COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

REVONNA ROGERS, et al.,	**:**	
Plaintiffs	**:**	**CASE NO. 2010 CVC 01370**
vs.	**:**	**Judge McBride**
RAYMOND WESTGERDES, et al.	**:**	**DECISION/ENTRY**
Defendant	**:**	

Gregory S. Young Co., L.P.A., Christopher D. Byers, attorney for the plaintiffs Revonna Rogers and Jimmy Rogers, 600 Vine Street, Suite 402, Cincinnati, Ohio 45202.

David A. Goldstein Co., L.P.A., Stuart A. Keller, attorney for the defendant Raymond Westgerdes, 326 S. High Street, Suite 500, Columbus, Ohio 43215.

Garvery Shearer PSC, John J. Garvey III and Jason Abeln, attorneys for defendant GEICO Insurance Company, 300 Buttermilk Pike, Suite 336, Ft. Mitchell, Kentucky 41017.

This cause is before the court for consideration of motions for summary judgment filed by the defendant Raymond Westgerdes and the defendant GEICO Insurance Company (hereinafter "GEICO").

The court scheduled and held a hearing on the motions for summary judgment on December 2, 2011. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, 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.

FACTS OF THE CASE

On October 12, 2008, the plaintiff Revonna Rogers was travelling from her home to her place of employment.[1] At approximately 10:00 p.m., when she was roughly fifteen minutes from work and on State Route 32 near Eastgate Mall, Rogers saw a vehicle in her rearview mirror and noticed that the vehicle got very close to the rear of her vehicle and then swerved around her into the next lane.[2] Rogers noticed the vehicle because it came upon her very fast and startled her.[3] The vehicle that she had seen in her rearview mirror then hit her driver's side mirror and Rogers slammed on her brakes, causing her body to go forward.[4] The hit did not take the mirror off the car, but it did break the mirror and its plastic casing.[5] Rogers came to a stop and, before the vehicle that hit her left the scene, Rogers was able to write down its license plate number.[6] Rogers also observed that the vehicle was a black Pontiac.[7]

Rogers called 9-1-1, and when officers arrived, she notified them that she could not identify the driver of the vehicle but that she did observe that there was only one

[1] Deposition of Revonna Rogers at pgs. 22-24.
[2] Id. at pgs. 31-32 and 36.
[3] Id. at pg. 38.
[4] Id. at pgs. 40 and 48.
[5] Id. at pgs. 119-120.
[6] Id. at pg. 42.
[7] Id. at pg. 43.

person in the black Pontiac.[8] Rogers testified that it appeared that a male was driving the Pontiac because, while she could only see the back portion of the person, the person's hair was short, so she made the assumption the driver was male.[9] Rogers also testified at her deposition that she believes the driver was Raymond Westgerdes; that belief appears to be rooted in the fact that the vehicle was registered to Westgerdes.[10]

On the evening of October 12, 2008, Raymond Westgerdes was travelling from his place of employment to his home.[11] Westgerdes acknowledges that the site of the accident would have been on his route home and, per his testimony, he likely left his work on Beechmont Avenue sometime around 9:30 p.m., after which he would have travelled to Interstate 275 and then on to State Route 32, then to Route 68.[12] He noted the distance encompassed by this trip is more than forty miles.[13] Westgerdes admits that, at the time of the accident, he owned a black 2002 Pontiac Sunfire and that his license plate number matches the number written down by Revonna Rogers on the night of the accident.[14] However, he denies being involved in any accident on the evening in question.[15]

[8] Id. at pgs. 42 and 51.
[9] Id. at pg. 120.
[10] Id.
[11] Deposition of Raymond Westgerdes at pgs. 8-10 and 14.
[12] Id. at pgs. 10 and 49.
[13] Id. at pg. 52.
[14] Id. at pgs. 11 and 16.
[15] Id. at pg. 14.

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."[16]

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.[17] 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.[18]

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

[16] 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.

[17] *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.

