COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JANE DONAWERTH, et al.,	**:**	
Plaintiffs	**:**	**CASE NO. 2012 CVC 00738**
vs.	**:**	**Judge McBride**
TERRY DILLON, et al.	**:**	**DECISION/ENTRY**
Defendants	**:**	

Thompson Hine LLP, Anthony J. Hornbach, attorney for the plaintiffs Jane Donawerth and Kenneth Donawerth, 312 Walnut Street, Suite 1400, Cincinnati, Ohio 45202.

Mulvey & Muller LLC, William J. Mulvey, attorney for the defendant Terry Dillon, 35 East 7th Street, Suite 750, Cincinnati, Ohio 45202.

Markesbery & Richardson Co., LPA, Samuel A. Gradwohl, attorney for the defendant American Commerce Insurance Company, 2638 Victory Parkway, Suite 200, P.O. Box 6491, Cincinnati, Ohio 45206.

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Kate M. Rottmayer, attorney for the defendant Grange Indemnity Insurance Company, 9277 Centre Pointe Drive, Suite 370, West Chester, Ohio 45069.

This cause is before the court for consideration of a motion for summary judgment filed by defendant American Commerce Insurance Company.

The court scheduled and held a hearing on the motion on November 19, 2012. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[1]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[2] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[3]

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[1] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

[2] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[3] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[4]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[5] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[6]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[7] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence

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[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[8] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[9] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[10] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[11]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[14] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[15]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and

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[9] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[15] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[16] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.

must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[18]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[19]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[20] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

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[17] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[18] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[19] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[20] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[24]

FACTS OF THE CASE

The present action is the result of an automobile accident in which a vehicle driven by the plaintiff Jane Donawerth was hit from behind by a vehicle driven by the

[21] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[23] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[24] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

defendant Terry Dillon. The vehicle driven by Donawerth at the time of the accident was owned by her employer American Mobile X-Ray.

At the time of the accident, Dillon was insured by Progressive Insurance Company in the amount of $100,000 per person and $300,000 per accident. American Mobile X-Ray had a commercial policy with Grange Indemnity Insurance Company which provided underinsured automobile coverage in the amount of $1,000,000. The Donawerths were insured by the defendant American Commerce Insurance Company under a personal automobile insurance policy which provided for underinsured motorists coverage in the amount of $500,000.

The Underinsured Motorists Bodily Injury Coverage portion of the Donawerths' policy with American Commerce Insurance Company states in relevant part as follows:

> "LIMIT OF LIABILITY
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> * * *
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> B. The limit of liability shall be reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible. * * *
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> * * *
>
> OTHER INSURANCE
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> If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this part of the policy:
>
> 1. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.
>
> 2. Any insurance we provide with respect to a vehicle you do not own, including any vehicle while used as a temporary substitute for 'your covered auto', shall be in excess over

> any collectible insurance providing such coverage on a primary basis."[25]

American Commerce Insurance Company now moves for summary judgment, arguing that, under the facts of this case, the language contained in its policy would prohibit any recovery by the plaintiffs under the underinsured motorist provisions.

LEGAL ANALYSIS

Pursuant to R.C. 3937.18:

> "(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.
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> * * *
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> (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:

[25] American Commerce Insurance Company's Motion for Summary Judgment, Exhibit D, pg. 10 of 21.

> (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."

The plaintiffs in the present case direct the court's attention to the case of *Wright v. Cincinnati Ins. Co.* (Aug. 8, 2003), 2nd Dist. No. 19802, 2003-Ohio-4201. In that case, the court held in applicable part that language in a policy which states that UIM limits must be reduced by all sums paid for bodily injury' by or on behalf of "anyone who is legally liable" does not include an insurance company providing UIM coverage and instead only includes the tortfeasor.[26] The court found that "[a]mounts paid pursuant to an underinsured motorist policy are by definition not paid 'by or on behalf of anyone who is legally liable[,]" and, instead, this language "clearly refers to persons legally liable for the accident."[27]

In *Merz v. Motorists Mut. Ins. Co.* (May 14, 2007), 12th Dist. No. CA2006-08-203, 2007-Ohio-2293, the decedent, James Merz, was a passenger in a vehicle driven by William Parker when the vehicle was hit by a vehicle operated by the tortfeasor Robert Centers.[28] William Parker was insured by State Farm under a policy providing uninsured/underinsured motorist limits in the amount of $100,000 per person, and $300,000 per accident.[29] "The UM/UIM limits in the amount of $100,000 per person provided by Mr. Parker's automobile policy [were] subject to a set off of $25,000

[26] *Wright v. Cincinnati Ins. Co.* (Aug. 8, 2003), 2nd Dist. No. 19802, 2003-Ohio-4201, at ¶ 40.
[27] Id.
[28] *Merz v. Motorists Mut. Ins. Co.* (May 14, 2007), 12th Dist. No. CA2006-08-203, 2007-Ohio-2293, at ¶ 3.
[29] Id. at ¶ 6.

