IN THE COURT OF APPEALS OF TENNESSEE

RASHELL (SHELLY) TEEGARDIN and husband MARK A. TEEGARDIN,	)	C/A NO. 03A01-9509-CV-00321
	)	HAMILTON COUNTY CIRCUIT COURT
Plaintiffs-Appellees,	)	
v.	)	
DENNIS AUSTIN and TACC, INC.,	)	HONORABLE SAMUEL H. PAYNE, JUDGE
Defendants,	)	
and	)	
BEAULIEU OF AMERICA, INC.,	)	
Intervenor-Appellant.	)	REVERSED AND REMANDED

LARRY W. BRIDGESMITH and FAITH KALMAN REYES of CONSTANGY, BROOKS & SMITH, Nashville, for Appellant.

JOHN D. BARRY of MILLIGAN, BARRY, HENSLEY & EVANS, Chattanooga, for Appellees.

OPINION

Susano, J.

In this appeal, we are asked to decide if an insurer is obligated to pay its insured's attorney a fee for collecting the insurer's subrogation interest. Under the facts of this case, we find the insurer is not obligated for the attorney's fee, and reverse the trial court's holding to the contrary.

Beaulieu of America, Inc. (Beaulieu), as the employer of appellee Mark A. Teegardin, made health benefits available to Teegardin and his wife, the appellee Rashell (Shelly) Teegardin, under the company's self-insurance program. Mrs. Teegardin was involved in an automobile accident on January 27, 1994, as a result of which Beaulieu paid medical expenses totaling $4,087.37. The original complaint filed by the Teegardins in this case sought to recover damages against the parties allegedly responsible for the accident.[1] The tort action was settled for $11,500. Following the settlement, Beaulieu was allowed to intervene to assert a subrogation claim for the benefits paid on behalf of Mrs. Teegardin.

The Teegardins sought to have Beaulieu's recovery reduced by their attorney's one-third contingent fee. They claimed that there was an express contract regarding the recovery of Beaulieu's subrogation interest. In the alternative, they argued that there was an implied contract between the parties, or that their attorney was entitled to a fee under a theory of

[1]The original defendants are not involved in this appeal.

quantum meruit. The trial court held that the Teegardins' attorney was entitled to a one-third contingent fee and reduced Beaulieu's recovery by $1,360.45[2]. On this appeal, the appellant Beaulieu raises the issue of whether the trial court erred in awarding an attorney's fee, contending that no contract, express or implied, existed between it and the appellees' attorney[3]. The appellees contend this appeal is frivolous and also raise the following new issue[4], taken verbatim from their brief:

> Is the subrogation/reimbursement clause upon which Intervenor/Appellant relies vague, ambiguous, unconscionable, and unenforceable as a matter of substantive Tennessee law?

I

The Teegardins filed their tort action on March 1, 1994. On March 7, 1994, Beaulieu sent the Teegardins a letter, stating as follows:

> Under the provisions of the Beaulieu of America, Inc. Health and Welfare Plan, the Plan is entitled to recover any amounts it pays when an injury or illness arises from actions that are caused by a third party. However, the Plan is prepared to honor the claim(s) provided that you sign this agreement. Before any payment can be made,

---

[2]One-third of the recovery is $1,362.46. There is no explanation in the record for the small discrepancy.

[3]Beaulieu raised several other issues. In view of our disposition of its main issue, we do not find it necessary to reach the other issues.

[4]The appellees state other issues in their brief but they are merely restatements of the main issue raised by the appellant.

> the following statement must be completed and submitted to the office of Combined Administrative Services. Plan Section 10.10, which explains the Plan's recovery rights, is attached.

On March 10, 1994, the Teegardins' attorney, John D. Barry, sent a response to Beaulieu's letter. His letter stated, in its entirety, as follows:

> Enclosed please find the executed information sheet regarding Shelly Teegardin's accident of January 27, 1994. The undersigned is acting as attorney for the Teegardins in this matter. If you should have any questions, please do not hesitate to contact me.