[18] *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.

summary judgment."[19]

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[?]"[20] "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."[21]

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.[22] 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."[23]

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 of a genuine issue of material fact on the essential element(s) of the nonmoving party's

---

[19] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[20] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[21] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[22] *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.
[23] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

claims.[24] 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.[25] 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.[26]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[27] 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.[28] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[29] 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."[30]

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.[31] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and

---

[24] *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.
[25] Id.
[26] Id.
[27] Id.
[28] Id.
[29] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[30] *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.
[31] *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.[32]

"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."[33]

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.[34]

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.[35] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all

---

[32] 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.
[33] *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.
[34] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[35] *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.

papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

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.[36] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[37]

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.[38]

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.[39]

---

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

LEGAL ANALYSIS

(A) WESTGERDES MOTION FOR SUMMARY JUDGMENT

The defendant Raymond Westgerdes seeks summary judgment as to the claims against him by arguing that the plaintiff failed to prove he is liable for her injuries "by a preponderance of the evidence" because she cannot identify him as the tortfeasor.

As noted above, the standard of review on summary judgment is not for a court to determine whether the plaintiff has proven her case by a preponderance of the evidence; that is the requisite standard of proof to be considered by the trier of fact at trial in a civil case such as this one. Instead, as discussed in the section above, the court's consideration in reviewing a motion for summary judgment is, taking all evidence and making all reasonable inferences in a light most favorable to the plaintiff as the non-moving party, whether the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the plaintiff and, therefore, no genuine issue of material fact remains to be litigated.

Revonna Rogers testified that she was hit by a black Pontiac with the license plate number 959XXB. Raymond Westgerdes admits that, at the time of the accident, he owned a black Pontiac Sunfire with that same license plate. Westgerdes also acknowledges that the site of the accident would have been on his route home. The testimony of Rogers and Westgerdes allows an inference that they could have both been at the site of the accident at approximately the same time on the evening in

question. Rogers testified that she believes a male was driving the vehicle that struck her.

Taking this evidence in a light most favorable to the plaintiff, the totality of this circumstantial evidence creates a genuine issue of material fact as to whether Westgerdes was driving the vehicle the plaintiff alleges struck her on the evening of October 12, 2008. This is a question of fact that must be decided by the trier of fact and cannot be resolved by the court on a motion for summary judgment.[40]

As a result, the motion for summary judgment filed by Raymond Westgerdes is not well-taken and shall be denied.

(B) GEICO MOTION FOR SUMMARY JUDGMENT

(i) PROXIMATE CAUSE

GEICO first argues that summary judgment is appropriate because the plaintiff's own negligence was the proximate cause of her injuries.

" * * * [C]omparative negligence principles require the factfinder to apportion the percentage of each party's negligence in relation to the proximate cause of the plaintiff's

[40] See *Price v. Roberts* (Sept. 30, 1999), 3rd Dist. No. 3-99-18, 1999-Ohio-896, *2.

damages."[41] " '[I]ssues of comparative negligence are for the jury to resolve unless the evidence is so compelling that reasonable minds can reach but one conclusion.'"[42]

There is at least one case in Ohio in which the court noted when discussing comparative negligence that, after her car began to skid on a patch of ice, the plaintiff "overreacted by slamming on her brakes" causing her brakes to lock and the car to skid out of control.[43] However, that case does not support a finding of judgment as a matter of law on the issue of comparative negligence simply because there is evidence that the plaintiff slammed on her brakes. Instead, that court ruled that, based on the evidence, either party could have been found negligent and that issue is one to be resolved by the trier of fact.[44]

In this case, a genuine issue of material fact remains as to the issue of comparative negligence. There is evidence that the plaintiff "slammed" on her brakes; however, there is also evidence that her side-view mirror was struck by another vehicle just prior to her braking. It is for the trier of fact to determine which party, if any, is negligent and, specific to the present argument, whether the plaintiff's reaction of "slamming" on her brakes was reasonable and/or whether the plaintiff's own actions were the proximate cause of her injuries.

Consequently, summary judgment is not appropriate on the issue of proximate cause.

---

[41] *Skowronski v. Waterford Crossing Homeowners' Assn.* (July 28, 2011), 8th Dist. No. 96144, 2011-Ohio-3693, ¶ 24.
[42] Id. See, also, *Corfee v. Swarthourt* (Sept. 25, 2001), 7th Dist. No. 99CO55, 2001-Ohio-3424, *3, quoting *Piper v. McMillen* (1999), 134 Ohio App.3d 180, 730 N.E.2d 481, citing *Hitchens v. Hahn* (1985), 17 Ohio St.3d 212, 213-214.
[43] Id. at *4.
[44] Id.

(ii) UNINSURED MOTORIST CLAIM

An action by an insured against an insurance company seeking uninsured or underinsured motorist coverage is a cause of action sounding in contract.[45]

"A choice-of-law clause is 'a contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties."[46] "Ohio has adopted the Restatement of the Law 2d, Conflict of Laws (1971), Section 187(2), to determine whether the state's law chosen by the parties should govern the contractual dispute."[47] This section can be invoked when the court is " 'satisfied that the parties have actually made an express choice of law regarding the issue before the court.' "[48]

In the case at bar, an amendment to the insurance contract between the parties explicitly states that "[t]he policy and any amendment(s) and endorsement(s) are to be interpreted pursuant to the laws of the state of Kentucky."[49] This is an express choice of law and neither party has set forth any argument that this contractual provision was not properly agreed upon by the parties. Therefore, the court finds that Restatement of the

---

[45] *Ohayon v. Safeco Ins. Co.,* 91 Ohio St.3d 474, 480, 2001-Ohio-100, 747 N.E.2d 206, citing, e.g., *Miller v. Progressive Cas. Ins. Co.* (1994), 69 Ohio St.3d 619, 624, 635 N.E.2d 317, 321.
[46] *DeSantis v. Lara* (June 5, 2009), 1st Dist. No. C-080482, 2009-Ohio-2570, ¶ 19, citing Black's Law Dictionary (8 Ed.Rev.2004) 258.
[47] Id., citing *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co. .* (1983), 6 Ohio St.3d 436, 453 N.E.2d 683, syllabus; *Ohayon*, supra, 91 Ohio St.3d at 486, 2001-Ohio-100, 747 N.E.2d 206.
[48] Id., quoting *Ohayon* at 486.
[49] Notice of Filing Certified Copy of the GEICO Insurance Policy, Automobile Policy Amendment, pg. 4.

Law 2d, Conflict of Laws (1971), Section 187 is applicable in this case. That section states in relevant party as follows:

> "(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

The court notes that no party has argued that Kentucky has no substantial relationship to the parties or that the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest in this action. Therefore, the court shall examine the plaintiff's uninsured and underinsured motorist claims under Kentucky law for the purposes of this summary judgment motion.

The insurance policy defines a "hit-and-run auto" as "a motor vehicle causing bodily injury to an insured through physical contact with him or with an auto he is occupying at the time of the accident * * * ."[50]

While Ohio law requires independent, corroborative evidence that a claimant was struck by a hit-and-run motorist[51], Kentucky law does not impose such a requirement.

[50] Id., Kentucky Family Automobile Insurance Policy, pg. 10.

Instead, in cases involving a claim of a hit-and-run motorist, Kentucky law has simply upheld contractual provisions requiring "physical contact" between the claimant and the alleged hit-and-run motorist.[52]

In the case at bar, the plaintiff testified that she was struck by a hit-and-run vehicle, specifically that said vehicle hit her driver's side mirror and that she was injured as a result. Therefore, a genuine issue of material fact exists as to these issues.

