**[Cite as *Allen v. Binckett,* 2009-Ohio-2969.]**

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LYDIA M. ALLEN, et al.

Plaintiffs-Appellants

-vs-

VIRGIL M. BINCKETT, et al.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Julie A. Edwards, J.

Case No. CT2008-0027

O P I N I O N

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| CHARACTER OF PROCEEDING: | Civil Appeal from the Court of Common Pleas, Case No. CH2006-0204 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | June 19, 2009 |

APPEARANCES:

For Plaintiffs-Appellants

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*Wise, J.*

**{¶1}** Plaintiffs-Appellants Lydia and Michael Allen appeal the April 23, 2008, decision of the Muskingum County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee State Farm Mutual Automobile Insurance Company.

## STATEMENT OF THE CASE AND FACTS

**{¶2}** This case involves a claim for personal injury arising out of an automobile collision that occurred on April 30, 2004, between vehicles operated by Appellant Lydia Allen and Virgil Binckley. Appellants filed suit against Mr. Binkley for personal injury and loss of consortium in the Muskingum County Common Pleas Court.

**{¶3}** Appellants also filed suit against their insurer, Appellee State Farm, for UM/UIM coverage. State Farm, in turn, filed a cross-claim against Mr. Binckley to recover the $4,073.85 that it paid to and/or on behalf of Appellant Lydia Allen pursuant to the Medical Payments coverage in its policy. Mr. Binckley was also insured by State Farm under a separate policy.

**{¶4}** On December 17, 2006, a mediation was held which resulted in Appellants and Virgil Binckley entering into a settlement in the amount of $10,500.00. The settlement encompassed State Farm's subrogation/reimbursement interest, but left the validity of that interest for judicial determination. Mr. Binckley deposited $4,073.85 of the settlement with the Muskingum County Clerk of Courts pending resolution of that issue. Appellants also dismissed their UM/UIM claim against State Farm and State Farm dismissed its cross-claim against Mr. Binckley as a result of the agreement reached at the mediation.

**{¶5}** The parties agreed to litigate the issue of whether Appellee State Farm is entitled to the funds pursuant to the subrogation and/or reimbursement provisions of its policy.

**{¶6}** Both Appellants and Appellee filed cross-motions for summary judgment.

**{¶7}** By judgment Entry filed April 23, 2008, the trial court ruled in favor of State Farm finding that it has a valid subrogation/reimbursement claim.

**{¶8}** Appellants now appeal, assigning the following errors for review:

**ASSIGNMENTS OF ERROR**

**{¶9}** "I. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT TO THE APPELLANTS BECAUSE STATE FARM'S CONFLICT OF INTEREST VOIDS ITS CLAIMED SUBROGATION RIGHTS.

**{¶10}** "II. ASSUMING THE TRIAL COURT FOUND ANY VALID SUBROGATION INTEREST, THE COURT ERRED BY FAILING TO APPLY THE "MAKE WHOLE" RULE.

**{¶11}** "III. ASSUMING STATE FARM HAS ANY VALID SUBROGATION INTEREST, THE TRIAL COURT SHOULD HAVE RECOGNIZED THAT STATE FARM'S INTEREST MUST BE REDUCED BY THE AMOUNTS OF THE FEES AND COSTS INCURRED IN RECOVERING FROM THE TORTFEASOR."

"Summary Judgment Standard"

**{¶12}** Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

**{¶13}** "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

**{¶14}** Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

**{¶15}** It is based upon this standard that we review Appellant's assignments of error.

**I.**

**{¶16}** In their first assignment of error, Appellants assert that State Farm has a conflict of interest which voids any subrogation interests it may have. We disagree.

**{¶17}** State Farm is the insurer for both the Appellant herein and the tortfeasor under separate insurance policies. However, we find no support for Appellants' argument that such creates a conflict of interest in this case.

**{¶18}** Initially, we note that while often used interchangeably, subrogation and reimbursement are two different concepts. Subrogation allows the insurance company to recover from the tortfeasor money it paid in benefits on behalf of its insured. Reimbursement allows the insurance company to collect such payments from its insured after the insured has received a full settlement from the tortfeasor. See *Curp v. Stone* (Feb. 16, 1996), Montgomery App. No. 14805, unreported, 1996 WL 65248, at *1-2.

