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NO. 4-14-1036

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December 1, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

TUGGLE, SCHIRO & LICHTENBERGER, P.C., Plaintiff and Counterdefendant-Appellee, v. COUNTRY PREFERRED INSURANCE COMPANY, Defendant and Counterplaintiff-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 12LM125 Honorable Brian L. McPheters, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's award of summary judgment in favor of plaintiff in regard to its petition for attorney fees under the common-fund doctrine.

¶ 2 In February 2012, plaintiff and counterdefendant, Tuggle, Schiro & Lichtenberger, P.C. (law firm), filed a petition for attorney fees under the common-fund doctrine against defendant and counterplaintiff, Country Preferred Insurance Company (Country Preferred). In September 2012, Country Preferred filed a counterclaim for declaratory judgment. In July 2013, the law firm filed a motion for summary judgment. In September 2013, Country Preferred filed its cross-motion for summary judgment. In July 2014, the trial court granted summary judgment in favor of the law firm and denied Country Preferred's cross-motion for summary judgment. The court awarded attorney fees to the law firm in the amount of $16,667.33.

¶ 3 On appeal, Country Preferred argues the trial court erred in awarding attorney fees to the law firm under the common-fund doctrine. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In May 2009, Carroll Watson, who was insured by Country Preferred, suffered injuries as a result of an automobile accident with another motorist, Milan Noe, who was insured by Country Mutual. Thereafter, Watson hired the law firm to represent him.

¶ 6 At the time of the accident, Watson's motor-vehicle insurance coverage with Country Preferred provided underinsured-motorist coverage of $250,000 and medical payment limits of $50,000. At the same time, Noe's automobile policy provided liability insurance with policy limits of $100,000.

¶ 7 As a result of the accident, Watson submitted various medical bills for payment to Country Preferred. Watson exhausted the medical-payments coverage of $50,000 under his own policy. Country Preferred paid these medical bills directly to medical providers, and the law firm did not charge Watson any attorney fees for the payments made on Watson's behalf. In 2011, the law firm demanded payment of the $100,000 policy limit available through Noe's policy and an additional $150,000 available through Watson's underinsured coverage.

¶ 8 In April 2011, Chris Giroux, an agent of Country Preferred, sent a letter to attorney Todd Lichtenberger telling him to accept the $100,000 limit available through Noe's policy. Giroux advised that Watson's $50,000 of medical-payments coverage had been exhausted and that amount would be taken as an offset on the underinsured-motorist claim. Giroux also indicated Country Preferred was not requesting Lichtenberger to collect any monies for it out of the underlying settlement with Noe.

¶ 9 In May 2011, Noe's policy limit of $100,000 was tendered and a release was fully

executed. Payment of $100,000 was made thereafter.

¶ 10 In early November 2011, Lichtenberger and Country Preferred agreed to settle the underinsured claim for the policy limit of $150,000, and Country Preferred asserted its right to take a $50,000 credit for payments made pursuant to the medical-payments coverage.

¶ 11 On November 7, 2011, Lichtenberger sent a letter to Giroux, asserting a one-third reduction of the $50,000 medical-payments coverage being claimed as a credit by Country Preferred. Lichtenberger's letter stated, in part, as follows:

> "It is our position that the common fund doctrine applies since it was our litigation efforts that created the fund from which the credit is being given. As such, we are requesting a 1/3 reduction of the medical payments lien which would result in a net credit of $33,333.33 to Country [Preferred] and a payment of $116,666.67 to Carroll Watson, Joyce Watson and my law firm."

¶ 12 On November 11, 2011, Giroux responded by letter, indicating it was Country Preferred's "position per our policy considerations that we would be entitled to a set off of the full amount of medical payments." In December 2011, Lichtenberger and Giroux agreed that regardless of the dispute over attorney fees under the common-fund doctrine, a minimum of $100,000 was still payable to Watson.

