

ORIGINAL

IN THE SUPREME COURT OF OHIO

IRENE LAMOSEK, et al

Appellants

vs.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE CO.

Appellee

Case No. 14-0089

On Appeal from the  
Trumbull Court of Appeals,  
Eleventh Appellate District

Court of Appeals Case No.: 2013-TR-15

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS LAMOSEK

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**EXPLANATION OF CASE AS ONE OF PUBLIC OR GREAT GENERAL INTEREST**

Sprinkled throughout Ohio’s legal landscape, conventional subrogation has become a subject of public and great general interest, especially when considered alongside the “make whole” doctrine. The literature discusses it.\* Probate court won’t approve wrongful death or minor settlement without it. We even call the subrogated interest’s relationship to tortfeasor settlement proceeds as one of “lien” though, under RC Chapter 1311, no such thing exists.

Here, the issue is whether a subrogee may enjoy its derivative right of recovery without regard for its subrogor’s “contingent attorney fee” cost to obtain that recovery, one of the two issues left unresolved in the Supreme Court’s most recent pronouncement on the subject, N.

Buckeye Edu. Council Group Health Benefits Plan v. Lawson, 103 Ohio St. 3d 188, 195 (2004):

“The court of appeals correctly held that the Plan is entitled to summary judgment on its claims for reimbursement of medical bills it paid on Emily’s behalf. We express no opinion regarding the court of appeals’ insulation of the underinsured motorist benefits from subrogation or its deduction of the contingency fee claimed by Lawson’s attorney in connection with recovery of funds from other sources, as the Plan did not cross-appeal on those issues.” (Emphasis added)

This case inheres public and great general interest for another reason. Its facts and circumstances are commonplace. Automobile insurance is mandatory. Motor vehicle accidents occur. Bodily injuries ensue. Medical expenses are incurred. “Medical payments” insurance coverage responds and, not unlike the following policy provisions here in place:

“Under medical payments coverage...we are subrogated to the extent of our payments to the right of recovery the injured person has against any party liable for the bodily injury. ...If the person to or for whom we make payment recovers from any party liable for the bodily injury, that person shall hold in trust for us the proceeds of the recovery, and reimburse us to the extent of our payment.”

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\* Ernst, Baldwin’s Ohio Practice, Tort Law (2<sup>nd</sup> Ed.), §§8:74 and 21:9.  
Ohio Personal Injury Practice (2009 Ed.), §§1:30-1:32 and 15:46.  
Markus, Ohio Trial Practice (2013 Ed.), §34.40.

the auto insurer is subrogated to its injured insured's right of third-party recovery. Insured third-party tortfeasors are identified. Settlements are reached. The pie is then baked, and its slices negotiated, cut and distributed among the injured subrogor, his counsel, subrogee med-pay carrier, and a medical provider and/or subrogee health insurance carrier along the way.

**STATEMENT OF THE CASE AND FACTS**

**Procedural Posture.** This garden-variety MVA negligence action was brought by Appellants, Irene and Daniel Lamosek, against Tortfeasor, Ahlam Buss, to recover damages occasioned by Irene's accident-related injuries.

Along the way and in consequence of the \$5,000.00 payment it made under Lamoseks' auto policy's med-pay coverage, Appellee, State Farm Mutual Automobile Insurance Co., asserted a subrogated interest against the "medical expenses" component of Lamoseks' damages recovery.

The instant issue arose when the tort action settled in advance of trial. Upon distribution of proceeds, Lamoseks and State Farm disagreed on whether State Farm's interest was subject to the "1/3 attorney fee" cost Lamoseks incurred to present and maintain their underlying damages claim against Buss. While Lamoseks offered to satisfy State Farm's interest for the pro-rata sum of \$3,333.33, State Farm balked and insisted on payment of the entire \$5,000.00.

The court determined the issue in State Farm's favor on cross-motions for summary judgment. Although finding it "frustrating to tort plaintiffs and this Court when insurers refuse to cooperate in settling injury cases," the court nonetheless entered judgment for State Farm because "there is absolutely no authority to support compelling State Farm to be bound to a contingency fee agreement that it never executed."

With separate concurrence, the trial court judgment was affirmed on appeal to the Eleventh District Court of Appeals sitting in Trumbull County, Ohio. Now, Appellants Lamosek bring their discretionary appeal to this Court for plenary review.

**Statement of Facts.** Lamoseks are insureds and State Farm is insurer under an auto policy that contains medical-payment coverage. In pertinent part, the coverage provides:

b. Under medical payments coverage:

(1) we are subrogated to the extent of our payments to the right of recovery the injured person has against any party liable for the bodily injury.

...

(3) if the person to or for whom we make payment recovers from any party liable for the bodily injury, that person shall hold in trust for us the proceeds of the recovery, and reimburse us to the extent of our payment.” (Emphasis added)

Irene Lamosek suffered bodily injuries in a certain MVA with Tortfeasor Buss, and had a right of recovery against Buss for compensatory damages. Irene’s injuries were medically treated and, under the med-pay coverage, State Farm paid the sum of \$5,000.00 toward her medical expenses.

In the meantime, Lamoseks hired counsel to enforce their right of recovery against Buss; and, on a standard “1/3 contingent fee” representation basis, sued Buss to recover damages for Irene’s medical expenses, lost wages and pain & suffering, and for Daniel’s loss of his wife’s consortium.

The action was eventually settled, whereupon Lamoseks proposed to satisfy State Farm’s medical-expenses subrogated interest, for the sum of \$3,333.33 (\$5,000.00 less the 1/3 cost to obtain the recovery). State Farm balked and, on grounds that it was not privy to the Lamosek legal representation arrangement insisted on payment of the entire \$5,000.00 to resolve its interest.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**Proposition of Law**

A subrogee may not enjoy its derivative right of recovery to any extent greater than that enjoyed by its subrogor.

\* \* \*

Under the parties' med-pay coverage, State Farm is subrogated to Lamoseks' "right of recovery" against Buss. "Subrogation" is a legal term under which an insurer that's paid a loss under the policy is, to the extent of that payment, entitled to the rights and remedies of its insured against a legally-responsible third party. Tom Harrison Tennis Center Ltd. v. Indoor Courts of America, Inc., 2002 Ohio-7150, 2002 WL31859462 (12<sup>th</sup> Dist., Warren). It is a derivative right, however-Bogan v. Progressive Cas. Inc. Co., 36 Ohio St. 3d 22, 29 (1988), where the insurer steps into and stands in the shoes of its insured vis-a-vis that third party. Its rights are identical to, neither more nor less than those of its insured. Physicians Ins. Co. of Ohio v. Univ. of Cincinnati Hosp., 146 Ohio App. 3d 685, 689-690 (Franklin 2001); and Aerosol Sys., Inc. v. Wells Fargo Alarm Serv., 127 Ohio App. 3d 486, 499-500 (Cuyahoga 1998).

Lamoseks enforced their right to recover against Buss pursuant to a legal representation arrangement, the cost of enforcing that right. Derivatively speaking, State Farm must likewise bear that cost, not as a matter of equity or unjust enrichment,<sup>†</sup> but of subrogation, qua subrogation. Its rights are identical to, neither more nor less than those of its insureds, supra.

Subrogation. Common examples are (1) where its subrogor-insured is 50% contributorily-negligent in causing the loss, the subrogee-insurer recovers only 50% of the amount it paid under the subrogated coverage; and (2) where the tortfeasor's liability policy

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<sup>†</sup> Distinguishing Gaier v. Midwestern Grp., 76 Ohio App. 3d 334 (Miami 1991) and Wiswell v. Shelby Mutual Ins. Co., 33 Ohio App. 3d 297 (Ottawa 1986).

limits are insufficient to fully compensate subrogor-insured's elements of damages, subrogee-insurer must pro-rata share such insufficiency; (3) where the subrogee-insured gives the tortfeasor a release, the subrogee-insurer's rights of recovery against that tortfeasor are thereby extinguished, despite its subrogated payment.

Subrogation. Where the subrogor-insured incurs a cost to enforce his rights of recovery against the tortfeasor, the subrogee-insurer incurs the identical cost, not because it is privy to the agreement to incur that cost, but because the nature of its subrogated interest is strictly derivative to and co-extensive with that of its insured.

In parasitic fashion, State Farm must absorb its subrogated responsibility for the cost of enforcing Lamoseks' right of third-party recovery. It may not enjoy the subrogated turkey without enduring its feathers.

**CONCLUSION**

As such the Court should ACCEPT discretionary review; REVERSE the trial court judgment; and ENTER final judgment in Lamoseks' favor, declaring that State Farm may not enjoy its subrogated right of recovery without regard for Lamosek's "contingent attorney fee" cost to obtain that recovery.

GUARNIERI & SECREST, P.L.L.

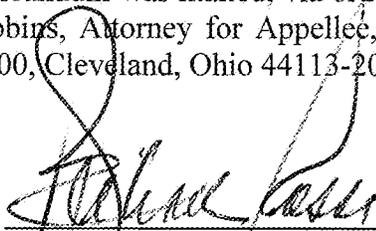


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**CERTIFICATE OF SERVICE**

I certify that a copy of the within Memorandum was mailed, via ordinary U.S. Mail, this 15<sup>th</sup> day of January, 2014 to Andrew C. Stebbins, Attorney for Appellee, State Farm Mutual Automobile Ins. Co., 55 Public Square, Suite 800, Cleveland, Ohio 44113-2001.



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MICHAEL D. ROSSI  
Counsel for Appellants Lamosek

APPENDIX

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO

FILED  
COURT OF APPEALS  
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TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

IRENE LAMOSEK, et al.,	:	OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2013-T-0015
AHLAM BUSS,	:	
Defendant,	:	
STATE FARM INSURANCE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2011 CV 2475.

Judgment: Affirmed.

*Michael D. Rossi, Guarnieri & Secret, P.L.L.*, 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Plaintiffs-Appellants).

*Andrew C. Stebbins and Patrick J. O'Malley, Keis George, LLP*, 55 Public Square, #800, Cleveland, OH 44113 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Irene and Daniel Lamosek appeal from a summary judgment rendered in favor of State Farm Mutual Automobile Insurance Company. On November 12, 2009, the Lamoseks were involved in an automobile accident with Ahlam Buss. At the time of the accident, the Lamoseks were insured by State Farm. Mr. Buss was insured by

Geico General Insurance Co. The Lamoseks filed their initial complaint against Mr. Buss on November 4, 2011.

{¶2} The Lamoseks' automobile insurance policy with State Farm contained medical payments coverage. Irene Lamosek sustained injuries in the accident which required medical treatment. The Lamoseks submitted medical bills to State Farm which paid to them, or on their behalf, \$5,000. Under its policy, State Farm asserted a subrogated interest against the medical expenses portion of Irene Lamosek's recovery.

{¶3} The Lamoseks filed an amended complaint on May 22, 2012, adding State Farm as a defendant. They alleged in the amended complaint that their rights were subject to an attorney contingent-fee representation agreement and that State Farm was likewise subject to the agreement. The Lamoseks asserted that State Farm was trying to avoid its subrogated responsibilities through inter-company arbitration with Geico.

{¶4} The tort case between the Lamoseks and Mr. Buss settled prior to trial. The Lamoseks and State Farm both filed motions for summary judgment regarding the subrogation issue. The Lamoseks argued that as subrogee, State Farm was subject to the costs of their right of recovery against Mr. Buss. The Lamoseks argued that State Farm was required to bear the costs of recovery (33 percent) as outlined in their contingent-fee contract, not as a matter of equity or unjust enrichment, "but of subrogation, qua subrogation." They argued that State Farm stands in the shoes of its insured and is subject to the same costs of the insured.

{¶5} In its cross-motion for summary judgment, State Farm argued that, regardless of the legal theory used, their subrogated recovery was not subject to the

contingent-fee agreement. State Farm averred that Ohio law is clear that insurers are not subject to the costs of counsel when their insured's enter into contingency agreements. The trial court granted State Farm's motion for summary judgment holding that there is "no authority to support compelling State Farm to be bound to a contingency fee agreement that it never executed."

{¶6} The Lamoseks filed a timely appeal, asserting a sole assignment of error:

{¶7} "On cross-motions for summary judgment, the trial court erred in entering judgments in favor of Appellee State Farm against Appellants Lamosek."

{¶8} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66, \* \*(1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. See *e.g.* Civ.R. 56(C).

{¶9} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, \* \*(1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, \* \*(1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfolk Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003 Ohio 6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence

presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, \* \* \*(1986). On appeal, we review a trial court’s entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996 \* \* \*(1996).” (Parallel citations omitted.) *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6.

{¶10} The Lamoseks state that the issue in this case is whether State Farm may enjoy its derivative right of recovery without regard for the costs to its insureds of obtaining that recovery. The Lamoseks claim this issue is distinguishable from those raised in *Gaier v. Midwestern Group*, 76 Ohio App.3d 334, 337-339 (2d Dist.1991) and *Wiswell v. Shelby Mut. Ins. Co.*, 33 Ohio App.3d 297, 300-301 (6th Dist.1986) as they are not raising a claim in equity or of unjust enrichment. They argue that as a subrogated insurer, State Farm stands in the place of its insureds and has no greater right to recovery than that of its insureds. *Physicians Ins. Co. v. Univ. of Cincinnati Hosp. Aring Neurological Inst.*, 146 Ohio App.3d 685, 690 (10th Dist.2001). The Lamoseks maintain that State Farm must bear the same costs they did in enforcing their right to recover against the tortfeasor.