**{¶19}** Appellants settled their claims with the tortfeasor. State Farm is therefore seeking reimbursement pursuant to the terms of the insurance policy, which states:

**{¶20}** "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 [State Farm] to the extent of our payment."

**{¶21}** We further find that no conflict existed in this case as State Farm did not represent Appellants in this litigation. Appellants made State Farm a party defendant in this action when they filed an underinsured motorist claim against it. To hold that by so doing, Appellants could nullify State Farm's rights to subrogation and reimbursement under the insurance contract would be to give Appellants the power to disregard the

terms of the insurance contract without any action on the part of State Farm. Both Appellants and the tortfeasor herein had separate contracts with State Farm. If, in this case, the tortfeasor would have been represented by a different insurance carrier, Appellants would not find themselves in any different position with regard to State Farm's right to reimbursement or subrogation.

**{¶22}** Thus, we find Appellants had a duty to reimburse State Farm for the medical payments it made under the medical payments provision of the insurance policy.

**{¶23}** Appellants' first assignment of error is overruled.

II.

**{¶24}** In their second assignment of error, Appellants contend the trial court erred in not applying the "make whole" rule. We disagree.

**{¶25}** The "make-whole" doctrine provides that "unless the terms of a subrogation agreement clearly and unambiguously provide otherwise, a health insurer's subrogation interests will not be given priority where doing so will result in less than a full recovery *to the insured." Northern Buckeye Edn. Council Group Health Benefits Plan v. Lawson* (2003), 154 Ohio App.3d 659, 664, 2003-Ohio-5196, affirmed 103 Ohio St.3d 188, 2004-Ohio-4886 (emphasis added). As an initial matter, we note that the doctrine only applies to an "insured" who has not been made whole.

**{¶26}** In this case, Appellants' claims were settled and dismissed with prejudice. Appellants also signed releases with the tortfeasor. By settling their case for less than limits, there was some evidence tending to prove that Appellants were fully compensated for their injuries. See *Hawkins v. True North Energy, LLC,* Portage App.

Nos. 2002-P-0098, 2002-P-0101, 2002-P-0102, 2004-Ohio-3341; *Risner v. Erie Ins. Co.* (1993), 91Ohio App. 3d. 695; *Erie Ins. Co. v. Kaltenbach* (1998), 130 Ohio App.3d 542.

**{¶27}** "[T]he voluntary settlement by an insured of his claims against a tortfeasor, without proof to the contrary, is persuasive evidence of the value of the insured's 'personal injury claim, and tends to prove that [the insured] (* * *) was fully compensated' for his injuries. *Risner v. Erie Ins. Co.* (1993), 91 Ohio App.3d 695, 699***." (Parallel citations omitted.)

**{¶28}** Although Appellants argue that they were not fully compensated, the evidence shows that as a condition of receiving the $10,500, appellants voluntarily settled with the tortfeasor, releasing him from any and all further liability. The voluntary settlement by Appellant tends to prove that Appellants were fully compensated for their injuries. *Erie Ins. Co. v. Kaltenbach* (1998), 130 Ohio App.3d 542, 546, 720 N.E.2d 597, supra.

**{¶29}** We therefore find that Appellant cannot argue that State Farm is not entitled to reimbursement pursuant to the "make whole" doctrine.

**{¶30}** Appellants' second assignment of error is overruled.

**III.**

**{¶31}** In their third and final assignment of error, Appellants assert that the trial court erred in not reducing the subrogation amount by costs and fees incurred in recovering said amount from the tortfeasor. We disagree.

**{¶32}** As an appellate court, we will not disturb a trial court's determination regarding attorney fees unless it is clear that the trial court abused its discretion. *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, 648 N.E.2d 488.

**{¶33}** In such matters, a great amount of deference is given to the trial court's decision. Further, the abuse of discretion standard is not easily satisfied. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d.

**{¶34}** In this case, State Farm filed a cross-claim against the tortfeasor to recover its medical payment. It also participated as necessary to pursue its subrogation rights.

**{¶35}** Based on the foregoing, we do find an abuse of discretion in the trial court's decision not to reduce State Farm's subrogation interest by the amount of fees and costs incurred by Appellants in recovering from Mr. Binckley.

**{¶36}** Appellants' third assignment of error is overruled.

**{¶37}** For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Edwards, J., concur.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ JULIE A. EDWARDS_____

JUDGES

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IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
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| LYDIA M. ALLEN, et al. | : | |
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| Plaintiffs-Appellants | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
| | : | |
| VIRGIL M. BINCKETT, et al. | : | |
| | : | |
| Defendants-Appellees | : | Case No. CT2008-0027 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

Costs assessed to Appellants.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ JULIE A. EDWARDS_____

JUDGES