farm's subsequent assertion of its right to a setoff from the damages award pursuant to its policy.

{¶24} Lastly under the first assignment of error, we reject appellants' contention that the trial court's application of setoff constituted a violation of appellants' right to a trial by jury, and we conclude that the trial court appropriately determined the setoff after trial. The trial court had before it uncontested evidence of appellants' insurance policy and their settlement agreements, including the amounts that appellants received in settlement of their claims against the settling defendants. In fact, the trial court had previously ordered enforcement of the settlement agreements, without objection from appellants, by dismissing appellants' claims against the settling defendants with prejudice prior to trial. The question of whether State Farm was entitled to a setoff of the amount that appellants received in settlement of their claims against the settling defendants involved no disputed facts, but depended entirely upon the interpretation of the undisputed and unambiguous policy language and R.C. 3937.18(C).

{¶25} The interpretation of an insurance contract involves a question of law to be decided by the court, not the jury. *Leber v. Smith*, 70 Ohio St.3d 548, 1994-Ohio-361. Pursuant to R.C. 2311.04, "[i]ssues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure." Moreover, the constitutional right to a trial by jury does not extend to the determination of questions of law. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶37. In *Arbino*, the Supreme Court of Ohio noted that, "[s]o long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, [jury]

awards may be altered *as a matter of law.*" Id. at ¶37 (emphasis sic). A court may apply the law to facts determined by the jury without violating the constitution. Id. Here, the trial court's application of setoff, as unambiguously provided for in the policy and supported by the public policy expressed in R.C. 3937.18(C), did not alter the jury's factual findings regarding appellants' total damages and, therefore, did not conflict with appellants' right to a trial by jury.

{¶26} For these reasons, we overrule appellants' first assignment of error.

{¶27} We now turn to appellants' second assignment of error, by which they argue that the trial court erred in excluding evidence of payments that State Farm made to appellants pursuant to the medical payments coverage of their policy. Prior to jury selection, State Farm's counsel moved the trial court for an order excluding any mention of State Farm's payments under the medical payments coverage as irrelevant, confusing, and misleading, and the trial court sustained that motion. The court revisited the issue during trial and heard arguments from counsel. Appellants' counsel argued that State Farm's payments, pursuant to coverage for "'reasonable expenses for necessary medical treatment resulting from the accident,'" constituted an admission that the paid medical expenses were reasonable and necessary. (Tr. 106.) Appellants' counsel further argued that State Farm's payments were admissible to impeach State Farm's independent medical examiner, who testified that appellants' reasonable and necessary medical expenses terminated in July 2004, despite State Farm's payment of subsequent expenses under the medical payments coverage. State Farm's counsel responded that the majority of payments under the medical payments coverage were

made prior to appellants filing suit against State Farm and prior to State Farm's independent medical examination, from which it determined that certain of appellants' medical expenses were not reasonable and necessary. State Farm's counsel also argued that, pursuant to Ohio case law, the different coverages under appellants' policy must be treated as separate policies and that payment under one coverage does not constitute an admission under another coverage. The trial court ultimately maintained its exclusion of evidence regarding State Farm's payments.

{¶28} "It is axiomatic that a determination as to the admissibility of evidence is a matter within the sound discretion of the trial court." *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164. "The issue of whether testimony is relevant or irrelevant, confusing or misleading, is best decided by the trial judge who is in a significantly better position to analyze the impact of the evidence on the jury." *Id.* We review rulings regarding the admission or exclusion of evidence under an abuse of discretion standard. *Barnett v. Sexten*, 10th Dist. No. 05AP-871, 2006-Ohio-2271, ¶5, citing *Dunkelberger v. Hay*, 10th Dist. No. 04AP-773, 2005-Ohio-3102. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶29} The Eleventh District Court of Appeals addressed this issue in *Gaul*. In that case, the appellant argued that the trial court erred by excluding evidence that her insurer paid \$10,000 in medical payments under her automobile liability policy, thus implicitly acknowledging that appellant sustained her injuries as a result of the

underlying accident. The appellate court rejected the appellant's arguments and affirmed the exclusion of evidence. The court stated, "we fail to see how appellant can avoid the clear implications of Evid.R. 409," which prohibits the admission of evidence of payments of medical expenses occasioned by an injury to prove liability for the injury. The court noted that, "as a practical matter, an insurer might rationally conclude that it is better to settle a suspect or contested claim for medical payments than it is to litigate the matter and risk a bad faith claim." Ultimately, the court declined to hold that an insurer's payment of a medical payment claim constituted an admission of liability. "[S]uch a holding might force insurance companies to withhold and/or contest payment under the medical payment provision for fear of compromising the insurer's position under the liability provisions of the policy."

{¶30} In *Kallmeyer v. Allstate Ins. Co.* (June 23, 2000), 1st Dist. No. C-990799, the court rejected the very arguments that appellants raise here. Specifically, Kallmeyer argued that her insurer's payment of costs submitted under the medical payments coverage of her policy, which required the insurer to pay " 'reasonable expenses * * * for necessary medical treatment,' " was admissible to rebut testimony from the insurer's medical expert that certain medical treatment was not reasonable and medically necessary for purposes of her UM claim. Kallmeyer also argued that the insurer's payments under the medical payments coverage constituted an admission of a party opponent that the bills were reasonable and medically necessary. The appellate court found no error in the trial court's exclusion of evidence regarding the insurer's payments under the medical payments coverage because the admission of the evidence "could

have been substantially prejudicial, with a potential chilling effect on insurance companies' willingness to pay medical expenses."

{¶31} We agree with the reasoning expressed in *Gaul* and *Kallmeyer* and discern no abuse of discretion in the trial court's exclusion of evidence of State Farm's payments under the medical payments coverage. Given the myriad potential reasons for State Farm's payment of appellants' medical bills under the medical payments coverage, including those expressed in *Gaul*, State Farm's payments constitute neither an admission that the medical bills were reasonable expenses for necessary medical treatment under her UIM coverage nor a waiver of the right to contest the reasonableness, necessity or proximate causation of appellants' treatment and injuries. The trial court's decision to exclude the evidence of State Farm's payments was not unreasonable, arbitrary or unconscionable. Accordingly, we overrule appellants' second assignment of error.

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

Judgment affirmed.

BROWN and KLATT, JJ., concur.