GEICO argues that the plaintiff failed to set forth a *prima facie* claim for uninsured motorist coverage. In support of its argument, GEICO cites to the fact that the plaintiff has alleged that Raymond Westgerdes was the tortfeasor in this collision and that Westgerdes testified that he had insurance through Safe Auto at the time of the alleged accident.[53]

While these facts are accurate, the fact also remains that the plaintiff has included a claim against a John Doe motorist in the present case in the alternative.[54] Pleading in the alternative is an accepted practice and, as a result, a genuine issue of material fact remains as to whether the plaintiff can prove a claim against a John Doe motorist and prove entitlement to uninsured motorist benefits.

---

[51] See, e.g., *Brown v. Philadelphia Indemn. Ins. Co.* (May 9, 2011), 12th Dist. No. CA2010-10-094, 2011-Ohio-2217, ¶¶ 20-28.
[52] See, e.g., *Burton v. Farm Bureau Ins. Co.* (2003), 116 S.W.23d 475, 477-479; and, *Shelter Mut. Ins. Co. v. Arnold* (2005), 169 S.W.3d 855, 856-857.
[53] Westgerdes Depo. at pg. 24.
[54] Complaint.

(iii) UNDERINSURED MOTORIST CLAIM

Finally, GEICO argues that it is entitled to summary judgment on the plaintiff's claim for underinsured motorist coverage because it argues that it is entitled to a set-off of the limits of the policy held by Raymond Westgerdes, the alleged tortfeasor.

GEICO bases its argument on the provisions of Ohio Revised Code Sections 3937.18(A)(2) and (C). As discussed in the preceding section of this decision, Kentucky law applies to the plaintiff's claims under the insurance contract. KRS § 304.39-320, Kentucky's statute regarding underinsured motorist coverage, reads as follows:

> "(1) As used in this section, 'underinsured motorist' means a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident.
>
> (2) Every insurer shall make available upon request to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage not inconsistent with this section the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering.
>
> (3) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights. An injured person, or in the case of death, the personal representative, may agree to

> settle a claim with a liability insurer and its insured for less than the underinsured motorist's full liability policy limits. If an underinsured motorist insurer consents to settlement or fails to respond as required by subsection (4) of this section to the settlement request within the thirty (30) day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.
>
> (4) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing to consent to settle, the underinsured motorist insurer must, within thirty (30) days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the liability insurer to the extent of its limits of liability insurance, and the underinsured motorist for the amounts paid to the injured party.
>
> (5) The underinsured motorist insurer is entitled to a credit against total damages in the amount of the limits of the underinsured motorist's liability policies in all cases to which this section applies, even if the settlement with the underinsured motorist under subsection (3) of this section or the payment by the underinsured motorist insurer under subsection (4) of this section is for less than the underinsured motorist's full liability policy limits. The term "total damages" as used in this section means the full amount of damages determined to have been sustained by the injured party, regardless of the amount of underinsured motorist coverage. Nothing in this section, including any payment or credit under this subsection, reduces or affects the total amount of underinsured motorist coverage available to the injured party."

Subsection (5) set forth above dictates that the UIM carrier is entitled to a credit against the total of damages awarded, if any, in the amounts of the limits of Westgerdes' liability policy limits, if Westgerdes is found to be the tortfeasor in this case. Therefore, while procedurally summary judgment is not appropriate on this claim due to

the fact that the entitlement to UIM benefits is not conclusively established until a judgment is rendered, the court does find that, should damages be awarded to the plaintiff against Raymond Westgerdes in an amount exceeding his liability insurance coverage and, consequently, the plaintiff's UIM coverage is triggered, GEICO will be entitled to a credit as set forth in KRS § 304.39-320(5).

CONCLUSION

The motion for summary judgment filed by Raymond Westgerdes is not well-taken and is hereby denied.

The motion for summary judgment filed by GEICO Insurance Company is also not well-taken and is hereby denied, except to the extent that the court finds that, in the event the plaintiff's UIM coverage is triggered, GEICO will be entitled to a credit as set forth in KRS § 304.39-320(5).

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent mailed by U.S. Mail/e-mailed/faxed this 12th day of January 2012 to all counsel of record and unrepresented parties.

_____