¶ 13 In February 2012, the law firm filed a petition for attorney fees under the common-fund doctrine, arguing it had a right to collect a fee of $16,666.66, as Lichtenberger was solely responsible for creating the entire $150,000 fund, payable through Watson's underinsured-motorist coverage, from which Country Preferred sought to take a credit of $50,000.

¶ 14 In April 2012, Country Preferred filed an answer to the petition, asserting, in part, that it sought to exercise its contractual setoff of $50,000 and was not requesting counsel to collect any money on its behalf in the underlying settlement. Country Preferred denied the law firm was entitled to any payment under the common-fund doctrine.

¶ 15 In September 2012, Country Preferred filed a counterclaim for declaratory judgment. Country Preferred alleged it never requested Watson or his attorney to protect any subrogation rights in connection with the $50,000 in medical payments it advanced under the policy. Further, Country Preferred alleged no lawsuit had been filed by Watson against Noe and Country Mutual did not contest, but rather, paid its $100,000 liability limits under the Noe policy. Country Preferred claimed Watson and his attorneys were not entitled to an additional $16,666.66, which would increase the underinsured-motorist limits of Watson's policy by that amount above $250,000. Pursuant to the terms of the policy, Country Preferred argued the enforceable setoff for medical payments against the underinsured-motorist limits reduced the limits by $50,000. Country Preferred cited the applicable policy provision as follows:

> "2. Limits of Liability. The Uninsured-Underinsured Motorists limits of liability shown on the declarations page apply as follows:
>
> * * *
>
> d. Amounts payable for damages under Uninsured Motorists coverage will be reduced by all sums paid under Medical Payments, Personal Injury Protection or Underinsured Motorists coverage of any personal vehicle issued by us. Any payment under coverages in section 2 of this policy

> either to or for an insured will reduce any amount that person is entitled to receive under Section 1, Liability; Medical Payments; Personal Injury Protection; or Underinsured Motorists coverage of this policy."

As Country Preferred paid the $50,000 in medical payments and $150,000 in underinsured-motorist coverage, and Watson received $100,000 from Noe's policy, Country Preferred claimed the underinsured-motorist coverage had been exhausted and no further payment was due.

¶ 16 In July 2013, the law firm filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2012)), asserting its right to collect a fee of $16,666.66 pursuant to the common-fund doctrine. The law firm contended it was the only firm that represented Watson and negotiated a settlement with both Country Mutual and Country Preferred. Further, the law firm stated it obtained policy limits under Noe's policy and under Watson's underinsured-motorist coverage, and thus it was solely responsible for creating the entire fund from which Country Preferred claimed its $50,000 offset pursuant to its medical-payments coverage. In arguing it was entitled to the fee under the common-fund doctrine, the law firm relied on this court's decision in *Stevens v. Country Mutual Insurance Co.*, 387 Ill. App. 3d 796, 903 N.E.2d 733 (2008).

¶ 17 In September 2013, Country Preferred filed its response and its cross-motion for summary judgment. Country Preferred argued the contractual setoff for medical payments applied and no common fund was created for the benefit of Country Preferred. Further, Country Preferred argued that a result in favor of the law firm would require Country Preferred to pay more than its policy limits. Country Preferred also contended this court's decision in *Stevens* was

distinguishable as well as wrongly decided.

¶ 18 In October 2013, the trial court conducted a hearing on the motions. In July 2014, the court issued its memorandum opinion and order. In analyzing the case, the court found the law firm "created the fund from which to pay monies to 'reimburse' [its] client's insurer for what it had paid out to Watson under the medical payments 'coverage of its policy of insurance.' " Relying on the majority's opinion in *Stevens*, the court stated, in part, as follows:

> "The fund was created by the [law firm] for its client Watson by claiming $150,000.00 on Watson's under-insured motorist coverage with Country Preferred. The defendant did not participate in the creation of the fund. The record shows the [law firm] created the fund by claiming the $150,000.00 under their client's policy, and the only involvement of the defendant concerned whether a third of the subrogation amount, $50,000.00 should be paid to [the law firm]."

The court entered judgment in favor of the law firm in the amount of $16,667.33 and against Country Financial. We note one-third of $50,000 is $16,666.67.