{¶11} While it is true that as a subrogated insurer State Farm has no greater right to recovery than its insured, appellants’ policy provides that “if any injured **person** to or for whom we have made payment recovers from any liable party, that injured **person** shall hold in trust for us the proceeds of the recovery and reimburse us to the extent of our payments \* \* \*.” (Emphasis sic). The Lamoseks were paid a settlement by Geico for, among other items, medical payments. Thus, they had a contractual

obligation to reimburse State Farm \$5,000 out of their recovery from Geico. The obligation to reimburse State Farm was to reimburse the entire amount, regardless of the amount of the settlement or the cost of obtaining the settlement. *Gaier* at 338.

{¶12} Additionally, an insured is not entitled to deduct attorney's fees from the amount to which the insurer is subrogated when the insurer has preserved its right to recover the amount paid to the insured under the medical-payments provision of the policy. *Wiswell* at 298, 300-301. Here, State Farm notified Geico of its subrogation claim prior to the settlement of the lawsuit; thus its right to subrogation was protected regardless of the settlement between the Lamoseks and Mr. Buss. See, e.g., *Peterson v. Ohio Farmers Ins. Co.*, 175 Ohio St. 34 (1963); *Motorists Mut. Ins. Co. v. Gerson*, 113 Ohio App. 321 (9th Dist.1960).

{¶13} For the foregoing reasons, appellants' sole assignment of error is not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed. The court finds there were reasonable grounds for this appeal.

THOMAS R. WRIGHT, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion.

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TIMOTHY P. CANNON, P.J., concurring in judgment only.

{¶14} I concur in the judgment of the majority, affirming the decision of the trial court. I do so primarily because State Farm was joined in this action as a party and was put in the position of having to set up and present its subrogation claim. Under certain

circumstances, I believe it is completely appropriate to allow payment of fees to an attorney representing an injured victim based on the amount of subrogated money recovered, because the subrogated insurer cannot obtain rights greater than the injured victim. When an injured victim must pay to recover the money, the subrogated insurer should not be able to require that the injured party also pay to collect the insurer's money.

{¶15} The policy at issue in this case states: "If the person to or for whom we make payment recovers from any party liable for the bodily injury, that person shall hold in trust for us the *proceeds* of the recovery, and reimburse us to the *extent* of our payment." (Emphasis added.)

{¶16} The *proceeds* of the injured party's recovery are only two-thirds of the amount paid by the subrogated carrier. This is the *extent* of the payment recovered by the insured. Therefore, because the subrogated insurer cannot get rights *greater* than the injured party, the recovery should be limited to the net *proceeds* the injured party was able to recover. It is insignificant that the subrogated insurer was not a party to the contingent fee agreement. If full recovery is sought in the name of the injured party and the recovery is achieved due to counsel's efforts, the *proceeds* are the net amount paid to the insured after payment of fees and expenses.

{¶17} According to appellee, not only should the injured party return the *entire* subrogated amount she paid someone to collect, the payment should come out of the *proceeds* of money to which the *injured party* was otherwise entitled. If this result occurred in all cases, it would be unjust and inequitable. According to its argument, the subrogated insurer, whose claim is contingent on that of the injured party, should be

able to recover 100 percent of its loss. The injured party, however, recovers only a small fraction of his or her claim, because after payment of attorney fees and expenses to recover *all* damages, there is little left.

{¶18} In this case, it is not clear from the record that the subrogated insurer sat on the sidelines and let the injured party do all the required work to effect recovery. In fact, it appears that because the insurer was actually named as a party to the suit, it was forced to obtain counsel and set up its own claim. Therefore, any recovery obtained by the subrogated insurer would have included whatever fees it arranged for its own counsel. As a result, on the particular facts of this case, I would affirm the judgment of the trial court.

STATE OF OHIO )  
 )SS.  
COUNTY OF TRUMBULL )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

IRENE LAMOSEK, et al.,  
Plaintiffs-Appellants,

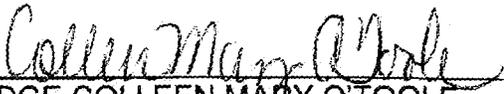
JUDGMENT ENTRY

CASE NO. 2013-T-0015

- vs -

AHLAM BUSS,  
Defendant,  
STATE FARM INSURANCE,  
Defendant-Appellee.

For the reasons stated in the Opinion of this court, the assignment of error is without merit. The order of this court is that the judgment of the Trumbull County Court of Common Pleas is affirmed. Costs to be taxed against appellants.

  
JUDGE COLLEEN MARY O'TOOLE

THOMAS R. WRIGHT, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion.

FILED  
COURT OF APPEALS

DEC 31 2013

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK