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2013 IL App (3d) 110380-U

Order filed May 15, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

PEGGY A. SCHEPPLER and JOHN W. SCHEPPLER,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
)	La Salle County, Illinois,
Petitioners-Appellees,)	
)	
v.)	Appeal No. 3-11-0380
)	Circuit No. 10-L-2
TOM C. PYLE,)	
)	
Defendant,)	
)	
COUNTRY MUTUAL INSURANCE COMPANY,)	Honorable
)	R. J. Lannon, Jr.
)	Judge, Presiding.
Respondent-Appellant.)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Presiding Justice Wright dissented.

ORDER

¶ 1 *Held:* Insurer was required to pay a reasonable attorney fee to insured's counsel under the common fund doctrine notwithstanding insurer's contractual right to set off medical payments from its liability for plaintiff's underinsured motorist claim because the plaintiff's counsel's efforts resulted in the creation of a settlement fund

that benefited the insurer and the insurer did not participate in the creation of the fund.

¶ 2 Peggy Scheppler was involved in an automobile accident with a vehicle driven by Tom Pyle in which Pyle was at fault. At the time of the accident, Peggy and her husband, John Scheppler, had an automobile insurance policy with respondent-appellant Country Mutual Insurance Company (Country), and Pyle had an automobile insurance policy with American Family Insurance (American Family). Country paid some of Peggy's medical bills. The Schepplers filed a tort suit against Pyle, which was settled for the limit of American Family's policy.

¶ 3 While the tort suit was pending, Peggy Scheppler filed an underinsured motorist claim against Country. Country argued that it was entitled to reduce its liability for underinsured motorist coverage by the amount of the medical payments that it had already made.

¶ 4 In response, the Schepplers' attorneys filed a "Motion to Adjudicate [Country's] Subrogation Claim." In that motion, the Schepplers' attorneys argued that, by recovering a settlement from Pyle, they had created a common fund that benefited Country. They argued that they were therefore entitled to receive one-third of the medical payments that Country had made to Peggy under the common fund doctrine. The trial court agreed and granted summary judgment in favor of the Schepplers' counsel. Country appeals the trial court's grant of summary judgment.

¶ 5 **FACTS**

¶ 6 On April 10, 2009, Peggy Scheppler was involved in an automobile accident with a vehicle driven by Tom Pyle. At the time of the accident, Peggy and her husband, John, had an

automobile insurance policy issued by Country. The policy contained a medical payment limit of \$50,000 and an underinsured motorist coverage limit of \$250,000. The section of the policy addressing underinsured motorist coverage provides, in relevant part, as follows:

"Limits of Liability. – the Uninsured – Underinsured Motorists
limits of liability shown on the declarations page apply as follows:

Amounts payable for damages under the Underinsured Motorists
coverage will be reduced by all sums paid under Medical Payments

***. Any payment under Underinsured Motorist coverage of this
policy either to or for an insured will reduce any amount that
person is entitled to receive under *** Medical Payments[.]"

¶ 7 The policy also provided that the most that Country would pay for an underinsured motorist claim is "the lesser of": (1) the difference between Country's liability limit under the policy and "the amount paid to the insured by or on behalf of persons or organizations who may be legally responsible for the bodily injury caused by an underinsured motor vehicle"; or (2) the difference between the insured's damages and "the amount paid to the insured by or on behalf of persons or organizations who may be legally responsible for the bodily injury caused by an underinsured motor vehicle."

¶ 8 Peggy requested medical payments under the policy, and Country paid the entire \$50,000 medical payment limit by February 2010.

¶ 9 On January 5, 2010, through counsel, the Scheplers filed a complaint against Pyle in the circuit court of La Salle County for personal injuries and loss of consortium arising out of the

accident. On May 24, 2010, Dave Gebel, a subrogation specialist at Country, sent the Schepplers' attorneys a letter which stated:

"I understand you are representing our insured in this claim.
Would you be willing to represent COUNTRY® for our
medical payment interests at resolution of the case for a 1/3
contingency fee?
If this is acceptable, please sign below and return in the
enclosed self-addressed, stamped envelope. Please provide
periodic updates as appropriate."

On July 9, 2010, the Schepplers' attorneys received another copy of the same letter from Gebel. This time, the letter was undated. The Schepplers' counsel did not sign either letter.

¶ 10 On October 28, 2010, the Schepplers' counsel sent Country a letter which made an underinsured motorist demand under the underinsured motorist coverage provided in the policy. The letter demanded arbitration of the claim and named an arbitrator.

¶ 11 On November 19, 2010, counsel for American Family wrote the Schepplers' counsel communicating American Family's settlement offer in the tort suit between the Schepplers and Pyle. American Family offered to pay its policy limit of \$100,000 in exchange for a release of Pyle's liability.

¶ 12 On November 29, 2010, the Schepplers' counsel wrote a letter to Country informing Country of the settlement offer from American Family. In the letter, the Schepplers' counsel demanded that Country either: (1) protect Country's subrogation rights by advancing payment to Peggy Scheppler in the full amount of American Family's policy limit within 30 days, as required

by 215 ILCS 5/143(a)-2(6) (West 2010); or (2) approve the execution of a release in favor of Pyle, thereby waiving Country's subrogation rights against Pyle.

¶ 13 On December 7, 2010, Simon Kampwerth, a liability specialist at Country, wrote Schepplers' counsel in response to counsel's November 29, 2010, letter. Kampwerth's letter stated, in relevant part, that Country "will be waiving [its] subrogated rights to [its] \$50,000 medical payments and taking it as a setoff from [its] underinsured motorist bodily injury policy limits."

¶ 14 On January 18, 2011, the Schepplers' attorneys received another undated copy of Gebel's form letter asking them if they would be willing to represent Country's subrogation interests in the medical payments for a one-third contingency fee. The Schepplers' counsel did not sign the letter. On March 1, 2011, the Schepplers' counsel received the settlement checks from American Family's counsel.

¶ 15 On March 4, 2011, the Schepplers' attorneys filed a "Motion to Adjudicate Subrogation Claim of Country Financial." In their motion, the Schepplers' attorneys argued that they recovered a common fund of \$100,000 which benefited Country by allowing Country to: (1) recover amounts it paid under the medical payments provision of the policy; and (2) limit its liability for Peggy Scheppler's underinsured motorist claim by deducting the amount of the common fund from its underinsured motorist liability. The Schepplers' attorneys argued that Country had received these benefits thanks to the efforts of the Schepplers' counsel without having to expend any of its own administrative or legal resources. Moreover, they argued that:

"at no time did Country *** ever instruct [the Schepplers' attorneys] to refrain from taking action to recover its

subrogation lien for medical payments, nor did Country *** ever tell [the Schepplers' attorneys] that it would not pay [them] attorneys fees *** in the event the subrogation lien was recovered. In fact, prior to the settlement of the bodily injury claim, Country *** on three separate occasions sent correspondence to [Schepplers' attorneys] requesting that [they] "represent COUNTRY for our medical payment interests at resolution of the case for a 1/3 contingency fee[.]"

Citing *Scholtens v. Schneider*, 173 Ill. 2d 375 (1996), *Stevens v. Country Mutual Insurance Co.*, 387 Ill. App. 3d 796 (2008), and other cases, the Schepplers' attorneys argued that their entitlement to compensation under the common fund doctrine arose independently of any subrogation agreement or other contractual provision in the policy. Therefore, they argued that the policy provision regarding setoffs for medical payments did not diminish their right to collect one-third of the "subrogation lien" for medical payments that they had recovered on Country's behalf.

¶ 16 In its response to the Schepplers' attorneys' motion, Country included an affidavit signed by Kampwerth which stated that: (1) Peggy Scheppler made no underinsured motorist demand prior to October 28, 2010; (2) Country had no knowledge of any lawsuit filed by the Schepplers against Pyle arising out of the accident until the Schepplers' counsel informed Country of the lawsuit by letter on November 29, 2010; (3) on December 7, 2010, Country informed the Schepplers' counsel by letter that Country waived any subrogation rights to the medical payments

and that it would be asserting a setoff provided under the policy against the underinsured motorist limits of the policy; and (4) at no time did the Schepplers' counsel agree to pursue subrogation of medical payments on Country's behalf. The Schepplers' attorneys did not submit any affidavits rebutting Kampwerth's sworn statements.

¶ 17 The trial court granted the Schepplers' attorneys' motion. The court relied on *Stevens*, which it found dispositive. However, the trial court expressed reservations regarding the soundness of the majority's reasoning in *Stevens*.

¶ 18 This appeal followed.

¶ 19 ANALYSIS

¶ 20 Country argues that the Schepplers' attorneys are not entitled to collect any attorney fees under the common fund doctrine. We disagree.

