STATE OF MICHIGAN

COURT OF APPEALS

ALDEN K. KIRSCHNER and NAOMI F. KIRSCHNER,

Plaintiffs-Appellees,

v

PROCESS DESIGN ASSOCIATES, INC.,

Defendant,

and

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,

Garnishee-Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 182861 and 183858
LC No. 88-08420

Before: Gribbs, P.J., and Saad and J.P. Adair,* JJ.

PER CURIAM.

I

FACTS

Garnishee-defendant General Accident Insurance Company of America ("GAI") appeals from a judgment entering summary disposition against it and in favor of plaintiffs. We reverse.

After Alden Kirschner[1] was injured in a chemical accident at work, he brought a products liability action (raising eleven theories of liability) against several parties, including defendant Process Design Associates, Inc. Process Design had allegedly designed, manufactured and installed the equipment that caused the injury, and GAI insured Process Design.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiffs proceeded to trial against Process Design only, and GAI defended the action under a reservation of rights because some of plaintiffs' allegations (negligent design) were excluded from coverage under the applicable policy. GAI sent, and Process Design admits receiving, three letters setting forth the details of the reservation of rights; it is undisputed that *Process Design* understood that GAI would not indemnify Process Design if the jury reached a verdict based upon negligent design or engineering.

On June 7, 1989, Process Design received interrogatories from plaintiffs; asking in relevant part if "there [was] any policy of insurance covering the Defendant [Process Design] on the date of this incident?" Process Design responded with the following answer: "General Accident Insurance Company, P.O. Box 16666, Columbus, Ohio, $1,000,000.00 coverage." There were no follow-up questions or later discovery about exclusions.

On June 23, 1989, GAI sent the following letter to *plaintiffs*' trial counsel:

> As I have indicated to you we have just begun the investigation into this matter and are attempting same under a reservation. Once we have resolved all coverage and liability issues I will advise accordingly. Should you have any questions, please feel free to contact me at the above captioned number.

Plaintiffs ultimately received a jury verdict which was based solely upon a negligent design theory for which coverage was excluded under the policy. Plaintiffs then brought a garnishment action against GAI to satisfy the judgment. The trial court found that the policy exclusion was applicable, and that GAI had adequately reserved its rights *as against Process Design*. However, the trial court concluded that GAI did not properly notify plaintiffs or the court of the exclusions, and, therefore, GAI was estopped from asserting the exclusions during the garnishment proceedings *against plaintiffs*. Hence, the trial court granted summary disposition in favor of plaintiffs. We reverse.

II

ANALYSIS

GAI argues that the lower court erred as a matter of law in ruling that Process Design's answer to the interrogatory was a basis to estop GAI from enforcing the policy exclusions against plaintiffs. We agree.

The general rule is that "[n]o attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not the insurer." *Michigan Millers v Bronson Plating,* 197 Mich App 482, 492; 496 NW2d 373 (1992). Process Design's counsel submitted an affidavit stating that in his representation of Process Design, he concentrated only upon the fact that Process Design did not design the tank in question; although he was aware that the defense was under a reservation of rights, he never concerned himself with the coverage issue.

Plaintiffs assert that, despite the general rule that an attorney owes his duty to his client, Process Design's counsel was taking orders from GAI when he aided Process Design in answering the interrogatories. However, plaintiffs offer no facts to support this contention. We do not agree with plaintiffs that "it is rather apparent" that Process Design and its counsel were taking their cue from GAI when they answered the interrogatory. Because plaintiffs fail to support their conjecture, as required by MCR 2.116(G)(3), the trial court erred in granted summary disposition in favor of plaintiffs.

Had there been evidence that GAI was responsible for the interrogatories the trial court still erred because the answers were neither false nor misleading. Many of the eleven allegations in the complaint were not based upon negligent design or engineering, and, therefore, Process Design did have coverage for "the type of claim" involved in the matter. Process Design's answer to the general question was fair and honest.

GAI also contends that, where Process Design was fully aware of the reservation of rights, the trial court erred as a matter of law: (1) in concluding that GAI had to notify plaintiffs of coverage limitations, and (2) in ruling that the lack of notice to plaintiffs prejudiced plaintiffs such that GAI should be estopped from asserting its policy exclusions. The fundamental question to be addressed is whether a defendant's liability insurer has a duty to notify a plaintiff about a potential lack of coverage. Under Michigan law, there is no such duty.

Our courts have consistently held that the insurer must notify its insured, but not the plaintiff, of a reservation of rights. See, e.g. *Meirthew v Last,* 376 Mich 33, 39; 135 NW2d 353 (1965)..

Smit v State Farm Ins Co, 207 Mich App 674, 525 NW2d 528 (1994), also demonstrates the error of plaintiff's position and the trial court's ruling here. In *Smit,* the plaintiff was injured when he was struck by a vehicle owned by one defendant and driven by another defendant. State Farm, the insurer of one defendant, sent a letter to plaintiff's counsel stating that State Farm denied liability based upon two policy provisions. A judgment was entered against the defendant insured by State Farm, and plaintiffs obtained a writ of garnishment directed to State Farm. State Farm sought summary disposition, arguing that the policy did not cover the injuries – however, State Farm relied upon different provisions than it had relied upon in its original letter to plaintiff's counsel. The trial court there found that State Farm was estopped from asserting policy defenses not raised in the original letter:

> Plaintiffs'[the injured and his spouse] right to recover depends on their status as assignees and as garnishors, both of which require a showing that [the insured] would have been entitled to recover against State Farm. In their status as judgment creditors, plaintiffs are entitled to recover against garnishee-defendant, State Farm, only to the extent that the principal defendant [the insured], could recover against State Farm. Similarly, the assignment of [the insured's] rights under the State Farm policy allows plaintiffs to claim the benefit of the waiver and estoppel doctrines, but only to the extent that [the insured] herself would be entitled to do so. Accordingly, the proper focus is whether [the insured] could have established the inequity necessary to outweigh "the

inequity of forcing the insurer to pay for a risk for which it never collected premiums." *Smit*, 207 Mich App at 683. (Emphasis added).

Most importantly for the instant case, in footnote six, the *Smit* court also explained:

> To the extent that . . . *Lee [v Evergreen Regency Corp,* 151 Mich App 281; 390 NW2d 183 (1986)] suggests that prejudice to the plaintiff-garnishor, who is neither the insured nor the insured's assignee, is relevant in determining the plaintiff-garnishor's right to claim waiver or estoppel in his own right and thereby recover in a garnishment proceeding against the principal defendant's insurance company, we disagree. *Smit,* 207 Mich App at 683-684, n 6.

Smit shows here the trial court erred when it estopped GAI from asserting a policy defense against plaintiff in the garnishment proceeding. The trial court found that GAI provided Process Design with adequate notice of its reservation of rights. Under the authority of *Meirthew* and *Smit*, this should have been the end of the trial court's inquiry. However, the trial court proceeded to consider the prejudice *to plaintiffs* when it estopped GAI from denying coverage. This was not a proper focus for the trial court, because plaintiffs had no greater rights than did Process Design.

We reject *Cozzens v Bazzani Bldg Co,* 456 F Supp 192 (E.D. Mich 1978), (a federal district court found that "the carrier owes certain responsibilities not only to the insured but also to the opposing party and to the court." 456 F Supp at 202) because *Cozzens* is in direct conflict with *Smit,* which is binding upon us.

Finally, *plaintiffs* contend that the trial court erred when it determined that the reservation of rights letters to Process Design were sufficient to provide notice of GAI's intent to deny coverage. In light of the content of the three letters sent, and the affidavits of Process Design personnel acknowledging that they knew GAI was defending under a reservation of rights on the negligent design and engineering claims, this argument lacks merit.

In summary, the trial court correctly determined that GAI provided adequate notice to Process Design that the defense was under a reservation of rights; but the court erred in estopping GAI from denying coverage under the policy. Because the court found that the policy exclusion was applicable, and because the court erred by estopping GAI from asserting this exclusion, summary disposition should not have been granted in favor of plaintiffs, but rather should have been granted in favor of GAI.

Reversed and remanded for entry of summary disposition in favor of GAI.

/s/ Henry William Saad
/s/ James P. Adair

[1] Naomi's claim is derivative of Alden's claim.