(amount paid on behalf of Mr. Centers) in accordance with the terms and conditions of the insurance policy and R.C. 3937.18(C) and * * * State Farm paid $75,000 to the" estate of the decedent.[30] The decedent's policy with Motorists Mutual provided UM/UIM coverage in the amount of $100,000 per person and $300,000 per accident.[31]

The decedent's estate filed breach of contract and bad faith claims against Motorists Mutual and the parties ultimately moved for summary judgment.[32] The trial court granted Motorists Mutual's summary judgment motion.[33] The Motorists Mutual policy contained the following relevant language:

> "LIMIT OF LIABILITY
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> B. With respect to [UIM] coverage * * * the limit of liability shall be reduced by all sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible.
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> * * *
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> OTHER INSURANCE
>
> If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided under this Part of the policy:
>
> 1. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis."[34]

The decedent's estate acknowledged that R.C. 3937.18(C) required that the limits of the Motorists Mutual policy UIM coverage be reduced by the amount received

[30] Id. at ¶ 7.
[31] Id. at ¶ 9.
[32] Id. at ¶¶ 10-11.
[33] Id. at ¶ 12.
[34] Id. at ¶¶ 24-30.

from the tortfeasor's policy.[35] However, the estate argued that "neither R.C. 3937.18(C) nor the setoff provision in the parties' insurance policy requires a setoff of amounts of UIM coverage available to them under another insurance policy such as the one between State Farm and Parker."[36]

The appellate court held that the language of R.C. 3937.18(C) precluded a finding that this statutory provision requires a setoff of amounts available from other UIM providers because that statute "requires setoff of amounts available to the insured under insurance policies *covering* persons liable to the insured" and an insurance company is not covered by a policy, it issues a policy.[37] However, the appellate court noted that, while R.C. 3937.18(C) does not mandate a setoff, it also does not prohibit policy language requiring such a setoff.[38]

The *Merz* court then disagreed with the appellate court's analysis in *Wright* regarding the interpretation and effect of the setoff language in the insurance policy.[39] The policies examined in both *Merz* and *Wright* contained similar policy language requiring the limit of the insurance to be reduced by all sums paid for bodily injury by or on behalf of anyone legally liable (*Wright*) or legally responsible (*Merz*).[40] The *Merz* court noted that a court may not delete or add words to a contract when determining the rights and obligations of the parties under that contract.[41] The *Merz* court found that "[b]y construing the phrase 'anyone who is legally liable' to mean 'persons legally liable *for the accident,*' (emphasis added), the *Wright* court was impermissibly adding words to

[35] Id. at ¶ 31.
[36] Id.
[37] Id. at ¶¶ 43-47.
[38] Id. at ¶ 48.
[39] Id. at ¶ 53.
[40] Id. at ¶¶ 50-51.
[41] Id. at ¶ 54.

the contract. By adding or deleting words to an unambiguous contract, the *Wright* court, in effect, rewrote the parties' contract, which it was not permitted to do."[42] The court then held as follows:

> "We conclude that the setoff provision in the parties' contract providing that with respect to UIM coverage, 'the limit of liability shall be reduced by all sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible[,]' refers not only to persons or organizations who may be legally responsible *for the accident,* but rather, refers to any person or organization 'who may be legally responsible [,]' period. Persons or organizations who may be 'legally responsible' can include persons or organizations who are contractually liable to the injured party, as well as those who are liable to the injured party as a matter of tort.
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> In this case, the parties stipulated that the accident was caused by Centers. Therefore, Parker and his UIM carrier, State Farm, were not liable to appellants as a matter of tort. Nevertheless, it is apparent from the fifth paragraph of the parties' stipulations that State Farm was contractually liable to appellants as a result of the February 5, 2005 accident. In that stipulation, the parties acknowledge that State Farm paid appellants $75,000 for their claim arising out of the accident. That amount represented the full $100,000 limit of the policy between Parker and State Farm, minus the $25,000 appellants received from Centers, the tortfeasor, as required under the terms of the policy.
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> Consequently, the trial court properly found that appellee was entitled under the setoff provision in the parties' policy to reduce the limits of UIM coverage under the policy by the amounts appellants received pursuant to the UIM provision of the policy between State Farm and Parker."[43]

Additionally, the *Merz* court also held that the anti-stacking provision set forth above required that the amount the estate received from the UIM coverage in the policy between State Farm and Parker be setoff against the $100,000 UIM limit of the parties'

[42] Id. at ¶ 55.
[43] Id. at ¶¶ 56-58.

policy.[44] The court noted that "[b]y attempting to recover UIM benefits under their policy with appellee on top of and in addition to the UIM benefits they have already received from Parker's policy with State Farm, appellants are attempting to 'stack' the UIM coverages provided for by Parker's policy with State Farm and appellants' policy with appellee[,]" which was prohibited by the anti-stacking provision in the decedent's insurance policy.[45]

The *Merz* case was decided by the Twelfth District Court of Appeals which is this court's appellate district. Therefore, this court cannot, as the plaintiffs urge it to do, adopt the reasoning set forth in *Wright* that was specifically and directly disagreed with by the Twelfth District. The plaintiffs attempt to distinguish *Merz* by noting that the policies in *Merz* were both personal consumer policies, while the policies at issue in the case at bar are a personal consumer policy and a commercial policy. However, the plaintiffs offer no explanation, and this court can see no reason, as to why this fact would alter the *Merz* court's analysis of the setoff language contained in the insurance policy in that case, which is essentially identical to the language of the American Commerce policy in the present case. The analysis set forth in *Merz* was not dependent on the type of policies discussed but was instead dependent on that court's analysis of the contractual language.

