

[Cite as *Whitaker v. Jones*, 2010-Ohio-668.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

TAMMY WHITAKER	:	APPEAL NO. C-090364
	:	TRIAL NO. A-0800584
and	:	
ERIC WHITAKER,	:	<i>DECISION.</i>
	:	
Plaintiffs-Appellants,	:	
	:	
vs.	:	
MICHAEL JONES	:	
	:	
and	:	
ALLSTATE,	:	
	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: February 26, 2010

*John M. Williams, Michael A. Jones, and Delev & Williams*, for Appellee Allstate,

*Steven D. Halper and Katzman, Logan, Halper & Bennett*, for Appellants.

Please note: This case has been removed from the accelerated calendar.

Per Curiam.

{¶1} Plaintiffs-appellants Tammy and Eric Whitaker appeal from the trial court's judgment ordering them to reimburse defendant-appellee Allstate for \$10,000 in medical expenses that Allstate had paid on the Whitakers' behalf to Total Health Chiropractic. We reverse.

{¶2} The Whitakers were in a car accident with defendant Michael Jones. They sued Jones for medical expenses, pain and suffering, and loss of consortium, and they also sued their own insurance company, Allstate, for underinsured-motorist coverage. In its answer to the Whitakers' complaint, Allstate pleaded a subrogation cross-claim against Jones, but it did not file a counterclaim against the Whitakers.

{¶3} The jury returned a verdict in favor of the Whitakers, awarding Tammy Whitaker \$12,973.87 and Eric Whitaker \$19,077.50. According to the jury's interrogatories, \$5000 of each award was attributed to medical expenses the Whitakers had incurred from Total Health Chiropractic.

{¶4} In a post-trial hearing before the court, Allstate moved for an order requiring the Whitakers to reimburse it for the \$10,000 that Allstate had paid to Total Health Chiropractic. Based upon admissions in the record, the trial court ruled in favor of Allstate. This appeal followed.

{¶5} In one assignment of error, the Whitakers contend that the trial court should not have entered judgment in favor of Allstate. The Whitakers argue that, since Allstate had failed to plead a counterclaim against them, the trial court was without authority to enter a judgment against them.

{¶6} It is apparent from the record that the trial court acted in an equitable manner when it ordered the Whitakers to reimburse Allstate for money it had paid on their behalf. The Whitakers, however, are technically correct.

{¶7} Under Civ.R. 13(A), Allstate was required to plead a counterclaim to preserve its right to proceed against the Whitakers.<sup>1</sup> In pertinent part, that rule provides that “[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim \* \* \*.” Here, it can not be disputed that Allstate’s subrogation claim arose out of the same occurrence as the Whitakers’ claim, i.e., medical expenses incurred as a result of the Whitakers’ car accident with Jones.

{¶8} Our decision in *Duskin v. Doe*<sup>2</sup> is controlling. Under similar facts, Judge Gorman, writing for this court, held that, absent a counterclaim, the trial court had no authority to enter judgment for defendant Allstate for money it had already paid to plaintiffs as a result of injuries sustained in a car accident. As here, defendant Allstate moved to be reimbursed for medical expenses it had made to plaintiffs that had arisen out of the same car accident that had been in dispute at trial. This court held that Allstate’s claim had been a compulsory counterclaim under Civ.R. 13(A) and therefore had to have been pleaded or was lost. The same reasoning applies here.

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<sup>1</sup> See *Rettig Enterprises, Inc. v. Koehler*, 68 Ohio St.3d 274, 1994-Ohio-127, 626 N.E.2d 99, paragraph one of the syllabus; *Westlake v. Rice* (1995), 100 Ohio App.3d 438, 441-442, 654 N.E.2d 181.

<sup>2</sup> 1st Dist. No. C-010626, 2002-Ohio-2348.

{¶9} We therefore sustain the Whitakers' assignment of error, reverse the trial court's judgment for Allstate, and remand this case for the entry of an order denying Allstate's motion for reimbursement.

Judgment reversed and cause remanded.

**HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.**

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.