IN THE COURT OF APPEALS OF TENNESSEE

LUTHER, ANDERSON, CLEARY & RUTH, P.C., GARY CARNES, Individually and as next friend of MICHAEL CARNES, a minor, Plaintiffs-Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee, and LEROY BRATTON and PATRICIA BRATTON, Defendants.	C/A NO. 03A01-9601-CV-00015 HAMILTON COUNTY CIRCUIT COURT HONORABLE WILLIAM L. BROWN, JUDGE AFFIRMED AND REMANDED

DAVID L. FRANKLIN of LUTHER, ANDERSON & CLEARY, P.C., Chattanooga, for Appellants.

JOSEPH R. WHITE of SPEARS, MOORE, REBMAN & WILLIAMS, Chattanooga, for Appellee.

OPINION

Susano, J.

In this appeal, we are asked to decide whether an insurer is entitled to collect its claimed subrogation interest, and, if so, whether the insurer must pay the insured's attorney a fee for collecting that interest from third party tortfeasors.[1] We affirm the trial court's ruling that the insurer is entitled to reimbursement of its subrogation interest, free of the attorney's fee.

Plaintiff Gary Carnes (Carnes) was the named insured in a policy of automobile insurance issued by State Farm Mutual Automobile Insurance Company (State Farm). Carnes was involved in an automobile accident in which he and his minor son, Michael Carnes, were injured. Pursuant to the terms of the policy, State Farm paid $14,950.17 to or for Carnes for the following claims:

Carnes' property damage	$ 4,986.33
Carnes' medical bills	886.15
Michael Carnes' medical bills	9,077.69
	$14,950.17

Carnes settled all the claims arising out of the accident for a total of $42,986.33. Apparently, the claims were settled before a suit was filed. Of that total, $31,000 was designated as being in settlement of claims arising out of Michael Carnes' injuries, including Carnes' claim for his son's medical bills. Carnes and his counsel, the law firm of Luther,

[1]The tortfeasors, the defendants Leroy Bratton and Patricia Bratton, are not parties to this appeal.

Anderson, Cleary & Ruth ("law firm"), then filed a complaint of interpleader coupled with a petition for approval of the minor's settlement. The complaint alleged that State Farm was not entitled to reimbursement for any of the payments made by it for the parties' medical expenses. The law firm also alleged that, in any event, it was entitled to an attorney's fee of one-third of the entire settlement. The trial court, sitting without a jury, held that State Farm was entitled to reimbursement of its subrogation interest, and consequently awarded State Farm $14,950.17. The trial court also held that the law firm was not entitled to a fee for collection of the subrogation interest. Carnes, for himself and for his minor son, as well as the law firm, appeal, raising the following issues:

> 1. Did the trial court err in holding that State Farm was entitled to recover amounts paid to its insured under the medical payments coverage of its insurance policy from the proceeds of a settlement of a third party tort claim?
>
> 2. Did the trial court err in holding that the law firm was not entitled to be paid attorney's fees for the subrogation amounts recovered by State Farm in the claim against the third party tortfeasor?

I

The original complaint in this action was filed on November 17, 1994. On January 6, 1995, the trial court approved the minor's settlement of $31,000, and on January 27, 1995, the

court ordered partial disbursement of the settlement funds as follows:

To Carnes for his claim of loss of services of the minor child	$ 1,000.00
To the law firm for its attorney's fee in the amount of one-third of the funds disbursed	7,424.03
To Michael Carnes--to be invested until he reaches his majority	13,922.31
	$21,922.31

The court retained the balance of the minor's settlement, along with money earlier paid into court for Carnes' property damage and his medical expenses. The retained funds were broken down as follows:

Remainder of the funds designated as minor's settlement, being an amount representing the medical expenses of Michael Carnes	$ 9,077.69
Carnes' medical expenses	886.15
Property damage to car	4,986.33
	$14,950.17[2]

The $14,950.17 retained by the court was the amount State Farm had previously paid to Carnes under its policy and

[2]Carnes received a direct settlement payment in the amount of $6,113.85 for his pure injury claim, thus bringing the total settlement amount to $42,986.33. The $6,113.85 is not at issue on this appeal.

thus the amount of the insurer's claimed subrogation interest. A brief bench trial was conducted on the issues of State Farm's entitlement to its subrogation interest, and the law firm's entitlement to an attorney's fee for the collection of that interest. As noted above, the trial court found for State Farm, awarding it the entire $14,950.17. Of this amount, $9,963.84 was for medical bills paid pursuant to the following provision in Carnes' policy:

> When we pay medical expenses under this coverage, we are entitled to be paid out of any subsequent recovery for ***bodily injury*** from a liable party or such party's insurer the lesser of:
>
> a. what we have paid. . .

