No. 31317 - Rose v. St. Paul Fire and Marine Insurance Company

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OF WEST VIRGINIA

Davis, J., concurring:

In this case the majority opinion has concluded that a defense attorney cannot be held liable under the Unfair Trade Practices Act for improper litigation conduct while defending an insured. The majority opinion has also concluded that an insurer maybe held vicariously liable, under the Act, for improper conduct by defense counsel, if the insurer has knowledge of the improper conduct and encourages, directs, participates in, relies upon or ratifies such conduct. I embrace both holdings by the majority opinion and therefore concur in the disposition of this case. I have chosen to write separately to more fully address the issue of vicarious liability of an insurer for improper conduct by defense counsel in defending an insured.

Split of Authority

Courts around the country are split on the issue of holding an insurer vicariously liable for litigation misconduct by an insurer's attorney who is hired to defend an insured. The positions taken by jurisdictions addressing the issue are set out below.

A. Insurer Not Vicariously Liable.

A *minority* of courts have held that an insurer may not be held vicariously liable for the litigation negligence or misconduct of defense counsel. *See Merritt v. Reserve Ins. Co*., 34 Cal. App. 3d 858, 880-882 (1973); *Marlin v. State Farm Mut. Auto. Ins. Co.*, 761 So. 2d 380, 381 (Fla. Dist. Ct. App. 2000); *Gibson v. Casto*, 504 S.E.2d 705, 708 (Ga. Ct. App. 1998); *Brocato v. Prairie State Farmers Ins. Ass'n*, 520 N.E.2d 1200, 1203 (Ill. App. Ct. 1998); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 541 (Mass. 2003); *Feliberty v. Damon*, 531 N.Y.S.2d 778, 782 (1988); *Brown v. Lumbermens Mut. Cas. Co.*, 369 S.E.2d 367, 371 (N.C. Ct. App. 1988); *Mentor Chiropractic Ctr., Inc. v. State Farm Fire & Cas. Co.*, 744 N.E.2d 207, 211 (Ohio Ct. App. 2000); *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 628-29 (Tex. 1998); *Evans v. Steinberg*, 699 P.2d 797, 798-799 (Wash. Ct. App. 1985). *See also Mirville v. Allstate Indem. Co.*, 87 F. Supp. 2d 1184, 1191 (D. Kan. 2000); *Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, 963 F. Supp. 452, 454-455 (M.D.Pa. 1997). The leading case is *Merritt v. Reserve Ins. Co*., 34 Cal. App. 3d 858 (1973).

In *Merritt* the plaintiff filed an action against the defendant as a result of injuries he received in an automobile accident with the defendant. The defendant's insurer retained counsel to represent the defendant. The case went to trial and the jury returned a verdict against the insured for four times the applicable policy limit. The insured subsequently assigned to the plaintiff his claim against the insurer for failure to settle within the policy limits.

As a result of the assignment, the plaintiff instituted a bad faith claim against the insurer. One of the theories alleged in the bad faith complaint was a claim for negligent conduct in defending the underlying case against the insured. This claim asserted that defense counsel was negligent in investigating the case, preparing for trial, and in conducting the trial. On a motion by the insurer, the trial court dismissed the claim that imputed liability on the insurer for conduct by defense counsel in the underlying action. The bad faith claim went to trial. The jury returned a verdict for the plaintiff. The insurer appealed the verdict. The plaintiff filed a cross-assignment of error on the trial court's dismissal of his vicarious liability claim against the insurer.

As to the defendant's appeal, the appellate court reversed the judgment against the defendant and remanded the case for the trial court to enter a judgment in favor of the insurer. In addressing the plaintiff's cross-assignment of error, on the issue of holding the insurer vicariously liable for defense counsel misconduct, the opinion rejected such a cause of action as follows:

> The second charge in [the complaint] is negligent handling and conduct of the defense in the [underlying] case. . . . The charge, however, was directed against [the insurer] and not against the independent trial counsel who conducted and handled the defense of the lawsuit. Plaintiff's theory on this aspect of the case is that trial counsel acted as agents for their employer, [the insurer], and the employer may be held liable for the negligent conduct of its agents in defending the lawsuit.
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> We do not accept the claim that vicarious liability falls on one who retains independent trial counsel to conduct litigation

> on behalf of a third party when retained counsel have conducted the litigation negligently. In our view independent counsel retained to conduct litigation in the courts act in the capacity of independent contractors, responsible for the results of their conduct and not subject to the control and direction of their employer over the details and manner of their performance. By its very nature the duty assumed by [the insurer] to defend its [insured] against suits must necessarily be classified as a delegable duty, understood by all parties as such, for [the insurer] had no authority to perform that duty itself and, in fact, was prohibited from appearing in the California courts. Since [an insurer] is not authorized to practice law it must rely on independent counsel for the conduct of the litigation. We reject the suggestion that the [insurer] assumed by contract a nondelegable duty to present an adequate defense. . . .
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> . . . Having chosen competent independent counsel to represent the insured in litigation, the [insurer] may rely upon trial counsel to conduct the litigation, and the carrier does not become liable for trial counsel's legal malpractice. If trial counsel negligently conducts the litigation, the remedy for this negligence is found in an action against counsel for malpractice and not in a suit against counsel's employer to impose vicarious liability.
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> . . . The conduct of the actual litigation, including the amount and extent of discovery, the interrogation, evaluation, and selection of witnesses, the employment of experts, and the presentation of the defense in court, remains the responsibility of trial counsel, and this is true both on plaintiff's side and on defendant's side of the case.
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> In our view the trial court correctly concluded that the negligence count . . . did not set forth any breach of duty by [the insurer] of the obligations with which it was chargeable. . . .

Merritt, 34 Cal. App.3d at 880-882 (internal citations omitted).

B. Insurer May Be Vicariously Liable.

A *majority* of courts have held that an insurer can be held liable for the misconduct of defense counsel during the defense of an insured. *See Continental Ins. Co. v. Bayless and Roberts, Inc*., 608 P.2d 281 (Alaska 1980); *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 1300 (Ariz. Ct. App. 1993); *Delmonte v. State Farm Fire and Cas. Co.*, 975 P.2d 1159 (Haw. 1999); *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571 (Ind. Ct. App. 1985); *Anderson v Southern Surety Co.*, 191 P. 583 (Kan. 1920); *Safeco Ins Co v Ellinghouse*, 725 P.2d 225 (Mont. 1986); *Stumpf v. Continental Cas. Co.*, 794 P.2d 1228 (Or. Ct. App 1990); *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472 (Wis. 1997). *See also Boyd Bros. Transp. Co. v Fireman's Fund Ins. Cos*., 729 F.2d 1407 (11th Cir. 1984); *National Farmers Union Property & Cas. Co. v. O'Daniel*, 329 F.2d 60 (9th Cir. 1964); *Smoot v. State Farm Mutual Auto. Ins.* Co., 299 F.2d 525 (5th Cir. 1962); *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 F. 573 (1st Cir. 1917); *Pacific Employers Ins. Co. v PB Hoidale Co*., 789 F. Supp. 1117 (D. Kan. 1992); *Hodges v State Farm Mut Auto Ins. Co.*, 488 F. Supp. 1057 (D.S.C. 1980). However, these jurisdictions are not uniform as to the requisite showing that must be made to hold an insurer vicariously liable. That is, most of the jurisdictions do not require that the insurer have actual knowledge of the misconduct of defense counsel. In those jurisdictions, actual knowledge is imputed. A few jurisdictions do not impute knowledge to the insurer. These jurisdictions require establishing that the insurer had knowledge of the misconduct.

1. Imputed knowledge jurisdictions. A majority of courts recognizing a cause of action against an insurer for defense counsel's misconduct, *do not* require actual knowledge of the misconduct by the insurer. *See Continental Ins. Co. v. Bayless and Roberts, Inc*., 608 P.2d 281, 294 (Alaska 1980); *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 1300, 1303-1304 (Ariz. Ct. App. 1993); *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571, 573-574 (Ind. Ct. App. 1985); *Anderson v Southern Surety Co.*, 191 P. 583, 584 (Kan. 1920); *Safeco Ins Co v Ellinghouse*, 725 P.2d 217, 225 (Mont. 1986); *Stumpf v. Continental Cas. Co.*, 794 P.2d 1228, 1232 (Or. Ct. App 1990); *Majorowicz v. Allied Mut. Ins. Co.*, 569 N.W.2d 472, 477 (Wis. 1997). *See also Boyd Bros. Transp. Co. v Fireman's Fund Ins. Cos*., 729 F.2d 1407, 1410-11 (11th Cir. 1984); *National Farmers Union Property & Cas. Co. v. O'Daniel*, 329 F.2d 60, 65 (9th Cir. 1964); *Smoot v. State Farm Mutual Auto. Ins*. Co., 299 F.2d 525, 530 (5th Cir. 1962); *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 240 F. 573, 581 (1st Cir. 1917); *Pacific Employers Ins. Co. v PB Hoidale Co*, 789 F. Supp. 1117, 1122-23 (D. Kan. 1992); *Hodges v State Farm Mut Auto Ins Co*, 488 F. Supp. 1057, 1065 (D.S.C. 1980). Although the decision in *United Farm Bureau Mut. Ins. Co. v. Groen*, 486 N.E.2d 571 (Ind. Ct. App. 1985) involved conduct of an attorney retained by an insurer to represent a plaintiff, this case best illustrates the position of the imputed knowledge jurisdictions.