The Teegardins signed the statement, which provided that "I acknowledge receipt of Section 10.10 of the Plan Document entitled Third Party Recovery and agree to its provisions."

Section 10.10 of the Plan Document, enclosed with Beaulieu's letter of March 7, 1994, and returned with Barry's response, stated in relevant part as follows:

> If the Plan pays benefits to or on behalf of a covered employee or covered dependent, and the covered employee or covered dependent . . . recovers or is entitled to recover from [sic] any amount from any third party because of or arising out of the illness or injury for which benefits were paid, the Plan shall be entitled to recover the amount of any such recovery realized, up to the amount of benefits paid by the Plan, regardless of how the recovery is characterized. Sources of the covered employee's or covered dependent's

> recovery include, but are not limited to, any liability or automobile insurer of any type whether or not issued to the covered employee or covered dependent or any third party or tortfeasor responsible for causing the injury of illness for which the Plan paid benefits. The Plan's rights under this Section 10.10 may be enforced through reimbursement, assignment, subrogation, or by any other legally acceptable means.
>
> * * *
>
> The Plan can also recover any expenses it incurs to enforce its rights under this section, including but not limited to, any attorney's fees it incurs to enforce its rights, and any fees and costs associated with litigation. The Plan will not bear any cost of suit or attorney's fees incurred by the covered employee or any covered dependent.

After receiving Barry's response and the signed statement, Beaulieu paid Mrs. Teegardin's medical expenses. The next correspondence between the parties was on June 20, 1994, when Beaulieu sent a letter to Barry, stating,

> [Beaulieu has] a signed subrogation agreement from your client, Shelly Teegardin. As you know, Ms. Teegardin incurred medical expenses due to a motor vehicular accident. This office has had no communications from you concerning the status of this claim.
>
> Please provide a status report and when we should expect to receive reimbursement for the medical claims paid on behalf of Ms. Teegardin.

Barry's response, mailed June 29, 1994, stated as follows:

> Please be advised that we have filed suit . . . against Mr. Dennis Austin and the corporation we believe to be his employer, TACC, Inc.
>
> * * *
>
> Please advise us if you desire that we represent your interests in connection with recovery of payments you have made on behalf of Mrs. Teegardin pursuant to your health and hospitalization contract. If you should desire that we represent your interests in connection with recovery of those items of the defendants, our fee for doing so would be 33 1/3 of the amount we recover on your behalf. If you do not desire to engage us under such arrangement, you may want to select another firm to intervene on behalf of your company to protect its interests.

Beaulieu claims that it never received this letter. Whether it did or not is not material to our resolution of this case.

Beaulieu sent the following letter to Barry on November 7, 1994:

> As you know, [Beaulieu has] a subrogation agreement with the Teegardins for charges incurred as a result of a motor vehicle accident. The Teegardins agreed to reimburse [us] for all charges paid on their behalf. Furthermore, they understood the Plan would not pay for any legal expenses they might incur.
>
> Please discuss this with your clients and assist them in honoring their agreement. [Beaulieu] maintains a very strong position concerning its rights under this plan provision and enforces those rights.
>
> As of this date, this plan has paid $4,087.37 toward medical expenses on behalf of Shelly Teegardin. [Beaulieu] fully expects to be

> reimbursed the full amount. Any fees for your services are the responsibility of the insured.

The parties to the original action settled the Teegardins' claim for $11,500, and on December 12, 1994, an order of compromise and dismissal was entered. The next day, Barry sent Beaulieu another letter, which stated as follows:

> The settlement of the Teegardin's claim has now been accomplished.
>
> * * *
>
> As I earlier advised you, this recovery was made on behalf of your company pursuant to my letter of June 29, 1994. The Teegardins did not participate in the settlement that involves your claim of $4,087.37, nor did this firm collect any fee from the Teegardins for that amount of recovery.
>
> This firm believes it is entitled to a fee from your company for the recovery it has made on behalf of your company as outlined in my letter of June 29. In order to protect your interest and that of this firm, we have lodged that sum in the registry of the Court.