¶ 19 In August 2014, Country Preferred filed a motion for reconsideration. In October 2014, the law firm filed a response. Following a hearing, the trial court denied the motion for reconsideration. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 In arguing the trial court erred in granting summary judgment in favor of the law firm, Country Preferred contends the contractual setoff for medical payments applied in this case and no common fund had been created for its benefit. We disagree.

¶ 22 A. Summary Judgment

¶ 23 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291, 730 N.E.2d 1119, 1127 (2000). On appeal from a trial court's decision to grant a motion for summary judgment, our review is *de novo*. *Bowles v. Owens-Illinois, Inc.*, 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267.

¶ 24 B. The Common-Fund Doctrine

¶ 25 Our supreme court has noted the common-fund doctrine has been applied "in numerous types of civil litigation, including insurance subrogation claims, class actions, and wrongful-death cases involving an intervenor." *Wendling v. Southern Illinois Hospital Services*, 242 Ill. 2d 261, 265, 950 N.E.2d 646, 648 (2011).

> "The common fund doctrine allows an attorney 'who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees.' [Citation.] The court's power to do equity in a particular situation authorizes the award of fees under this doctrine, which is based on the policy to avoid the unjust enrichment of someone who obtains the benefit of a lawsuit without contributing to its costs." *Baez v. Rosenberg*, 409 Ill. App.

3d 525, 537, 949 N.E.2d 250, 262-63 (2011).

"The obligation to pay fees under the common fund doctrine, which is quasi-contractual, is independent of any insurance contract or subrogation agreement and is 'resting instead upon equitable considerations of *quantum meruit* and the prevention of unjust enrichment.' " *Wajnberg v. Wunglueck*, 2011 IL App (2d) 110190, ¶ 26, 963 N.E.2d 1077 (quoting *Scholtens v. Schneider*, 173 Ill. 2d 375, 390-91, 671 N.E.2d 657, 665 (1996)).

> " 'To sustain a claim under the common fund doctrine, the attorney must show that (1) the fund was created as the result of legal services performed by the attorney, (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.' " *Linker v. Allstate Insurance Co.*, 342 Ill. App. 3d 764, 770, 794 N.E.2d 945, 950 (2003) (quoting *Bishop v. Burgard*, 198 Ill. 2d 495, 508, 764 N.E.2d 24, 33 (2002)).

"[A] plaintiff may not recover attorney fees under the doctrine while rendering services for an unwilling recipient." *Johnson v. State Farm Mutual Automobile Insurance Co.*, 323 Ill. App. 3d 376, 382, 752 N.E.2d 449, 455 (2001).

¶ 26 In *Stevens*, 387 Ill. App. 3d at 797, 903 N.E.2d at 735, the plaintiff, Matthew Stevens, who was insured by Country Mutual Insurance Company (Country), suffered injuries in an automobile accident caused by Heather Phares, who was insured by State Farm Insurance Company (State Farm). With medical expenses totaling $151,587, Stevens received $20,420.60 from Country under the terms of the medical-payments coverage policy, which allowed Country to recover the amount it paid to him. *Stevens*, 387 Ill. App. 3d at 798, 903 N.E.2d at 735.

Stevens' attorney, Bruce Beeman, sent a letter to Country, confirming (1) Country did not intend to pursue an action against Phares; (2) Country authorized him to accept State Farm's $50,000 settlement; and (3) Stevens intended to file a claim for $50,000 under the terms of his $100,000 underinsured-motorist coverage policy. *Stevens*, 387 Ill. App. 3d at 798, 903 N.E.2d at 735. Beeman also requested Country waive its subrogation lien for medical benefits paid, but Country indicated its intent not to waive the subrogation lien. *Stevens*, 387 Ill. App. 3d at 798, 903 N.E.2d at 735. State Farm later issued a $50,000 check pursuant to the settlement agreement. *Stevens*, 387 Ill. App. 3d at 799, 903 N.E.2d at 736. Thereafter, Stevens filed a complaint to adjudicate Country's subrogation lien, arguing Country was obligated to pay one-third of its subrogation lien for attorney fees. *Stevens*, 387 Ill. App. 3d at 799, 903 N.E.2d at 736.