In *United Farm Bureau* the insurer provided automobile insurance coverage for its insured. After the insured was in an accident with a third-party, the insurer retained

an attorney to represent the insured to collect on a claim arising from the accident. The attorney filed an action in the name of the insured against the tortfeasor. A default judgment was entered against the tortfeasor, though he was apparently never served with a copy of the complaint. The attorney forwarded a copy of the default judgment to the Bureau of Motor Vehicles, which, in turn, suspended the tortfeasor's driver's license. The tortfeasor was subsequently arrested for driving on a suspended license.

After his arrest, the tortfeasor challenged the default judgment and it was set aside.[1] The tortfeasor then filed an action against the insurer for the negligent conduct of the attorney in not properly serving the complaint on him before seeking a default judgment.[2] The insurer moved for summary judgment on the grounds that it could not be vicariously liable for the actions of the attorney, who was an independent contractor representing the insured. The trial court denied the motion. The insurer filed an interlocutory appeal. The appellate court affirmed the trial court's decision and reasoned as follows:

> An attorney representing a client is not a party to the litigation, he acts on behalf of and in the name of the client. The attorney is the agent of the party employing him, and in court stands in his stead. The attorney has by virtue of the retainer or employment alone, the general implied authority to do on behalf of the client all acts in or out of court necessary or incidental to the prosecution or management of the suit or defense or the accomplishment of the purpose for which he was retained.

[1]The criminal charges were subsequently dismissed as well.

[2]The original plaintiff in the underlying case and the attorney were also named as defendants.

> Indiana courts have held that in the absence of fraud by the attorney the client is bound by the action of his attorney even though the attorney is guilty of gross negligence. The negligence of an attorney is the negligence of his client.
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> . . . Because of the close identity of an attorney with the client he represents, we hold that neither the absence of a master-servant relationship nor the characterization of the attorney as an independent contractor is a bar to liability of the [insurer] for the torts of the attorney acting within the scope of his authority.

United Farm Bureau Mut. Ins. Co., 486 N.E.2d at 573-574 (internal citations omitted).

2. Jurisdictions requiring insurer have actual knowledge. A minority of courts that permit a cause of action against an insurer for defense counsel's misconduct require actual knowledge of the misconduct by the insurer. *See Delmonte v. State Farm Fire and Cas. Co.*, 975 P.2d 1159, 1175 (Haw. 1999); *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 393-396 (Tenn. 2002). The decision in *Givens* fully addressed the issue of the requirement of actual knowledge.

In *Givens*, the plaintiff sued the defendant for injuries received in an automobile accident. The defendant's insurer provided counsel for him. After a period of discovery in the case, the insurer fired defense counsel and retained another attorney to represent the defendant. When new defense counsel entered the case it initiated another round of discovery. This new discovery by defense counsel included 237 interrogatories and subparts, that sought much of the information the defense already possessed. As a result of

this discovery misconduct by defense counsel, the plaintiff filed a separate action against the insurer for the oppressive discovery conduct of defense counsel.[3]

The insurer filed a motion to dismiss the second complaint on the grounds that it could not be held vicariously liable for the actions of defense counsel. The trial court denied the motion to dismiss. The insurer thereafter filed an interlocutory appeal to the court of appeals. The court of appeals affirmed the trial court's ruling on vicarious liability. The insurer filed an appeal with the state supreme court. The high court affirmed the ruling on vicarious liability using the following reasoning:

> In the typical situation in which an insurer hires an attorney to defend an insured, the relationship of the insurer and its attorney is precisely that of principal to independent contractor. For example, the attorney is engaged in the distinct occupation of practicing law, and this occupation is one in which the attorney possesses special skill and expertise. Moreover, the attorney generally supplies his or her place of work and tools; the attorney is employed and paid only for the cases of individual insureds; and he or she alone, consistent with ethical obligations to ensure competence and diligence in the representation, determines the time to be devoted to each case. Finally, and obviously, the practice of law is not, nor could it be, part of the regular business of an insurer.
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> Moreover, an insurer in Tennessee clearly possesses no right to control the methods or means chosen by an attorney to defend the insured. As we stated in *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn.1995), the insurer "cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion

[3]The new action was also filed against the insured. This issue is not relevant to our discussion. Additionally, the plaintiff alleged other theories of liability that are not relevant.

with regard to the representation [of the insured]." In addition, we also affirmed without reservation that "[a]ny policy, arrangement or device which effectively limits, by design or operation, the attorney's professional judgment on behalf of or loyalty to the client is prohibited by the Code, and, undoubtedly, would not be consistent with public policy." *Youngblood*, 895 S.W.2d at 328. Therefore, because the insurer lacks this important right of control, an attorney hired by an insurer to defend an insured must be considered, at least initially, to enjoy the status of an independent contractor.

However, while the rule is that a principal is not generally liable for the tortious actions of an independent contractor, this rule is subject to many exceptions, and our finding that an attorney in this context should generally be regarded as an independent contractor does not, ipso facto, relieve the insurer of all liability from the attorney's acts or omissions. Chief among the some twenty-four exceptions to this general rule listed in the Restatement (Second) of Torts is that contained in section 410, which provides that when an independent contractor acts pursuant to the orders or directions of the employer, then the employer "is subject to the same liability . . . as though the act or omission were that of the employer himself.". . .

. . . .

Consequently, although an insurer clearly lacks the right to control an attorney retained to defend an insured, we simply cannot ignore the practical reality that the insurer may seek to exercise actual control over its retained attorneys in this context. While this practical reality raises significant potential for conflicts of interest, it does not become invidious until the attempted control seeks, either directly or indirectly, to affect the attorney's independent professional judgment, to interfere with the attorney's unqualified duty of loyalty to the insured, or to present "a reasonable possibility of advancing an interest that would differ from that of the insured." To be clear, our recognition of the control exercised by insurers in this context does not condone this practice, especially when it works to favor the interests of the insurer over that of the insured; rather, we

> acknowledge this aspect of the relationship only because it would be imprudent for this Court to hold that attorneys are independent contractors vis-a-vis insurers, but then to ignore the practical realities of that relationship when it causes injury.
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> Accordingly, we hold that an insurer can be held vicariously liable for the acts or omissions of an attorney hired to represent an insured when those acts or omissions were directed, commanded, or knowingly authorized by the insurer. This having been said, we suspect that cases in which an insurer may be held liable under an agency theory will be rare indeed. We do not hold today that an insurer may be held vicariously liable for the acts or omissions of its hired attorney based merely upon the existence of the employment relationship alone. Nor do we hold that an insurer may be held liable for any acts or omissions resulting solely from the exercise of that attorney's independent professional judgment, and in all cases, a plaintiff must show that the attorney's tortious actions were taken partly at the insurer's direction or with its knowing authorization. Nevertheless, when the insurer does undertake to exercise actual control over the actions of the insured's attorney, then it may be held vicariously liable for any harm to a plaintiff proximately caused thereby.

Givens, 75 S.W.3d at 393-396 (internal citations omitted).

C. The Position Adopted by this Court.

I have presented the different ways in which courts address the issue of vicarious liability of an insurer for defense counsel's misconduct, because I believe it is critical that the bench and bar understand the limitations of the majority opinion in this case. The majority opinion does not recognize a cause of action under the Act when an insurer does not have actual knowledge of defense counsel's misconduct. That is, the majority opinion is squarely in line with the position articulated in *Givens*. To be held accountable

under the Act for defense counsel's misconduct during litigation, an insurer must "knowingly" encourage, direct, participate in, rely upon, or ratify litigation misconduct by defense counsel. There is no room in the majority opinion for a cause of action based upon "should have known or could have known" allegations. A plaintiff must show the insurer had actual knowledge of the complained of misconduct.

Based upon the foregoing, I concur in the majority opinion.