(Emphasis in original). The trial court also found that State Farm gave the law firm adequate notice that it did not want the firm's representation in connection with the recovery of its subrogation interest, and thus the law firm was not entitled to a fee for recovery of that interest.

II

Carnes makes two alternative arguments in attempting to persuade us that the trial court erred in awarding State Farm its subrogation interest. The first argument relies upon certain language found in Carnes' insurance policy which reads as follows:

> The injured ***person*** shall:
>
> a. execute any legal papers we need;
>
> b. when we ask, take action through our representative to seek a recovery;
>
> c. not hurt our rights to recover;
>
> d. not make claim to that portion of the recovery that we are entitled to be paid; and
>
> e. answer truthfully all questions that we may ask.
>
> We will not seek reimbursement from payments received from a liable party or such party's insurer by a ***person*** who has complied with all of these requirements.

(Emphasis in original). Carnes argues that he has "complied with or ha[s] been ready, willing and able to comply with all of the requirements contained in subparagraphs (a) through (e)," and that therefore State Farm cannot seek reimbursement of its medical payments subrogation interest. The trial court responded to this argument as follows:

> Well, it's the Court's position, based upon the plaintiffs' claim in this case, that the Carneses have not complied with paragraph [d] in that they are seeking to claim or keep that portion of the medical benefits to which State Farm is entitled under the subrogation clause of their policy.

We agree with the trial court's analysis. Carnes' first argument is without merit.

The alternative argument made by Carnes involves only the payments made by State Farm for his son's medical expenses. Carnes argues that the insurance contract is only between himself and State Farm, and that it does not bind his minor son. The argument, quoted from his brief, goes as follows:

> Gary Carnes, as a party to the contract with State Farm, is bound by [its] language. However, Gary Carnes did not recover any money for the medical payments made on behalf of Michael. The only money received by Mr. Carnes out of Michael's settlement was $1,000 for his claim for loss of services. . . The balance of the money belonged to Michael, who is not a party to the contract, and who is therefore not bound by it.

The fallacy of this argument lies in the falsity of one of its premises, i.e., "the balance of the money belonged to Michael."

The law is clear in Tennessee that a cause of action for medical expenses of a minor child incurred as a result of a tort against the minor belongs to the child's parent, not to the minor. The general rule was enunciated by the Supreme Court in the case of ***Dudley v. Phillips***, 405 S.W.2d 468, 469 (Tenn. 1966):

> When a tort is committed against a child there arises two separate and distinct causes of action. The general rule is well stated by the Annotation in 42 A.L.R. 722, 724 as follows:
>
> > The almost universally accepted theory is that, upon injury to a child, there immediately arises in favor of the parent a cause of action for loss of services, *medical expenses* to which he will be put, etc. and that another and distinct cause of action arises in favor of the child for the elements of damage to him, such as pain and suffering, disfigurement, etc.

Id. (emphasis added); *see also* ***Boring v. Miller,*** 386 S.W.2d 521, 523 (Tenn. 1965); ***Rogers v. Donelson-Hermitage Chamber of Commerce,*** 807 S.W.2d 242, 247 (Tenn.App. 1990).

The case upon which Carnes primarily relies, ***Page by Page v. Wilkinson,*** 657 S.W.2d 422 (Tenn.App. 1983) also supports the conclusion that the payments for Michael's medical expenses were recovered by Carnes and not his minor son. In ***Page by Page***, a minor was injured in an accident, and the parent's insurer made payment for the minor's medical expenses in the amount of $5,000. *Id.* at 423. A settlement was reached on behalf of the minor, and the insurer attempted to collect the $5,000 out of the settlement. *Id.* The court held the insurer could not recover because the settlement was for bodily injury only, and not for the minor's medical expenses. In so holding, the ***Page by Page*** court made the following pertinent statement:

> The father could not subrogate the rights of the minor for damages due to bodily injuries. The father could subrogate only his rights *which was the right to recover from the tort-feasor for medical expenses incurred. Had the settlement in this lawsuit specified an amount to the father for medical expenses, the subrogation agreement signed by the father would have been enforceable. . .*

Id. at 425 (emphasis added). In the present case, the court, in approving the settlement, designated a portion of the payment, i.e., $9,077.69, as being for the medical expenses of the minor. It is of no consequence that it was wrapped into the total settlement package for the child of $31,000; it remains an element of the father's recovery. That being the case, Carnes' argument that the money belonged to Michael, and was therefore beyond the reach of the subrogation agreement, must fail.

III

We now turn to the law firm's contention that it is entitled to a one-third attorney's fee for the collection of State Farm's subrogation interest. Conceding there was no express contract for its services, the law firm argues that the circumstances of this case "justify and compel the finding of an implied or quasi-contract between itself and State Farm." The facts relevant to our inquiry whether the law firm is correct in that assertion are summarized in the paragraphs that follow.

The initial correspondence regarding subrogation was sent from a representative of State Farm, Ms. Jan Davis, to attorney Morgan Adams, who primarily handled the case for the law firm. It stated as follows:

> Enclosed are copies of medical bills paid for Michael for injuries resulting from the automobile accident of 12-06-93 by State Farm Insurance.
>
> I have put St. Paul Insurance [the tortfeasors' insurer] on notice of our subrogation interest, *and expect 100% recovery* whether they pay you and your clients or pay State Farm direct.
>
> Please notify me in writing that you are in agreement with this.

(Emphasis added). The letter is dated April 27, 1994. A written response from the law firm was not sent until June 28, 1994, when Adams sent two letters to State Farm. The first stated the following in relevant part:

> This letter will confirm our conversation of June 27, 1994. In that conversation you requested that we not pursue your subrogation interest for property damage.

The second letter, addressed to Davis as was the first, stated the following:

> I have received notice of your subrogation interest for medical payments in the amount of $8,765.69.
>
> * * * *

> My firm will be happy to collect your medical subrogation interest and send you the appropriate amount. Our standard fee for this is 1/3 of all collected monies. Would you please notify me in writing that you will agree to our fee arrangement.

Regarding the telephone conversation to which the first letter made reference, Davis and Adams presented conflicting testimony as to whether Davis specifically informed Adams that State Farm did not want his firm's representation on both the medical payments claim and property damage claim. Davis testified on this point as follows:

> Well, I told Mr. Adams that we were presenting our own subrogation interest to St. Paul [the tortfeasor's insurer], that we'd already sent our documentation to them and that we were expecting them to either pay us direct a hundred percent or if they chose to include it in the payments to the part that would go to the attorneys, Mr. Adams' firm, that we would expect a hundred percent recovery then, also. I told him that, you know, I had done a lot of work on the file to present our subrogation claim to St. Paul and that we did not need them to represent us.

Adams' testimony on this point was as follows:

> Q: All right. In that phone conversation or in that correspondence, was there anything said about State Farm's subrogation interest [as] far as the medical payments is concerned?
>
> A: I don't recall that, no. I understand that that's in dispute now, but I don't recall that at all.

Also introduced into evidence was a handwritten note from Davis to Adams, dated June 28, 1994. Davis testified she sent the note to Adams along with a copy of medical expenses received, and documentation of State Farm's payment of those expenses; it states,

> Mr. Adams,
>
> Blue Cross/Blue Shield is sending sub documentation on Gary Carnes to me. As we discussed, State Farm does not want your representation of our subrogation interest.

Adams testified that he did not "recall receiving it specifically," but did not deny receiving the note. Finally, the record contains two other letters from State Farm. One is dated September 16, 1994, and it states, "State Farm does not want you to represent us in our subrogation interest on this claim for property damage and medical payments coverage." The second, dated October 5, 1994, states, "we do not wish for you to present State Farm's subrogation interest in this matter." The settlement was reached a few days after October 5, 1994.

This court was recently presented with this issue in the case of ***Teegardin v. Austin,*** No. 03A01-9509-CV-00321 (Tenn. App. filed at Knoxville, Feb. 29, 1996, Susano, J.). We apply the same analysis and rely on the same authorities in the instant case, and so quote at length from ***Teegardin***:

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 insurers' 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.

Id. at p. 8-11.

In the case at bar, we again find the Supreme Court's holding in ***Travelers Ins. Co.*** controlling, and the ***Tennessee Farmers Mut. Ins. Co.*** and ***Boston, Bates & Holt*** cases factually distinguishable. Therefore, we find that the numerous letters quoted above were sufficiently definite and unambiguous to put the law firm on clear notice that protection of State Farm's subrogation rights by the law firm was neither necessary nor desired. Therefore, to the extent that the law firm can be described as performing any services for State Farm, it did so as a volunteer and is not entitled to an attorney's fee.

For the aforementioned reasons, the judgment of the trial court is affirmed in its entirety. This case is remanded to the trial court for collection of costs assessed there pursuant to applicable law. Costs on appeal are taxed and assessed to the appellants and their surety.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.