¶ 27 The trial court granted summary judgment in favor of Stevens and required Country to (1) endorse the $50,000 check from State Farm; (2) remit $29,579.40 to Stevens, representing the balance of his underinsured-motorist coverage; and (3) remit $6,806.88 to Stevens, representing one-third of Country's subrogation lien for medical payments under the common-fund doctrine. *Stevens*, 387 Ill. App. 3d at 799-800, 903 N.E.2d at 736.

¶ 28 On appeal, Country argued, in part, that the common-fund doctrine did not apply because it did not receive any benefit from the common fund and the medical payments Country made to Stevens were recovered under the terms of its underinsured-motorist coverage. *Stevens*, 387 Ill. App. 3d at 800, 903 N.E.2d at 736. In a 2-to-1 decision, this court found (1) Stevens had sustained injuries as a result of the accident with Phares; (2) Country paid $20,420.60 to Stevens under the terms of its medical-payments coverage policy; (3) thereafter, Beeman pursued State Farm for damages on Stevens' behalf; (4) Beeman created a $50,000 common fund as a result of his legal services; and (5) Country did not participate in the common fund's creation. *Stevens*,

387 Ill. App. 3d at 801, 903 N.E.2d at 737-38.

¶ 29 Based on those facts, the majority concluded Country received a benefit from the creation of the common fund since, had Beeman not acted, "Country would have expended substantial administrative and legal resources to recover the $20,420.60 it paid to Stevens." *Stevens*, 387 Ill. App. 3d at 801, 903 N.E.2d at 738. The majority also found Country did not expressly state to Beeman that it did not want him to take action to recover its subrogation lien and would not pay him if he did. *Stevens*, 387 Ill. App. 3d at 801, 903 N.E.2d at 738. On the issue of Country's recovery of medical payments under its underinsured-motorist policy, the majority noted "the fact that Country's policy with Stevens allowed it to recover medical payments made through its underinsured-motorist coverage does not negate its obligation to pay Beeman for his services in creating the common fund." *Stevens*, 387 Ill. App. 3d at 803, 903 N.E.2d at 739.

¶ 30 In the case *sub judice*, the efforts of the law firm resulted in Watson receiving policy-limit payments from both the Noe policy and the Watson policy. Country Preferred did not participate in the creation of those funds. Country Preferred also benefitted from the creation of the entirety of the funds, as it was able to recover $50,000 of medical-payments coverage.

¶ 31 Country Preferred claims that its contract with Watson gave it the right to set off the $50,000 in medical payments such that the common-fund doctrine does not apply. However, as noted, "[t]he obligation to pay fees under the common fund doctrine *** is independent of any insurance contract or subrogation agreement." *Wajnberg*, 2011 IL App (2d) 110190, ¶ 26, 963 N.E.2d 1077. Although Country Preferred's right to set off settlement proceeds was created by the insurance policy with Watson, the law firm's efforts enabled Country Preferred to exercise that contractual right.

¶ 32 In its final argument, Country Preferred contends that, by ordering it to pay the law firm one-third of the $50,000 in medical payments, the trial court required it to pay more than the policy limits of $250,000. However, the attorney fees will be paid to the law firm, not to Watson. Country Preferred will not pay Watson any more than the limits of its liability for underinsured-motorist claims set forth in the insurance policy. The $16,667.33 (actually $16,666.67) is a payment under the common-fund doctrine for services rendered to Country Preferred by the law firm. Thus, it is independent from the policy limits and the payments made by Country Preferred to Watson under the policy.

¶ 33 III. CONCLUSION

¶ 34 In closing, we commend the trial court for its thorough and reasoned written order on the motions for summary judgment. For the reasons stated, we affirm the trial court's judgment granting summary judgment in favor of the law firm and denying Country Preferred's cross-motion for summary judgment.

¶ 35 Affirmed.