¶ 21 Under the common fund doctrine, a lawyer who recovers a sum of money for the benefit of persons other than his client is entitled to a reasonable attorney fee from the fund as a whole. *Scholtens*, 173 Ill. 2d at 385; *Garcia v. Gutierrez*, 331 Ill. App. 3d 127, 130-31 (2002). The underlying justification for this rule is that, if the costs of litigation were not spread among the beneficiaries of the fund, some beneficiaries would be unjustly enriched by the attorney's efforts. *Scholtens*, 173 Ill. 2d at 385; *Country Mutual Insurance Co. v. Birner*, 293 Ill. App. 3d 452, 456 (1997). The obligation to pay fees under the common fund doctrine, which is quasi-contractual, is independent of any insurance contract or subrogation agreement and rest[s] instead upon equitable considerations of *quantum meruit* and the prevention of unjust enrichment. *Scholtens*, 173 Ill. 2d at 385; *Wajnberg v. Wunglueck*, 2011 IL App (2d) 110190, ¶ 26 (2011); *Stevens*, 387 Ill. App. 3d at 802-03.

¶ 22 Whether the common fund doctrine applies to any particular case is a question of law which we review *de novo*. *Wajnberg*, 2011 IL App (2d) 110190, ¶ 16; *Ritter v. Hachmeister*, 356 Ill. App. 3d 926, 929 (2005) (citing *Linker v. Allstate Insurance Co.*, 342 Ill. App. 3d 764, 770–71 (2003)). To be entitled to fees under the doctrine, an attorney must show that: (1) a fund was created as a result of legal services he performed; (2) the subrogee or claimant did not participate in the creation of the fund; and (3) the subrogee or claimant benefited or will benefit from the fund that was created. *Garcia*, 331 Ill. App. 3d at 131; *Stevens*, 387 Ill. App. 3d at 801.

¶ 23 Each of these elements is satisfied here. The efforts of the Schepplers' attorneys resulted in a \$100,000 settlement from American Family. Country did not participate in the creation of that settlement fund in any way; it did not intervene in the Schepplers' tort suit against Pyle, participate in the settlement negotiations, or file an arbitration demand against American Family to recover the medical payments it made to Peggy Scheppler. Moreover, the creation of the settlement fund benefited Country by allowing it to deduct the full amount of the settlement and the \$50,000 in medical payments from its underinsured motorist liability. Accordingly, we hold that the common fund doctrine applies, and the Schepplers' attorneys are entitled to recover a reasonable fee from Country.

¶ 24 Country argues that the common fund doctrine does not apply because Country's right to set off the \$50,000 in medical payments from its underinsured motorist liability existed by operation of the insurance policy, not due to any efforts of Schepplers' counsel or to any "common fund" that benefited Country. Country contends that it was not reimbursed for the medical payments out of the proceeds of the settlement and that it did not claim a right to any portion of the settlement proceeds by asserting a subrogation lien. Rather, Country exercised its

preexisting contractual right to set off any medical payments from its liability for Peggy Scheppler's underinsured motorist claim. Country suggests that, by asserting this right, it was merely enforcing the contractual limitations of liability for which the parties had bargained. Put another way, Country maintains that the reduction in its underinsured motorist liability came from the *policy*, not from the efforts of Schepplers' attorneys, and applied before the Schepplers' attorneys did any work to procure the settlement. Thus, it argues, the common fund doctrine does not apply.

¶ 25 We disagree. As noted above, "[t]he obligation to pay fees under the common fund doctrine *** is independent of any insurance contract or subrogation agreement" and "rest[s] instead upon equitable considerations of quantum meruit and the prevention of unjust enrichment." *Wajnberg*, 2011 IL App (2d) 110190, ¶ 26 (quoting *Scholtens*, 173 Ill. 2d at 390-91); see also *Tenney v. American Family Mutual Insurance Co.*, 128 Ill. App. 3d 121, 122 (1984) ("[A]n attorney who performs services in creating a fund should in equity and good conscience be allowed compensation out of the whole fund from those who seek to benefit from it."). Thus, where an insurer benefits from the creation of a common fund, it must compensate the attorneys who created the fund, regardless of any rights it has under its contract with the insured. See *Stevens*, 387 Ill. App. 3d at 803. Here, Country benefited from the creation of the settlement fund because it was able to deduct the entire \$100,000 settlement amount from its payment on the Schepplers' underinsured motorist claim. Although Country's right to set off any settlement proceeds was created by the insurance policy, Schepplers' attorneys' efforts made it possible for Country to exercise that contractual right. Schepplers' counsel helped to create the \$100,000 settlement, and if they had not done so (or if they had settled the case for less than \$100,000),

Country would not have been able to reduce its underinsured motorist coverage liability by that amount.

¶ 26 Schepplers' counsel's efforts also made it possible for Country to set off the \$50,000 in medical payments from its underinsured motorist coverage liability because it could not be determined whether Country had *any* such liability (and, therefore, whether it had the contractual right to any setoff against such liability) until Schepplers' counsel obtained a settlement from Pyle's insurer that was less than Country's underinsured liability limit. If the value of the settlement had equaled or exceeded that policy limit, the Schepplers would have been unable to state a viable underinsured motorist claim (see *Giardino v. American Family Insurance*, 164 Ill. App. 3d 389, 391 (1987)), and Country would have been unable to exercise any contractual setoffs against such a claim. In that event, Country would have had to assert a subrogation lien against the settlement in order to recoup the \$50,000 in medical payments it made to Peggy. That would have cost Country money, regardless of whether it asserted a subrogation claim on its own behalf or paid the Schepplers' attorneys to represent its interest. By exercising its contractual right to set off the medical payments after the fund was created, Country was able to avoid these litigation costs.

¶ 27 In sum, Country benefited from the settlement fund in this case without having to expend any of its own resources. Thus, notwithstanding Country's contractual right to set off the medical payments, equitable principles require Country to pay Schepplers' attorneys a reasonable fee for creating the fund. See *Stevens*, 387 Ill. App. 3d at 803 (holding that the fact that the insurance policy allowed recovery for medical payments made through underinsured-motorist coverage provision did not negate the insurer's obligation to pay the plaintiff's attorney for his

services where the insurer benefited from the common fund that the attorney's efforts created)¹; see also *Wajnberg*, 2011 IL App (2d) 110190, ¶ 26.

¶ 28 Country also suggests that the common fund doctrine should not apply in this case because Country expressly waived its subrogation lien and asserted the contractual set off immediately after it learned of the Schepplers' lawsuit against Pyle, the settlement offer from American family, and the Schepplers' underinsured motorist claim. However, these actions are insufficient to preclude the application of the common fund doctrine.

¶ 29 An attorney may not recover attorney fees under the common fund doctrine for rendering services to an unwilling recipient. *Tenney*, 128 Ill. App. 3d at 124. Thus, an insured's attorney may not recover fees from an insurer if the insurer promptly and unequivocally informs the

¹ Country attempts to distinguish *Stevens* on two grounds. First, Country notes that the insurer in *Stevens* refused to waive its subrogation lien for medical payments, whereas Country expressly waived its subrogation lien in this case as soon as it learned of the lawsuit, the settlement offer from American Family, and Peggy Scheppler's underinsured motorist claim. Second, in *Stevens*, the insurer knew about the plaintiff's tort suit at an early stage. Here, by contrast, Kampwerth's affidavit (which the Schepplers' attorneys did not rebut through counteraffidavits) states that Country did not learn of the Schepplers' lawsuit against Pyle until it received Schepplers' counsel's letter on November 29, 2010.

We do not find *Stevens* distinguishable on these bases. First, although Country claims not to have known about the Schepplers' lawsuit against Pyle until November 2010, Country sent the Schepplers' attorneys two letters in May and July of 2010 asking whether they would represent Country in its efforts to recoup the medical payments. Thus, Country knew at an early stage that the Schepplers had retained counsel and that the Schepplers would be filing a claim against Pyle, and it asked Schepplers' counsel to represent its interests. By October 28, 2010, it also knew that Peggy had asserted an underinsured motorist claim. Nevertheless, like the insurer in *Stevens*, Country did nothing to help create the settlement fund. (Indeed, more than one month after waiving its subrogation lien and asserting the setoff, Country sent Schepplers' attorneys a third letter asking them to represent Country in its efforts to recoup the medical payments.) Moreover, like the insurer in *Stevens*, Country argues that its contractual right to set off the medical payments precludes the application of the common fund doctrine. The *Stevens* court rejected that claim, and we reject it here for the same reasons.

insured's attorney that it will represent its own interests and then participates in the creation of the fund by, for example, filing a timely arbitration demand against the tortfeasor's insurance company or promptly intervening in the insured's lawsuit against the tortfeasor. See, e.g., *Ritter*, 356 Ill. App. 3d at 931; *Taylor v. American Family Insurance Group*, 311 Ill. App. 3d 1034, 1041 (2000); *Myers v. Hablutzel*, 236 Ill. App. 3d 705, 709 (1992). However, Country did none of those things in this case. Instead, it wrote the Schepplers' attorneys *three times* asking them to represent Country in its efforts to recover medical payments, twice before it purported to waive its subrogation lien, and once afterward. Moreover, Country's alleged waiver came too late in the process to negate its obligations under the common fund doctrine. Country waived its subrogation lien and asserted its contractual right to a set off only after the fund had been created and Country had benefited from it. Further, as noted, Country did not participate in the creation of the fund by filing its own claim or participating in the Schepplers' lawsuit. Instead, it "reaped the benefits of the settlement procured by the plaintiff's attorney while expending nothing." *Meyers*, 236 Ill. App. 3d at 709. Such a situation is "most suitable for the application of the [common] fund doctrine." *Id.* (quoting *Powell v. Inghram*, 117 Ill. App. 3d 895, 899-90 (1983)).

¶ 30 Finally, Country argues that, by ordering Country to pay the Schepplers' counsel one-third of the \$50,000 in medical payments (which amounts to \$16,666), the trial court has required Country to pay more than its policy limits for underinsured motorist coverage. Country is mistaken. The \$16,666 payment will be made to Schepplers' attorneys, not to the Schepplers themselves. Country will not pay the Schepplers any more than the limits of its liability for underinsured motorist claims prescribed by the policy. The \$16,666 is a payment under the common fund doctrine for services rendered to Country by Schepplers' counsel. As such, it is

wholly separate and independent from the policy limits and from Country's payments to the Scheplers under the policy.

¶ 31

CONCLUSION

¶ 32 For the reasons set forth above, we affirm the judgment of the circuit court of La Salle County.

¶ 33 Affirmed.

¶ 34 PRESIDING JUSTICE WRIGHT, dissenting.

¶ 35 As Justice Appleton stated in his dissent in *Stevens*, “I believe *plaintiff’s attorneys* are, by the majority’s decision, unjustly enriched by Country’s compliance with its insurance contract with plaintiff.” *Stevens*, 387 Ill. App. 3d at 805 (Emphasis added.) (Appleton, J., dissenting). I could not have said it better myself.

¶ 36 As the majority recognizes, Country wrote the Scheplers’ attorneys three times requesting them to represent Country’s interests regarding plaintiff’s medical expenses. Yet, the Scheplers’ attorneys did not agree to act on Country’s behalf or otherwise enter into a contingency fee agreement with Country. Had the Scheplers’ attorneys accepted Country’s multiple offers to compensate them for representing Country’s similar interests, this appeal would not be necessary.

¶ 37 Having failed to establish a contractual obligation to provide legal services to Country, the Scheplers’ attorneys now contend the common fund doctrine applies because they recovered a \$100,000 common fund that benefitted Country. I agree with this theory. However, the trial court did not order Country to pay a portion of the Scheplers’ attorneys fees incurred as a result of obtaining the \$100,000 settlement. Instead, the court ordered Country to pay additional

attorneys fees of \$16,666, or one-third of the entire value of the \$50,000 benefit to Country, without taking into consideration the amount of attorneys fees charged to the Schepplers. I emphasize that the court erred by considering the value of the benefit (\$50,000) rather than amount of attorneys fees charged to create the common fund in this case.

¶ 38 For example, assuming the Schepplers paid a one-third contingency fee of approximately \$33,333 stemming from the \$100,000 settlement obtained by their attorneys, then I could agree Country should be required to pay one-third of that amount, specifically, \$11,111. Yet, the trial court's approach is not consistent with the common fund doctrine which should *reduce* a plaintiff's fees by dividing those fees between both common fund beneficiaries. Instead, much like double billing for the same time, the common fund doctrine was misapplied in the trial court to *increase* the amount counsel will receive for performing the same work that benefitted both parties without splitting the fees between the parties.

¶ 39 If the Schepplers agreed to pay one-third of the settlement amount to their attorneys, and County does in fact pay \$16,666 to the attorneys for the same work, then plaintiffs' counsel will essentially receive approximately \$50,000 in attorneys fees for the work performed to procure a single \$100,000 settlement. This would unjustly enrich plaintiffs' counsel, especially if counsel does not reduce the attorney fees the Schepplers must pay. Moreover, again assuming a one-third contingency fee is applicable, even if plaintiffs' counsel does reduce the Schepplers' attorneys fees by \$16,666, then Country will pay approximately 50% of a customary one-third contingency fee attributable to the \$100,000 common fund, which is a higher overall percentage than the 33% ordered by the trial court.

¶ 40 Under these circumstances, and in accordance with Justice Appleton's dissent in *Stevens*, the plaintiffs' attorneys, not Country, are unjustly enriched in this case. The purpose of the common fund doctrine is to relieve plaintiffs from the responsibility of shouldering the entire burden of attorneys fees (*Wolff v. Ampacet Corp.*, 284 Ill. App. 3d 824, 828 (1996) (overruled on other grounds)), not to unjustly enrich the attorneys with duplicate payments for the same time expended. Therefore, I must respectfully disagree with the majority's holding.

¶ 41 For the following reasons, I respectfully dissent.