Additionally, as in the *Merz* case, the anti-stacking language in the American Commerce policy is applicable. As with the setoff provisions, the anti-stacking language used in the American Commerce policy in the case at bar and the anti-stacking language in the policy examined in *Merz* are practically identical. That contractual

[44] Id. at ¶ 59.
[45] Id. at ¶ 63.

language states that "[i]f there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided by this part of the policy * * *" then recovery under those policies may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on a primary or excess basis.

The plaintiffs argue that this provision is not applicable in this case because the American Commerce and Grange policies are not "similar," in that they are a personal consumer policy and a commercial policy, respectively. However, the plaintiffs ignore the plain language of that provision, which references other applicable insurance under "policies *or provisions of coverage that is similar to the insurance provided in this part of the policy* * * *." The part of the policy referred to is the Underinsured Motorists Bodily Injury Coverage. Therefore, the unambiguous meaning of this contractual language refers to provisions of coverage similar to the American Commerce UIM coverage, which would certainly apply to the UIM coverage contained in the Grange policy.

The plaintiffs also argue that, even if the setoff and anti-stacking provisions of the American Commerce policy apply, coverage could still be invoked because both Jane Donawerth and Kenneth Donawerth have filed claims in this case. In making this argument, the plaintiffs posit that both Jane Donawerth and Kenneth Donawerth are each entitled to up to $500,000 of underinsured motorist coverage per accident.

However, as American Commerce correctly argues, the policy language of the UIM coverage states that American Commerce "will pay compensatory damages which 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle' because of 'bodily injury" sustained by an insured and caused by an

accident.[46] The policy defines "bodily injury" as "bodily harm, sickness or disease, including death that results therefrom."[47] Kenneth Donawerth's claim in the present case is a derivative claim for loss of consortium, which does not fall under the definition of "bodily injury" as set forth in the American Commerce policy.[48] As such, he is not entitled to coverage under the UIM provision of the American Commerce policy for his loss of consortium claim.

Finally, the plaintiffs argue that summary judgment is not appropriate because American Commerce's motion is premature. The plaintiffs note that all of the legal arguments set forth above are predicated on the assumption that the Grange policy is the primary UIM policy in the present case, making American Commerce the excess policy. Grange has withdrawn several of its affirmative defenses, including its third affirmative defense which states that "[p]laintiffs may have other UM coverage which may apply to this loss on a primary or pro-rata basis[,]" and its nineteenth affirmative defense which alleges that the plaintiffs failed to comply with all preconditions and conditions precedent and subsequent in the Grange policy.[49] However, unlike in the *Merz* case, there has been no stipulation filed in the present case which definitively establishes that the Grange policy is the primary policy. The issue of applicability and coverage under the Grange policy has not been legally determined.[50]

American Commerce directs this court's attention to the relevant language of the Grange policy and notes that Grange did not oppose its motion for summary judgment

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[46] American Commerce Insurance Company's Motion for Summary Judgment, Exhibit D, pg. 9 of 21.
[47] Id. at pg. 1 of 21.
[48] See, e.g., *Bebout v. Tindall* (July 27, 2004), 10th Dist. No. 03AP-1031, 2004-Ohio-3936, ¶ 25, citing, e.g., *Saunders v. Mortensen*, 101 Ohio St.3d 86, 801 N.E.2d 452, 2004-Ohio-24; and *Greiner v. Timm* (Mar. 28, 2000), Franklin App. No. 99AP-618, dismissed, appeal not allowed, 89 Ohio St.3d 1466, 732 N.E.2d 998.
[49] Notice of Affirmative Defenses by Defendant Grange, filed November 8, 2012.
[50] See, e.g., *Wright*, supra, at ¶ 50.

which argues that the Grange policy is primary. However, American Commerce's motion requests judgment as to the plaintiff's claims against it and, consequently, Grange had no obligation to file any opposition or answer to the present motion for summary judgment. Determination of the applicability and status of the Grange policy is not properly before this court on American Commerce's motion for summary judgment as American Commerce has no claims pending against Grange or brought by Grange it.

Therefore, while it is likely merely academic to keep American Commerce in the case at this juncture, it is not appropriate for American Commerce to be granted judgment as a matter of law at this time. However, the court notes that it has determined all of the legal issues above as a matter of law. Therefore, if Grange's policy is stipulated or otherwise determined to be the primary UIM policy in this case, no valid claim against American Commerce will remain at that time.

CONCLUSION

Based on the above analysis, the motion for summary judgment filed by American Commerce Insurance Company is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 24th day of January 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride