

IN THE OHIO SUPREME COURT

CASE NO. 2006-1811

IRENE F. PATEREK, et cet., et al.

Plaintiff-Appellee,

v.

PETERSEN & IBOLD, et al.,

Defendants-Appellants.

APPEAL FROM THE GEAUGA COUNTY COURT OF APPEALS,
ELEVENTH APPELLATE DISTRICT
COURT OF APPEALS CASE NO: 2005-G-2624

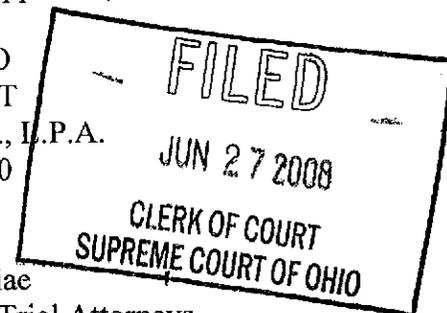
**MOTION FOR RECONSIDERATION
OF APPELLANTS PETERSEN & IBOLD AND JONATHON EVANS**

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MOTION FOR RECONSIDERATION

Defendants-Appellants Petersen & Ibold and Jonathon Evans request this Court to reconsider its conclusion that Defendant-Appellee Irene Paterek's UM/UIM coverage should have been included in calculating her damages, as set forth in its June 18, 2008 Slip Opinion. Specifically, Appellants request that the Court to reconsider its instruction to the trial court regarding the amount of the judgment to be entered. Appellants request that, upon reconsideration, the Court reinstate the trial court's judgment N.O.V. awarding the sum of \$100,000 to the Plaintiff as the full measure of her damages against the Defendants.

A memorandum in support of this motion is attached hereto and incorporated by reference.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RECONSIDERATION

S.Ct. R. XI, Section 2 (A), permits a party to seek reconsideration of the Court's decision on the merits of a case within 10 days after the judgment entry is filed with the Clerk. Pursuant to Section 2(B), any such motion "shall be confined strictly to the grounds urged for reconsideration," and "shall not constitute a reargument of the case."

On June 18, 2008 the Clerk filed the Court's judgment entry on the merits of this appeal. In its opinion, the Court unanimously adopted Appellants' sole proposition of law, holding that, "in an attorney-malpractice case, proof of the collectibility of the judgment lost due to the malpractice is an element of the plaintiff's claim against the negligent attorney."¹

However, by a 5-2 majority, the Court went on to apply that rule to the facts of this case and to further find that, "the trial court erred in failing to include the additional \$150,000 available to [Plaintiff-Appellee] Irene [Paterek] under the UIM policy in its calculation of damages. It should have entered judgment for her in the amount of \$250,000."² The Court then reversed the judgment of the court of appeals, and remanded the case to the trial court with instructions to enter judgment for Paterek in the amount of \$250,000 plus interest.

Appellants request this Court to reconsider its application of the rule to the facts in the record on appeal. Specifically, Appellants request that the Court reconsider its finding that the trial court should have included Paterek's UM/UIM coverage in calculating her damages, and its instructions to the trial court with respect to the entry of judgment. Appellants request that the Court instead reinstate the Geauga County Court of Common Pleas' judgment notwithstanding the verdict awarding the sum of \$100,000 to the Plaintiff as the full measure of her damages against the Defendants.

¹ *Paterek v. Petersen & Ibold*, Slip Op. No. 2008-Ohio-2790, para. 1.

² *Id.*, at para. 45.

**A. APPELLANTS' LEGAL MALPRACTICE DID NOT IMPAIR
PATEREK'S UIM CLAIM**

After crafting a well reasoned rule of law that is consistent with the majority of states that have considered the issue, the Court misapplied that rule to the facts of this case. The error appears to have arisen from a misapprehension or mischaracterization of a few significant facts. Appellants urge the Court to review those critical aspects of the record and to correct those irregularities and ensure that the rule of law articulated in the opinion is fairly applied to the litigants before the Court.

Here the majority premised its finding that \$150,000 in UIM coverage was includable in Paterek's damages on the assumption that Appellants' malpractice had "tainted" Paterek's ability to obtain UIM coverage under her One Beacon policy. The majority cited to the syllabus law of this Court's opinion in *Ferrando v. Auto-Owners Mut. Ins. Co.*,³ where it held:

[w]hen an insurer's denial of underinsured motorist coverage is premised on the insured's breach of a * * * subrogation related provision in a policy of insurance, the insurer is relieved of the obligation to provide coverage if it is prejudiced by the failure to protect its subrogation rights. An insured's breach of such a provision is presumed prejudicial to the insurer absent evidence to the contrary."⁴

The majority concluded that "[s]ince One Beacon could not pursue Richardson for subrogation because of appellants' negligent handling of the Patereks' case, One Beacon is presumed not to be obligated to provide coverage to Irene Paterek."⁵ The majority *assumed* the existence of a causal connection between the legal malpractice and the loss of the ability to

³ 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, paragraph two of the syllabus,

⁴ *Paterek v. Petersen & Ibold*, Slip Op. No. 2008-Ohio-2790, para. 44 (emphasis added).

⁵ *Id.*

collect under the UIM policy. It then reasoned that the UIM coverage should be included in the damages that Paterek was entitled to recover from her attorneys. The majority held:

If the victim loses his case against the UIM carrier [because of the lawyer's negligence], the loss of that coverage becomes a part of malpractice damages.⁶

While the *reasoning* is not objectionable, it proceeds from a faulty premise. The invocation of *Ferrando* was not warranted under the facts in the record before the Court, because this case did not involve the denial of UIM coverage “premised on the insured's breach of a subrogation related provision” of her policy.

The record below is clear. One Beacon never asserted destruction of its subrogation rights as a premise for refusing to pay Paterek's UIM claim. One Beacon did not plead that defense in its answer.⁷ One Beacon advised in a written July 22, 2004 pretrial statement that it would not seek summary judgment.⁸ Instead, One Beacon requested “additional time to conduct discovery,” including the opportunity to depose Irene Paterek, and “retain its own accident reconstructionist and defense medical experts.”⁹ Thus, the record on appeal clearly reflects that right up until Paterek dismissed her UIM claim, three weeks prior to trial, One Beacon had committed to defend on the same theory as Appellants: proximate cause and damages.

The passage from *Ferrando* quoted in paragraph 44 of the majority opinion clearly *conditions* the abrogation of the insurer's duty to pay the claim because of an insured's destruction of its subrogation rights on the affirmative pursuit of such a defense by the insurer. It is only “when the denial of coverage is premised on the breach of a subrogation related provision” that prejudice to the insurer is presumed.

⁶ *Paterek v. Petersen & Ibold*, Slip Op. No. 2008-Ohio-2790, para. 44

⁷ Answer of Defendant One Beacon Insurance to Plaintiff's 2d Amended Complaint, filed June 4, 2004.

⁸ Pre-trial statement of Defendant One Beacon Insurance, filed July 22, 2004.

⁹ *Id.*

Because One Beacon denied coverage based on its determination that Paterek's damages did not exceed the limits of the underlying liability coverage, rather than on destruction of its subrogation rights, Paterek's ability to obtain UIM coverage was not "tainted" by the Appellants' malpractice. The absence of a causal connection between the legal malpractice and the loss of the opportunity to collect the UIM coverage removes any rationale for including the UIM coverage in the damages Paterek was entitled to recover from her attorneys. Any other conclusion contravenes the third element of the syllabus law set forth in *Vahila v. Hall*,¹⁰ which the Court quoted and cited as authority for its opinion in this case:

To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss.¹¹

Because the majority opinion reflects a critical mistaken assumption regarding One Beacon's denial of Paterek's claim for UIM coverage, the Court should reconsider its application of the law to the facts of this case, and revise its holding to affirm the trial court's judgment for Paterek in the amount of \$100,000.

B. APPELLANTS DID NOT STIPULATE THAT PATEREK WAS ENTITLED TO RECOVER \$150,000 OF UIM COVERAGE

The majority concluded that the trial court "erred in failing to include the additional \$150,000 available to Irene under the UIM policy in its calculation of damages" and that it "should have entered judgment for her in the amount of \$250,000."¹² The majority's conclusion

¹⁰ (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164

¹¹ *Paterek v. Petersen & Ibold*, Slip Op. No. 2008-Ohio-2790, para. 27 (emphasis added).

¹² *Id.* at, para. 45

in this respect again rested on a faulty premise. The majority reached that conclusion on the assumption that “the appellants stipulated to the existence of the underinsured motorist coverage and the amount that *would* be available to Irene Paterek from that policy.”¹³

The actual wording of the parties’ stipulation with regard to the One Beacon policy and the availability of coverage under it was as follows:

3. That the Plaintiffs had underinsured motorists coverage with Beacon One in the amount of \$250,000 at the time of the accident in question (\$150,000 of which **may** be available to the Plaintiffs to cover damages, if necessary, after set-off of the \$100,000 available from the tortfeasor’s policy);¹⁴

Appellants stipulated that \$150,000 of the One Beacon coverage “*may* be available” to Paterek, not that it *would* be available. While the distinction is subtle, the validity of the majority’s reasoning rests on the difference. Appellants stipulated only that the \$150,000 *may* be available to Paterek because her ultimate right to collect that sum from One Beacon rested on proof of the nature, extent and value of her damages (and those of her decedent), as well as proof of a causal connection between those damages and the original tortfeasor’s negligent driving.

The record reflects that the stipulation was entered into between the parties and filed with the trial court on December 8, 2004, only five days before trial, but more than two weeks after Paterek had dismissed One Beacon as a defendant in the case. At that point in time, Appellants were obviously informed of the fact that whatever the verdict turned out to be, it would not be binding on One Beacon under the doctrine of *res judicata*. Accordingly, Appellants stipulated only that Paterek *may* have the ability to collect \$150,000 of UIM coverage from One Beacon,

¹³ Id. (emphasis added).

¹⁴ Stipulation filed December 8, 2004 (Supp. p. 1)

but only after refiling her suit, obtaining the court's jurisdiction over her insurer, and proving all of the elements of her claim.

None of these pre-conditions came to pass. Rather, Paterck allowed the one year window for refiling her claim against One Beacon to pass, and her right to demand UIM coverage from One Beacon was at that point forever lost. Had the Appellants nonetheless stipulated that Paterck was entitled to \$150,000 of UIM coverage---regardless of any proof considerations---that fact may arguably have been sufficient to support an inference that the lost UIM coverage was a proper element of Paterck's legal malpractice damages. But because Appellants only stipulated that the UIM coverage *may* have been available to Paterck, subject to her actually proving a claim under her policy, the absence of any evidence in the record that Paterck was actually owed \$150,000 by One Beacon removes even a remote, potential or arguable causal link between the Appellants' legal malpractice and Paterck's inability to realize the benefits of her UIM coverage.

Again, a causal connection between the attorneys' negligence and the plaintiff's damages is the keystone of liability under *Vahila*. In the absence of such a connection, the majority's holding that the UIM limits should have been awarded to Paterck as part of her malpractice damages defies the rationale of the very case law upon which the decision purports to rest. The Court should take this opportunity to reconsider this mis-application of the law to the facts of this case and affirm the trial court's original judgment.

C. THE MAJORITY OPINION IMPLIES THE CREATION OF A NEW CAUSE OF ACTION SUBROGATING A NEGLIGENT ATTORNEY TO HIS WRONGED CLIENT'S RIGHT TO COLLECT UIM COVERAGE UNDER HER AUTO POLICY.

At paragraph 44 of the majority opinion, the Court rejected as unfair, the notion that the aggrieved client should be compelled to rebut a presumption that her UM/UIM carrier was

prejudiced by the destruction of its subrogation rights against the original tortfeasor as a result of her attorneys' malpractice. Instead, the majority held that:

The better approach, then, is to include UIM coverage as part of the plaintiff's evidence of collectibility and leave the malpracticing attorney to prove in his own subrogation claim against the UIM carrier that his negligence did not prejudice the carrier.¹⁵

Subrogation has been defined as "the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor."¹⁶ Subrogation was defined by Justice Holmes in his dissenting opinion in *State of Ohio, Department of Taxation v. Jones*,¹⁷ as "the substitution of one person for another with reference to a lawful claim or right, or the substitution of another person in the place of the creditor to whose rights he succeeds." In *Bogan v. Progressive Casualty Ins. Co.*¹⁸ this Court recognized subrogation as "an insurer's derivative right." Equitable subrogation is used to prevent unjust enrichment.¹⁹

This court has recognized the legal doctrine of subrogation in various circumstances. See, e.g., *Federal Union Life Ins. Co. v. Deitsch*²⁰ (subrogation to rights of mortgagee); *Aetna Cas. & Sur. Co. v. Hensgen*²¹ (subrogee succeeds to rights of insured); *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*²² (excess insurer subrogated to rights against primary insurer); *James v. Michigan Mut. Ins. Co.*²³ (subrogation in case involving underinsured motorist); *Shealy v. Campbell*²⁴

¹⁵ *Paterek v. Petersen & Ibold*, Slip Op. No. 2008-Ohio-2790, para. 44

¹⁶ Black's Law Dictionary (8 Ed.2004).

¹⁷ (1980), 61 Ohio St.2d 99, 105, 399 N.E.2d 1215

¹⁸ (1989), 36 Ohio St. 3d 22

¹⁹ *Fannie Mae v. Webb* (July 6, 2006), Morrow App. No. 2005CA0013, 2006-Ohio-3574; 2006 Ohio App. LEXIS 3513, Fifth District,

²⁰ (1934), 127 Ohio St. 505, 189 (1934), 127 Ohio St. 505, 189 N.E. 440

²¹ (1970), 22 Ohio St. 2d 83, 51 O.O. 2d 106, 258 N.E. 2d 237

²² (1980), 62 Ohio St. 2d 221, 16 O.O. 3d 251, 404 N.E. 2d 759

²³ (1985), 18 Ohio St. 3d 386, 18 OBR 440, 481 N.E. 2d 272

(subrogation to contribution rights); *Federal Bank of Louisville v. Taggart*²⁵ (accommodation party may be subrogated to rights of the holder of a promissory note).

However, this Court has never recognized a tortfeasor's right to be subrogated to his victim's contractual interest in a collateral source of recovery. Here, neither Evans nor Petersen and Ibold have ever claimed that they were subrogated to Paterek's right to collect UM/UIM coverage from One Beacon. Because no such claim is before the Court in this case, whether the Court deems the creation of such a right to be consistent with the public policy of this state is an issue that deserves more studied consideration than that available here. However, in light of the preceding concerns, the Court should reconsider its apparent creation of this new cause of action and simply affirm the trial court's original judgment N.O.V. for Paterek in the amount of \$100,000.

D. THE COURT SHOULD REINSTATE THE TRIAL COURT'S JUDGMENT N.O.V. IN THE AMOUNT OF \$100,000 FOR THE REASONS SET FORTH IN THE DISSIDENTING OPINION AND IN THE APPELLANT'S REPLY BRIEF FILED WITH THE COURT ON JUNE 11, 2007

Appellants request that the Court reconsider its application of the law to the facts of this case for the reasons set forth in Justice Cupp's opinion concurring in part and dissenting in part, as well as for the additional reasons first raised in argument (C) of Appellants' reply brief (pp. 11-15) filed with the Court on June 11, 2007.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellants Petersen & Ibold and Jonathon Evans request this Court to reconsider its finding that the trial court should have included Paterek's UM/UIM coverage in calculating her damages, and its instructions to the trial court

²⁴ (1986), 20 Ohio St. 3d 23, 20 OBR 210, 485 N.E. 2d 701

²⁵ (1987), 31 Ohio St. 3d 8, 12, 31 OBR 6, 10, 508 N.E. 2d 152, 156

with respect to the entry of judgment. Appellants request that the Court instead reinstate the Geauga County Court of Common Pleas' judgment notwithstanding the verdict awarding the sum of \$100,000 to the Plaintiff as the full measure of her damages against the Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration of Appellants has been mailed this 27th day of June, 2008 to:

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