Beaulieu opposed the reduction of its recovery to allow a fee for Barry.

The trial court found that "counsel for plaintiffs in this cause is entitled to an attorney's fee upon the $4,087.37 for services and time expended in producing and preserving that fund." No reason for this finding was set forth in the order. A hearing was scheduled to determine the amount of the fee, after

which an order was entered awarding an attorney's fee in the amount of $1,360.45, and directing the clerk to disburse the funds.

II

There are no disputed material facts. This being the case, no presumption of correctness attaches to the trial court's judgment. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). We are dealing with a question of law.

On several occasions, the appellate courts of this state have addressed the issue of whether an insurer is obligated to pay a fee to an insured's attorney for the collection of the insurer's subrogation interest. The principles set forth in the cases of ***Tennessee Farmers Mut. Ins. Co. v. Pritchett,*** 391 S.W.2d 671 (Tenn.App. 1964), ***Travelers Ins. Co. v. Williams,*** 541 S.W.2d 587 (Tenn. 1976), ***Motors Ins. Corp. v. Blakemore,*** 584 S.W.2d 204 (Tenn.App. 1978), and ***Boston, Bates & Holt v. Tennessee Farmers Mut. Ins. Co.,*** 857 S.W.2d 32 (Tenn. 1993), provide the necessary guidance for the resolution of the instant case.

In ***Tennessee Farmers Mut. Ins. Co.,*** an insurer was held liable for an attorney's fee in the amount of one-third of the subrogation interest. In that case, the insurer had been informed by the insurance company for the defendant in the underlying tort action that

> [d]ue to the fact that your insured was injured *and is represented,* we anticipate this settlement will be pending for quite some time, but we shall keep your subrogation interests in mind when a final settlement is made with your insured.

Tennessee Farmers Mut. Ins. Co., 391 S.W.2d at 674 (emphasis in original). A representative of the insurer had called the insured's attorney and requested that he forward the insurer's subrogation interest when the claim was settled. *Id.* at 672. The Chancellor found that

> this case is another glaring example of an insurance company sitting back on its haunches, doing nothing and waiting to get its share of a claim procured by attorneys, but not wanting to pay its share of an attorney's fee.

Id. at 674. The Court of Appeals agreed, finding that

> [i]t is fundamental that one cannot sit silently and permit another, who obviously expects to be paid, to perform valuable services for him and then not be liable for the reasonable value thereof.

Id. at 675.

The Supreme Court reached a similar result in the ***Boston, Bates & Holt*** case. In that case, a representative of the insurer, after being advised that its insured had representation, told the insured's attorney "not to forget [Tennessee Farmers'

subrogation claim]." 857 S.W.2d at 34 (brackets in original). The Supreme Court found "a classic example of implied contract" and held that the insurer's request, along with its equivocal response to the notice from the insured's attorney that he was providing representation in the case, compelled the conclusion that the insurer was liable for the attorney's fee. *Id.* at 35.

The Supreme Court was presented with the same issue, but a different factual scenario, in the case of ***Travelers Ins. Co. v. Williams,*** 541 S.W.2d 587 (Tenn. 1976). In that case, the insurer notified the tortfeasor's insurance company of its subrogation claim and stated that it would "handle (its) own subrogation." *Id.* at 588. The Supreme Court held that since the insurer had provided notice that protection of its subrogation right was not necessary, the insured's attorney "acted as a volunteer," and was not entitled to a fee for collection of the subrogation interest. *Id.* at 591.

The Court of Appeals followed the ***Travelers Ins. Co.*** holding two years later in ***Motors Ins. Corp. v. Blakemore,*** 584 S.W.2d 204 (Tenn.App. 1978). In that case the insurer, after paying the insured's property damage claim, sent a letter to the insured's attorney, stating that

> [a]ny legal action for property damage that you find it necessary to initiate on behalf of your client should be limited to his collision deductible. Please let us know if it becomes necessary to file suit.

