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COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

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2019 MAY 17 PM 1:41

BARBARA A. WIEDEMEIER
CLERK OF COURTS
CLERMONT COUNTY, OH

JOANNE DUNLAP, ET AL.	:	
	:	
Plaintiffs		**CASE NO. 2017 CVC 01030**
	:	
vs.		**Judge McBride**
	:	
RICHARD A. CROCKER, III, ET AL.		**FINAL JUDGMENT ENTRY**
	:	
Defendants		

This action came before the court on a jury trial that ended on January 15, 2019, the issues having been duly tried and the jury having returned its verdict in the amount of $22,045.25 for total compensatory damages to be awarded to the plaintiffs Joanne Dunlap and Timothy Dunlap.

Pursuant to the stipulation of the plaintiffs Joanne Dunlap and Timothy Dunlap (hereinafter referred to as "the Dunlaps") and the defendant Allstate Fire and Casualty Insurance Company (hereinafter referred to as "Allstate") entered into by the parties, the parties have stipulated that if a verdict is rendered in favor of the Dunlaps, either individually or jointly, in excess of $100,000.00, Allstate has a duty to pay that amount, less a set-off of $100,000.00 for the tortfeasor's policy. Because the verdict amount is $22,045.25, less than the tortfeasor's $100,000.00 policy limits, Allstate has no duty to pay that verdict amount.

IT IS HEREBY ORDERED AND ADJUDGED that Allstate is the prevailing party in this action and that there are no damages due the Dunlaps from Allstate as a result of the verdict rendered by the jury.

DATED: 5-17-19

Judge Jerry R. McBride

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Plaintiffs		**CASE NO. 2017 CVC 01030**
	:	
vs.		**Judge McBride**
	:	
RICHARD A. CROCKER, III, ET AL.		**DECISION/ENTRY**
	:	
Defendants		

Gregory M. Utter and Taylor V. Trout, counsel for the plaintiffs Joanne Dunlap and Tim Dunlap, 1 East Fourth Street, Suite 1400, Cincinnati, Ohio 45202.

William A. Dickhaut, counsel for the intervening defendant Allstate Fire and Casualty Insurance Company, 625 Eden Park Drive, Suite 325, Cincinnati, Ohio 45202.

This cause is before the court for consideration of the parties' competing requests for costs under Civ.R. 54(D). The intervening defendant Allstate Fire and Casualty Insurance Company filed its proposed judgment entry, awarding costs to itself, on February 4, 2019. The plaintiffs filed their motion for costs on February 11th. Neither party requested oral argument, and the court took the motions under advisement on March 5th.

Upon consideration of the motions, the record of the case, the evidence before the court, the written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This case stems from a vehicular accident that occurred on September 12, 2015. The defendant Richard A. Crocker III negligently struck the plaintiff Joanne Dunlap's vehicle, forcing the plaintiff's vehicle into the vehicle in front of her. The plaintiff suffered injuries to her face, neck, shoulders, back, and legs.

On August 18, 2017, the plaintiff filed a complaint alleging a claim of negligence against Crocker and claims of negligent entrustment against the defendants Kyle James Sears and Ronald Sears. Additionally, the plaintiff Tim Dunlap filed a claim for loss of consortium.[1]

On December 18, 2017, the intervening defendant Allstate Fire and Casualty Insurance Company (hereinafter referred to as "Allstate") filed a motion to intervene as a party defendant and to have its answer filed *instanter*. In its motion, Allstate indicated that the plaintiffs had an insurance policy with it. If the plaintiffs received a judgment against the defendants in excess of the tortfeasor's policy of liability, $100,000, then the plaintiffs would be entitled to receive a payout from Allstate under its underinsured motorist ("UIM") policy with the plaintiffs.

The court granted the motion on January 22, 2018. Thereafter, on September 6th, the plaintiffs filed an amended complaint, adding Anthem Blue Cross Blue Shield and Allstate as defendants. As it relates to Allstate, in their prayer for relief, the plaintiffs asked for a judgment against Allstate on their claims of negligence, negligent entrustment, and loss of consortium.

On September 19, 2018, the plaintiffs and Allstate entered into certain stipulations, as follows:

> "Plaintiffs Joanne Dunlap and Timothy Dunlap ('Plaintiffs') and Defendant Allstate Fire and Casualty Insurance Company ('Defendant' or 'Allstate') (collectively 'the Parties'), hereby stipulate that Allstate Policy no. 980 102 933 ('UM/UIM Policy') issued to

[1] The defendants Kyle Sears and Ronald Sears were subsequently dismissed from this suit without prejudice on November 16, 2018.

> Joanne M. Dunlap and Timothy C. Dunlap was in full force and effect at the time of the accident giving rise to the above captioned case involving Joanne Dunlap and Richard A. Crocker, III and which occurred on or about September 12, 2015. The Parties further stipulate that the UM/UIM Policy provides for underinsured/uninsured motorist coverage limits of $500,000.00 for each person and $1,000,000.00 per accident for Joanne Dunlap and Timothy C. Dunlap. The Parties stipulate that the Loss of Consortium claim of Timothy C. Dunlap is derivative of the Bodily Injury claim of Joanne Dunlap, therefore the combined claims of Joanne Dunlap and Timothy Dunlap are covered under the per person limitation in the UM/UIM Policy. The Parties stipulate that if a verdict is rendered in favor of Plaintiffs, either individually or jointly, in excess of $100,000.00, then under the UM/UIM Policy, Allstate is liable to Joanne Dunlap and Timothy Dunlap for the verdict amount, less a set-off of $100,000.00 for the tortfeasor's policy, said verdict amount not to exceed the $500,000.00 per person limits.
>
> The Parties further stipulate that nothing contained in this stipulation changes or impacts the dispute between the Parties related to Allstate Personal Umbrella Policy, Policy No. 980 974 806. Nor does it change or impact the bifurcation of that dispute. If the jury returns a verdict in favor of Plaintiffs which exceeds the $500,000.00 per person limits of the UM/UIM Policy, then the Parties will proceed in accordance with the Court's order on bifurcation."

On December 28th, the court entered an order bifurcating the trial as follows: "The issue of whether Allstate's Excess/Umbrella, Policy No. 980 974 806, provides underinsured motorists coverage in excess of the underlying policy is hereby bifurcated."

The case went to a jury trial beginning on January 14, 2019. On January 24th, the jury returned a verdict finding the plaintiffs were damaged in a total amount of $22,045.25. They also found that Crocker's negligence directly and proximately injured Joanne Dunlap. Then, on February 5th, the plaintiffs dismissed their claims against Crocker. The plaintiffs' claims as to Anthem and Allstate remained pending.

Allstate filed its proposed judgment entry, proposing an award of costs to itself, on February 4, 2019. It argued that it was the prevailing party, because per the stipulations, Allstate has no duty to pay the plaintiffs since the award from the jury was less than the tortfeasor's $100,000 policy limit. As such, Allstate posits that it is the prevailing party.

The plaintiffs filed their request for costs and response in opposition on February 11th. They posit that they are the prevailing parties because the issue before the jury was whether Crocker proximately caused Joanne Dunlap's injuries, and the jury found that he proximately caused her injuries.

Allstate filed a reply in support on February 18th. Neither party requested oral argument. The court took the motions under advisement on March 5th.

LEGAL STANDARD

Civ.R. 54(D) provides: "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The phrase "unless the court otherwise directs" is interpreted to grant "the court discretion to order that the prevailing party bear all or part of his or her own costs."[2] "Costs * * * may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action * * * and which the statutes authorize to be taxed and included in the judgment."[3]

Civ. R. 54(D) does not define "prevailing party."[4] Ohio courts have found that a "'prevailing party' generally is the party in whose favor the verdict or decision is rendered and judgment entered."[5] A prevailing party is also defined as:

> "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The

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[2] *Smallwood v. State*, 12th Dist. Butler No. CA2011-02-021, 2011-Ohio-3910, ¶ 9, quoting *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555 (1992).
[3] *Smallwood*, 2011-Ohio-3910 at ¶ 9, quoting *Vance*, 64 Ohio St.3d at 555.
[4] *Kleemann v. Carriage Trace, Inc.*, 2d Dist. Montgomery No. 21873, 2007-Ohio-4209, ¶ 98.
[5] *J&H Reinforcing & Structural Erectors, Inc. v. Ohio School Facilities Comm.*, 10th Dist. Franklin No. 13AP-732, 2014-Ohio-1963, ¶ 18, quoting *Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 13AP–471, 2014–Ohio–519, ¶ 9. *See Hikmet v. Turkoglu*, 10th Dist. Franklin No. 08AP-1021, 2009-Ohio-6477, ¶ 73, quoting Black's Law Dictionary (9th ed.2009) (defining "'prevailing party' as '[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.'").

> one in whose favor the decision or verdict is rendered and judgment entered. * * * To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who had made a claim against the other, has successfully maintained it."[6]

As noted, the status of prevailing party does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit the party who has made a claim against the other, has successfully maintained it.[7] This is true even when a plaintiff ultimately receives less at trial than the defendant offered during settlement or when the plaintiff receives less than he or she demanded during settlement discussions.[8]

The parties cite to *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555 (1992), which has facts inapposite to this case. In *Vance*, a mandatory arbitration proceeding resulted in a $10,000 award, which the plaintiff appealed.[9] In a trial *de novo*, the plaintiff was only awarded $5,000.[10] The Court concluded that a party who goes into a trial with $10,000 and comes out with $5,000 cannot be viewed as the prevailing party.[11] *Vance* stands for the proposition that a plaintiff who obtains an arbitration award that is reduced by the court of common pleas has not prevailed.[12] Since this case did not involve a mandatory arbitration awarding the plaintiffs less than the jury awarded them, it is not particularly instructive in the instant case.

LEGAL ANALYSIS

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[6] *Hikmet*, 2009-Ohio-6477 at ¶ 75, quoting *Moga v. Crawford*, 9th Dist. Summit No. 23965, 2008-Ohio-2155, ¶ 6. *See J.B.H. Properties, Inc. v. N.E.S. Corp.*, 11th Dist. Lake No. 2007-L-024, 2007-Ohio-7116, ¶ 14, citing *Woyma v. Johnson*, 11th Dist. No. 94-L-004, 1994 WL 638493 (Oct. 7, 1994).

[7] *Wainscott v. Frauenknecht*, 12th Dist. Warren No. CA94-11-094, 1995 WL 476202, *5 (Aug. 14, 1992), quoting *Woyma v. Johnson*, 11th Dist. Lake App. No. 94-L-004, 1994 WL 638493 (Nov. 16, 1994). *See Leaman v. Coles*, 115 Ohio App.3d 627, 632, 685 N.E.2d 1294, 1297 (3d Dist. 1996), citing *Woyma*, 1994 WL 638493 (holding same).

[8] *See Wainscott*, 1995 WL 476202 at *5 (plaintiff was prevailing party even though she was awarded $3,200 by the jury after refusing to settle for $45,000); *Moga*, 2008-Ohio-2155 at ¶ 8 (finding that the plaintiff was the prevailing party at trial after receiving a jury award of $28,500, despite the fact that the plaintiff's settlement demand was $50,000).

[9] *Vance*, 64 Ohio St.3d at 555.

[10] Id.

[11] Id.

[12] *Moga*, 2008-Ohio-2155 at ¶ 7.

"An insurer's obligations to its insured are governed by the coverage stated in the policy."[13] That insurance policy is a contract.[14] The construction of contracts is a matter of law.[15] R.C. 3927.18 governs uninsured and underinsured motorist coverage in Ohio.[16] It limits underinsured motorist coverage so that claimants cannot receive a greater amount of coverage than they would have received under their uninsured motorist coverage had the tortfeasor been uninsured.[17] The Twelfth District Court of Appeals has opined that the purpose of R.C. 3937.18 is "clear and unequivocal: to provide uninsured and underinsured motorist coverage for injured persons who have a legal cause of action against a tortfeasor but who are uncompensated because the tortfeasor is either (1) not covered by liability insurance, or (2) covered in an amount that is less than the insured's uninsured motorist coverage."[18]

The Ohio Supreme Court has explained that the setoff for the amount available to the claimant under R.C. 3937.18 for underinsured motorist coverage, "means the amounts actually accessible to and recoverable by an underinsured motorist claimant from all bodily injury liability bonds and insurance policies (including from the tortfeasor's carrier)."[19] In calculating the setoff, "a person injured by an underinsured motorist should never be afforded greater coverage than that which would be available had the tortfeasor been uninsured."[20] As such, when multiple claimants' recoveries "either individually or collectively, would exceed the amount that they

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[13] *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 7, citing *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 36, 665 N.E.2d 1115 (1996).
[14] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 9. *See Cox v. Grubb*, 12th Dist. Madison No. CA2010-09-020, 2011-Ohio-1635, ¶ 15, citing *Westfield*, 2003-Ohio-5849 at ¶ 9 ("An insurance policy is a contract.").
[15] *Nationwide Ins. Co. v. Johnson*, 84 Ohio App.3d 106, 108, 616 N.E.2d 525 (12th Dist. 1992), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146 (1978).
[16] *Johnson*, 84 Ohio App.3d at 109.
[17] *Cox*, 2011-Ohio-1635 at ¶ 25, citing R.C. 3937.18(C).
[18] *Johnson*, 84 Ohio App.3d at 109-110, citing *State Farm Auto. Ins. V. Alexander*, 62 Ohio St.3d 397, 400, 583 N.E.2d 309 (1992).
[19] (Internal citations omitted.) *Webb v. McCarty*, 114 Ohio St.3d 292, 2007-Ohio-4162, 871 N.E.2d 1164, ¶ 4, quoting *Littrell v. Wigglesworth*, 91 Ohio St.3d 425, 746 N.E.2d 1077 (2001).
[20] *Brown v. Nationwide Mut. Fire Ins. Co.*, 174 Ohio App.3d 694, 2008-Ohio-174, 884 N.E.2d 617, ¶ 9, quoting *Littrell*, 91 Ohio St.3d at 430.

would have recovered had their injuries been caused by an uninsured motorist, [courts] must conclude, as a matter of law, that no UIM [underinsured motorist] coverage is available."[21]

The case of *Vilagi v. Allstate Indemnity Company*, 9th Dist. Lorain No. 03CA008407, 2004-Ohio-4728, dealt with awarding costs in a case that involved a UIM coverage dispute. The plaintiff was involved in a motor vehicle accident and settled with the tortfeasor, but the tortfeasor's insurance was insufficient to cover the plaintiff's losses.[22] The plaintiff then brought suit against his insurance carrier seeking to recover through his underinsured motorist coverage.[23] The parties stipulated to all issues except as to the amount of damages, which was tried to a jury.[24] The jury returned a verdict in the plaintiff's favor for $35,000.[25] The trial court had the parties brief the issue of whether a setoff was appropriate, and thereafter reduced the verdict.[26] The plaintiff, as a result, received $26,037.[27] On appeal, the plaintiff was identified as the prevailing party under Civ.R. 54(D) and entitled to costs.[28]

In examining the present case, Allstate posits that it is the prevailing party because the jury returned a verdict of less than $100,000, and thus Allstate has no duty to pay the plaintiffs under its policy and under the agreed stipulations. The plaintiffs maintain that the ultimate issue for the jury was proximate cause, and because the jury found that the accident proximately caused Joanne Dunlap's injuries, it is the prevailing party.

The court and the parties have not been able to identify a case that is precisely on point. The case of *Vilagi* dealt with a prevailing party in a UIM insurance claim case. However, the plaintiff there clearly was a prevailing party because, even after a setoff, the insurance carrier had to pay the plaintiff. Here, that has not occurred.

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[21] *Brown*, 2008-Ohio-174 at ¶ 30.
[22] *Vilagi v. Allstate Indemnity Company*, 9th Dist. Lorain No. 03CA008407, 2004-Ohio-4728, ¶ 2.
[23] Id.
[24] Id. at ¶ 4.
[25] Id.
[26] Id.
[27] Id.
[28] Id. at ¶ 31.

After examining the above case law on UIM coverage claims, the ultimate issue in such cases is whether the insurance carrier has a duty to pay the policy holder under the UIM provisions. Here, the parties stipulated that Allstate had no such duty unless the jury verdict exceeded $100,000. This is not a case where the plaintiffs will be walking away with a small judgment from Allstate compared to the larger judgment they sought. Here, the plaintiffs walk away with no money damages because Allstate has no duty under the policy. Although the jury did make a finding on causation, that was not the ultimate issue. The ultimate issue was whether Allstate was liable to the plaintiffs, and that hinged on the jury awarding more than $100,000. The court cannot find that, at the end of this suit, the plaintiffs, who had made a claim against Allstate for UIM coverage, have successfully maintained it. As such, the court finds that Allstate is the prevailing party under Civ.R. 54(D).

CONCLUSION

For the foregoing reasons, the court finds that the intervening defendant Allstate Fire and Casualty Insurance Company's motion well-taken and hereby grants it. For the same reasons, it finds the plaintiffs Joanne Dunlap and Tim Dunlap's motion not well-taken and hereby denies it.

IT IS SO ORDERED.

DATED: 5-17-19

Judge Jerry R. McBride