Id. at 205. The court in ***Motors Ins. Corp.*** found the ***Travelers Ins. Co.*** case controlling, stating,

> [b]y following the ruling in ***Travelers,*** this court must determine that there was no contract between Motors and [the insured's attorney], either expressed, implied or quasi, and that [the attorney] acted as a volunteer.

Id. at 208.

Turning now to the instant case, we also find the Supreme Court's holding in ***Travelers Ins. Co.*** to be controlling. We further find that the ***Tennessee Farmers Mut. Ins. Co.*** and ***Boston, Bates & Holt*** cases are factually distinguishable. The relevant inquiry was succinctly stated in ***Travelers Ins. Co.***:

> [W]hether or not an attorney is entitled to collect from the insurer a fee with respect to a subrogation claim depends upon whether an express or implied contract or a quasi contractual relation exists between them.

541 S.W.2d at 590. Thus, we apply fundamental principles of contract law to determine whether the communications between the parties in this case were such as to create a contractual relationship between them.

In this regard, the letter of June 29, 1994, from Barry to Beaulieu is particularly significant. It stated, in pertinent part, as follows:

> *Please advise us if you desire that we represent your interests* in connection with recovery of payments you have made . . . *If* you should desire that we represent your interests, . . . our fee for doing so would be 33 1/3 of the amount we recover on your behalf.

(Emphasis added). We would make two observations about this letter, both of which hold true regardless of whether Beaulieu received this correspondence. First, it demonstrates that Barry understood there was no agreement between the parties prior to the writing of the letter. If there had been, there would have been no need for the inquiry clearly expressed in that letter. Second, by its express terms, the letter required an affirmative response from Beaulieu in the nature of an acceptance of the attorney's offer. The appellees acknowledge that Beaulieu did not respond to Barry's proposition.

What Barry *did* receive was Beaulieu's letter of November 7, 1994, which should have erased any possible doubt as to Beaulieu's position:

> As of this date, this plan has paid $4,087.37 toward medical expenses on behalf of Shelly Teegardin. [Beaulieu] fully expects to be reimbursed *the full amount*. *Any fees for*

> *your services are the responsibility of the insured.*

(Emphasis added). This letter was sent more than a month before the order of compromise and settlement was entered. It is clear that no express contract existed for Barry's legal representation.

Regarding the appellees' assertion of an implied contract, or a quasi-contractual relationship, the following words of the ***Travelers Ins. Co.*** case are instructive:

> A promise cannot be implied in fact in the face of a declaration to the contrary by the party to be charged. Any authority which the insured might otherwise have had to direct his attorney to prosecute the subrogation claim was expressly revoked.
>
> Neither do we find evidence of unjust enrichment of the insurer from the services of the insured's attorney upon which a quasi or constructive contractual duty could be based. In our view, one is not unjustly enriched by a benefit 'forced upon' him as a result of services voluntarily and officiously performed by another who has been expressly informed by the alleged promisor that his services are not desired.

541 S.W.2d at 590. We find, as did the court in ***Travelers Ins. Co.,*** that the insured's attorney acted as a volunteer as to the subrogation claim.

III

We now address briefly the issue raised by the appellees. We have read the appellees' brief carefully several times, and conclude their argument that the provisions of Section 10.10 of the Plan Document are "ambiguous" and "unconscionable" amount in essence to an assertion that the Teegardins should not be held liable for an attorney's fee for time and energy expended pursuant to recovering Beaulieu's subrogation interest. This argument is moot in light of our holding that the Teegardins' attorney acted as a volunteer regarding Beaulieu's claim.

As is obvious from our holding, we do not find Beaulieu's appeal to be frivolous.

For the aforementioned reasons, we reverse the judgment of the trial court. This case is remanded to the trial court for the entry of an order directing disbursal of the $1,360.45 in question to Beaulieu and taxing costs below relative to this dispute to the appellees. Costs on appeal are also taxed and assessed to the appellees.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Houston M. Goddard, P.J.

_____
Herschel P. Franks, J.