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IADC Committee Newsletter

PROFESSIONAL LIABILITY

July 2012

IN THIS DOUBLE ISSUE

First, John T. Lay and Childs Cantey Thrasher provide an overview of the issues surrounding professional liability in legal malpractice claims arising when one lawyer or law firm associates with or refers a case to another lawyer or law firm. The second article, which reviews potential theories of attorney liability to non-clients in the wills, trusts, and estates contexts, was first presented at the IADC Professional Liability Roundtable on May 17, 2012 in Chicago, Illinois.

Featured Articles

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ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Mary G. Pryor
Vice Chair of Newsletters
Cavanagh Law Firm
602-322-4035
mpryor@cavanaghlaw.com

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w: *p: 312.368.1494* *f: 312.368.1854* *e:*

Potential Liability for Attorneys Engaging Co-counsel and Referrals

ABOUT THE AUTHORS

John T. Lay is a shareholder in Gallivan, White & Boyd, P.A.'s Columbia, South Carolina office. With over 20 years of experience managing complex, high-stakes litigation for clients, his practice focuses on business litigation, professional malpractice, insurance bad faith and coverage, financial services litigation, and product liability. Mr. Lay was recently elected to serve on the IADC's Board of Directors, and served as Chair of the IADC's Business Litigation Committee for the past year. He can be reached at jlay@gwblawfirm.com.

Childs Cantey Thrasher is an Association in Gallivan, White & Boyd, P.A.'s Columbia, South Carolina office. Her practice focuses on business and commercial law, environmental law, and litigation including products liability, professional liability and internet law. Prior to joining GWB, she served as an Assistant Attorney General in both the civil and criminal divisions of the South Carolina Attorney General's Office, where she prosecuted criminal matters and represented the State in civil disputes such as the SC vs. NC Catawba River Water suit in the United States Supreme Court. She can be reached at cthrasher@gwblawfirm.com.

Professional liability claims against attorneys using outside counsel are being filed more frequently than ever before. However, there are ways to avoid such actions. The purpose of this article is to provide an overview of the issues surrounding professional liability in legal malpractice claims arising when one lawyer or law firm associates with or refers a case to another lawyer or law firm.

Joint Ventures and Sub-agency

In general, "a firm is not liable for the acts or omissions of a lawyer outside the firm who is working with firm lawyers as co-counsel or in a similar arrangement." Restatement (Third) of the Law Governing Lawyers, § 58, Comment *e*. The outside lawyer is usually an independent agent of the client over whom the firm has no control. He is not an agent or a contractor of the firm.

However, there are primarily two instances when this is not the case: joint venturers and sub-agents.

Whether or not a joint venture is created by a referral is a fact-specific question. Two cases can shed some light on when such a relationship may be found to exist.

In *In Re Fox*, the South Carolina Supreme Court found that "where an attorney retained on a contingent fee to prosecute a claim engages another lawyer to assist in the litigation, upon an agreement to share the fee in case of success . . . [the attorneys] become joint venturers." *In Re Fox,* 490 S.E.2d 265, 271 (S.C. 1997) (citing 46 Am.Jur. 2d Joint Ventures § 54 (1994)). The Court went on to say that "relations among joint venturers are governed by partnership law." *Id.* (citing *Tiger, Inc. v. Fisher Agro, Inc.*, 391 S.E2d 538, 543 (S.C. 1989)). As such, one partner may be held liable for the misconduct of another depending on the specific fact scenario.

In *W.B. Duggins, Jr. v. Guardianship of Washington,* the Supreme Court of Mississippi rejected attorney Duggins' argument that the associated attorney, Barfield, was an independent contractor because Duggins and Barfield divided the responsibilities for preparing the case and split the fees equally. *W.B. Duggins, Jr. v. Guardianship of Washington,* 632 So.2nd 420, 427 (Miss. 1993). Accordingly, "each attorney [had] an equal stake in the outcome of the case and . . . joint control of the case." *Id.* Thus, the Court found that Duggins and Barfield were joint venturers. *Id.* at 429, n. 12.

If Barfield were an independent contractor, he would have been compensated under a fixed fee arrangement rather than a contingency fee arrangement. The Court further reasoned that fraud committed by a partner acting within the scope of his actual or apparent authority could be imputed to the partnership. *Id.* at 430.

The ABA Model Code of Professional Conduct requires that the division of fees between lawyers is proper only if the division of fees is proportionate to the services performed and the responsibility assumed by each lawyer and the total fee is reasonable. ABA Mod. Code of Prof. Cond., Ethical Consideration 2-22.

Additionally, a firm can subject itself to vicarious liability if the representation is structured so that the referred-to firm or outside counsel has no direct relationship with the client. This creates a sub-agency relationship, making the referred-to firm a sub-agent of the law firm that hired it. In that situation, the outside counsel is acting as the firm's sub-agent and, therefore, vicarious liability is transferred to the initial firm or lawyer.

In *Alice Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey,* the New York Appellate Division found that because the client had no contact with outside counsel, Bailey, and completely relied on her own counsel, DeGraff, to satisfy her judgment, DeGraff "assumed the responsibility to [the client] . . . and Bailey became [DeGraff's] sub-agent. Therefore [DeGraff] had a duty to supervise Bailey's actions." *Alice Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey,* 53 A.D.3d 912, 915 (N.Y.A.D. 3 Dept. 2008).

Negligent Referrals

Negligent referrals can create another professional liability cause of action. When lawyers arrange for co-counsel to represent a client, they are serving as their client's agent and, accordingly, owe the client a duty of care in the process. Ronald E. Mallen & Jeffery M. Smith, Legal Malpractice, § 5:9, at 679-81 (2009 ed.).

An agent, here the initial law firm or lawyer, who is authorized to employ other agents, here co-counsel, to handle his client's affairs, is under a duty to select competent and otherwise proper agents. Restatement (Second) of Agency § 405(2). In *Rainey v. Davenport*, the Bankruptcy Court of the Southern District of Texas found that "bringing an incompetent attorney on board" would violate a lawyer's fiduciary duty to his client. *Rainey v. Davenport*, 353 B.R. 150 (Bankr. S.D. Tex. 2006). The lawyer's duty relates to the referral itself, regardless of whether the original attorney cedes responsibility for the matter after making the referral or retains some level of responsibility in cooperation with referred-to co-counsel.

Additionally, collecting a referral fee may cause a problem under local Rules of Professional Conduct.

Practice Tips

How can you protect you or your law firm from being found liable for the actions (or inactions) of another firm with whom you are working on a case? There are ways to protect yourself and your firm. First and foremost, avoid the sub-agency problem by having your client directly engage the other law firm. That is, the agreement should not be between your law firm and local counsel, but between the client and local counsel. Moreover, the engagement letter should be signed by local counsel and the client, and you should verify that such an engagement agreement has been executed. The agreement should include a clear division of labor.

Alternatively, if you are local counsel serving in a litigation support role with national counsel assuming full responsibility for trial strategy, examination of witnesses, etc., it is imperative that your engagement letter reflect with specificity your role and responsibilities as local counsel.

Do not accept a referral fee.

Make sure that referrals are made to competent attorneys. Do not rely on social acquaintances. Use reputable sources to verify competence. There are many sources for such confirmation. The IADC membership list, made up of peer reviewed, vetted members, is a good place to start. Additionally, Martindale-Hubble, Lexis Nexis, Westlaw, or other peer-reviewed sources can help. Do an internet search. Seek recommendations from other members of the jurisdiction in question's bar, as well as other leaders in that particular area of law.

Include a disclaimer in your engagement contract.

Make sure the referral has legal malpractice insurance. Ask. You will be surprised how many attorneys are not keeping up with premiums.

While these cases may be showing up more frequently than in the past, there are ways to protect yourself and your firm. Ultimately, choosing the right attorneys to work with can be the best way to prevent professional liability claims. As the old saying goes, a good offense is the best defense.

Attorney Liability to Non-Clients in the Wills, Estates and Trusts Context

ABOUT THE AUTHORS

Joseph S.D. Christof, II is a shareholder/director in the law office of Dickie, McCamey & Chilcote, P.C. headquartered in Pittsburgh, Pennsylvania. Mr. Christof has been a member of the IADC since 1989 and serves on its Professional Liability Committee. His practice encompasses a wide range of areas in civil litigation, including a significant emphasis in the representation of professionals. He is admitted to the Bars of Pennsylvania, West Virginia and Ohio. He can be reached at jchristof@dmclaw.com.

Douglas C. Crone is a claims specialist in the Lawyers Professional Responsibility area for CNA. Prior to joining CNA, Mr. Crone was in private practice for a number of years as a Director with a Chicago firm. His practice areas were primarily insurance defense, professional liability and commercial litigation. He holds a B.A. from the University of Illinois at Urbana-Champaign and a J.D. from Northwestern University School of Law. He can be reached at douglas.crone@cna.com.

Special thanks also go to Michael J. Joyce, Esquire for his assistance in preparation of this article.

An attorney's liability to his or her client is a fairly well-defined area of law and, unfortunately, often a frequent occurrence in today's legal marketplace. A practitioner's liability to third parties other than clients, however, is much more ambiguous and varies depending on the identity of the third party, the applicable jurisdiction, and the specific facts involved. This article provides an overview of an attorney's potential liability to third party non-clients in various jurisdictions, with a particular emphasis on the wills, trusts, and estates context. The wills, trusts, and estates context is perhaps the best defined area of liability for attorneys to non-clients, and some courts borrow from this area to apply or extend liability to non-clients to other areas of legal services.

A. The General Rule – No Liability to Third Parties

Generally and historically, most jurisdictions required the privity of an attorney-client relationship in order for an injured party to maintain a cause of action for negligence against a lawyer regarding the rendition of legal services. *Guy v. Liederbach*, 459 A.2d 744, 748-49 (Pa. 1983). In other words, "an attorney will be held liable for negligence only to his client. In the absence of special circumstances, he will not be held liable to anyone else." *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984). *See also Young v. Williams*, 645 S.E.2d 624, 625 (Ga. Ct. App. 2007) ("In general, an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice case."); *McIntosh County Bank v. Dorsey & Whitney, LLP*, 726

N.W.2d 108, 114 (Minn. Ct. App. 2007) ("Generally, an attorney is liable only to those with whom he has an attorney-client relationship."); *Fox v. White*, 215 S.W.3d 257, 260 (Mo. Ct. App. 2007) ("The elements necessary to establish a claim of legal malpractice are: (1) an attorney-client relationship . . . ."); *Estate of Albanese v. Lolio*, 923 A.2d 325, 331 (N.J. Super. Ct. App. Div. 2007) (same).

The general, and antiquated, rule barring attorney liability to third parties is based upon the absence of privity between the lawyer and the third party. Essentially, because the lawyer has no contract of employment with the third party, no liability can exist. Strict adherence to the privity requirement, however, has been criticized in some jurisdictions because it potentially leaves injured third parties without a source of compensation for their losses. *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984).

B. The Balancing Test for Third Party Recovery – The California Approach

Abrogation of a strict privity requirement in legal malpractice cases originated in California state courts. The California Supreme Court determined that the question of whether a lawyer may be held liable to a non-client third party is a matter of public policy and requires the balancing of various factors, including:

(1) the extent to which the transaction was intended to affect the plaintiff;

(2) the foreseeability of harm to the plaintiff;

(3) the degree of certainty that the plaintiff suffered injury;

(4) the closeness of the connection between the defendant's conduct and the injury suffered;

(5) the moral blame attached to the defendant's conduct; and

(6) the policy of preventing future harm.

Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958). A similar approach was advocated by a panel of the Pennsylvania Superior Court in *Guy v. Liederbach*, 421 A.2d 333 (Pa. Super. Ct. 1980). However, on allocatur, the Pennsylvania Supreme Court expressly rejected a balancing test, and continued to adhere to the strict privity rule. *Guy v. Liederbach,* 459 A.2d 744 (Pa. 1983).

A balancing of factors test has been used, in varying degrees, in other jurisdictions as well. *See, e.g.*, *Fickett v. Super. Ct.*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) ("We are of the opinion that the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors."); *Licata v. Spector*, 225 A.2d 28, 31 (Conn. Super. Ct. 1966) (balancing of factors "must be applied in determining whether a beneficiary is entitled to bring an action against an attorney for negligence in drafting a will"); *McAbee v. Edwards*, 340 So. 2d 1167, 1168 (Fla. Dist. Ct. App.

1976) (accepting the *Biakanja* factors); *Stewart v. Sbarro*, 362 A.2d 581, 588 (N.J. Super. Ct. App. Div. 1976) ("We believe, moreover, that where, as here, an attorney undertakes a duty to one other than his client, he may be liable for damage caused by a breach of that duty to a person intended to be benefited by his performance."); *Schwartz v. Greenfield, Stein & Weisinger*, 396 N.Y.S.2d 582, 584 (N.Y. Sup. Ct. 1977) (applying the *Biakanja* factors); *Jenkins v. Wheeler*, 316 S.E.2d 354, 356-57 (N.C. Ct. App. 1984) ("North Carolina now recognizes a cause of action in tort by non-client third parties for attorney malpractice" based on a balancing of factors.); *Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983) ("Although the lack of privity does not bar this action, there remains the question of whether liability should be imposed in this specific case. Normally, such a factual determination would be one for the trial court to make.").

C. Attorneys Remain Liable for Intentional Torts to Third Parties

If an attorney's conduct is motivated by malice or otherwise commits an intentional tort, the attorney may still be personally liable for losses suffered by a third party. *Smith v. Griffiths*, 476 A.2d 22, 26-27 (Pa. Super. Ct. 1984). *See also Adelman v. Rosenbaum*, 3 A.2d 15, 18 (Pa. Super. Ct. 1938) ("[M]alicious action is not sheltered by any privilege. An attorney is personally liable to a third party when he is guilty of fraud, collusion, or a malicious or tortious act, and he is liable, as anyone else, when he encourages and induces another to commit a trespass."). Therefore, irrespective of a lack of privity or balancing of factors, an attorney is generally liable for his intentional wrongs.

D. Attorneys are Liable to Third Parties for Negligently Drafting Wills

In Pennsylvania, pursuant to the rule of privity, a claim against an attorney for either legal malpractice or breach of an attorney-client agreement must be asserted by the attorney's actual client and not by third parties outside of such relationship. The only exception to this rule is for a "narrow class of third party beneficiaries," specifically, for named legatees of a will, whose legacies have failed as a result of attorney malpractice. *Krauss v. Claar*, 879 A.2d 302, 308 (Pa. Super. Ct. 2005). *See also Guy v. Liederbach*, 459 A.2d 744, 752 (Pa. 1983) (permitting recovery of a disappointed legatee on a third party beneficiary theory).

The lone exception in Pennsylvania, which is accepted in other jurisdictions as well, is generally premised on a third party beneficiary theory. Under the Restatement (Second) of Contracts, as adopted in Pennsylvania and other jurisdictions, there is a two part test to determine whether an intended beneficiary may sue on a third party beneficiary theory: (1) the recognition of the beneficiary's right must be "appropriate to effectuate the intention of the parties," and (2) the performance must "satisfy an obligation of the promisee to pay money to the beneficiary" or "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Guy*, 459 A.2d at 751-52 (citing and quoting RESTATEMENT (SECOND) OF CONTRACTS § 302). As the Pennsylvania Supreme Court explained:

> The underlying contract is that between the testator and the attorney for the drafting of a will. The will, providing for one or more named beneficiaries, clearly manifests the intent of the testator to benefit the

> legatee . . . Since only named beneficiaries can bring suit, they meet the first step standing requirement of § 302. Being named beneficiaries of the will, the legatees are intended, rather than incidental, beneficiaries . . . In the case of a testator-attorney contract, the attorney is the promisor, promising to draft a will which carries out the testator's intention to benefit the legatees. The testator is the promisee, who intends that the named beneficiaries have the benefit of the attorney's promised performance. The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will.

Guy, 459 A.2d at 751-52. The Pennsylvania exception to the general requirement of privity ensures recovery for "those legatees who would otherwise have no means by which to obtain their expectancies under the testamentary instruments naming them." *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 807 (Pa. Super. Ct. 2007). The exception is truly out of necessity to permit the injured party to be made whole.

Other courts have disregarded the third party beneficiary analysis and concluded "that the requirement of privity does not extend to a malpractice suit brought by the intended beneficiary of a will against the attorneys who drafted it." In fact, the District of Columbia Court of Appeals has stated that it "need not dwell upon a third party beneficiary analysis for, in any event, the gravamen of the cause of action is negligence." *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983). *See also Ogle v. Fuiten*, 466 N.E.2d 224, 226 (Ill. 1984) (holding that the traditional elements of negligence in tort were sufficiently stated by the allegations of the complaint, in a case involving disappointed potential beneficiaries under a will).

E. Other Examples of Attorneys Liable (or not Liable) to Third Parties

There are numerous other unique and interesting third party liability cases involving attorneys around the United States, which often involve the estates or trusts context.

- Divorce - Although third party liability may be found to exist where the attorney is responsible for damage caused by the attorney's negligence to a person intended to be benefited by the attorney's performance irrespective of any lack of privity, an opposing party in a divorce proceeding is not an intended beneficiary. *Baker v. Coombs*, 219 S.W. 3d 204, 208-09 (Ky. Ct. App. 2007).

- Trusts - An attorney for a trustee will be liable for breach of a fiduciary duty to third-party beneficiaries of the trust if the attorney places his or her self-interest above that of the trustee. *Chinello v. Nixon, Hargrave, Devans & Doyle, LLP*, 788 N.Y.S.2d 750, 751 (N.Y. App. Div. 2005); *Weingarten v. Warren*, 753 F. Supp. 491, 495 (S.D. N.Y. 1990).

- Estates - "Other courts have suggested that a testator's estate or a personal representative of the estate might stand in the shoes of the testator in an action for legal malpractice in order to meet the strict privity requirement . . . This may well be

a solution to the problem, but it is a question for another day . . . While recognizing that public-policy reasons exist on both sides of the issue, we conclude that the bright-line rule of privity remains beneficial. The rule provides for certainty in estate planning and preserves an attorney's loyalty to the client." *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1171-72 (Ohio 2008).

- Intentional Tort - "Unlike a claim for negligence, an attorney can be held liable for fraudulent misrepresentation" to a third party. *Buscher v. Boning*, 159 P.3d 814, 832 n.13 (Haw. 2007).

- Heirs - Massachusetts has considered whether an attorney owes a duty to a potential heir during the drafting of a will. The court concluded that "the financial interest of one who would only take by intestate succession would not be served in those cases where the attorney decides that the client is competent and free from undue influence, and a will is prepared. If we were to hold that, in the circumstances of this case as alleged in the complaint, the defendant attorney owed a duty of care both to [testator] and [heir], we would be imposing conflicting duties on attorneys. This we shall not do." *Logotheti v. Gordon*, 607 N.E.2d 1015, 1018 (Mass. 1993).

- Trusts - Beneficiaries of an *inter vivos* trusts stated a cause of action against the drafting attorney due to adverse tax consequences of the attorney's drafting. *Bucquet v. Livingston*, 57 Cal.App.3d 914 (Cal. App. 1976).

- Trusts - In a guardianship case, a mother hired a lawyer to help institute a guardianship for her child's estate following the death of the child's father. The father had designated the child as the beneficiary of his life insurance policy. The lawyer petitioned the court for a guardianship, but the resulting guardianship order neither required a bond for the guardian, nor blocked the account from access in lieu of the bond. The mother depleted the funds of the account. The court concluded that the child had standing to bring an action against the attorney for malpractice based on a balancing of factors analysis. *In re Guardianship of Karan*, 38 P.3d 396, 397 (Wash. Ct. App. 2002).

- Wills - An attorney who negligently failed to procure the proper number of witnesses for his client's signing of her will, resulting in the will being denied probate, was held liable to the intended beneficiaries under the will, who had thus been deprived of a portion of their intended legacy. The court stated that the attorney owed a duty to use due care to those foreseeably injured by the negligent performance or nonperformance of the contract, without regard to any question of reliance on the contract. *Licata v. Spector*, 225 A.2d 28 (Conn. Super. Ct. 1966).

- Wills - An attorney employed to draft a will so as to pass his client's entire estate to her two daughters was held liable to the daughters, under a negligence theory, when the client's husband, whom she had married a few days after executing the will and whom the attorney had known she was about to marry, claimed a portion of the estate as a post-testamentary spouse. *Heyer v Flaig*, 449 P.2d 161 (Cal. 1969).

- Wills - Attorney was liable to residuary beneficiaries, under a legal malpractice theory, when the attorney accidentally left out a residuary clause when drafting a will even though there was no privity of contract between attorney and the residuary legatees. The court reasoned that the attorney assumed a legal relationship not only with client, but also with the client's intended beneficiaries when he undertook to fulfill the testamentary instructions of his client. *Arnold v. Carmichael*, 524 So.2d 464 (Fla. Ct. App. 1988).

- Estates - Decedent's son and the corporation established as part of decedent's estate plan had standing to bring legal malpractice claim against law firm after the IRS disregarded the corporate form of the corporation and recharacterized the son's salary from the corporation as a taxable gift to the son. *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 686 N.Y.S.2d 404 (N.Y. Sup. Ct. App. Div. 1999).

- Trusts - Attorney who drafted a will setting up a testamentary trust owed a duty of care to trust beneficiaries, and was liable to them in negligence for their not having received as much as they should have due to attorney's alleged negligence in advising testator about tax consequences. However, attorney was not liable to beneficiaries for other losses allegedly caused by attorney's later negligence in representing estate. *Jewish Hosp. v Boatmen's Nat'l Bank*, 633 N.E.2d 1267 (Ill. App. Ct. 1994).

- Wills / Trusts - In an action against attorney by an intended beneficiary under a will, where attorney failed to include plaintiff either in the will or related trust instrument, plaintiff stated causes of action both as an intended beneficiary of attorney's professional contract with decedent, and as a tort claimant based on breach of duty to the plaintiff created by that contract as its intended beneficiary. *Hale v. Groce*, 744 P.2d 1289 (Or. 1987).

As the above-cited cases exemplify, many courts have agreed that a lawyer is liable for mistakes made during the drafting of wills and trusts that adversely affect the beneficiaries of such instruments. Courts also have been willing to abandon the traditional requirement of privity between an attorney and client, which historically stood as a prerequisite to recovery in such contexts. With some, perhaps "rogue," courts extending attorney liability to third parties outside of the well-settled law in the estates and trust context, practitioners must be cognizant of the growing realms of potential liability from clients and non-clients alike.

PAST COMMITTEE NEWSLETTERS

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Neutral Last updated April 03, 2016 11:02:51 pm GMT
Neutral When saved to folder April 03, 2016 11:02:51 pm GMT

Martinez v. Powell

Court of Appeals of Kansas

September 27, 2002, Opinion Filed

No. 87,888

Reporter
2002 Kan. App. Unpub. LEXIS 810

DAN MARTINEZ, Appellant, v. , and , Appellees, and STATE FARM FIRE & CASUALTY, DON MUSTAIN, and PEGGY SCHMIDT, Appellees.

Notice: NOT DESIGNATED FOR PUBLICATION.

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Subsequent History: Reported at *Martinez v. Powell, 54 P.3d 980, 2002 Kan. App. LEXIS 848 (Kan. Ct. App., 2002)*

Prior History: **[*1]** Appeal from Sedgwick District Court; MARK A. VINING and DOUGLAS R. ROTH, judges.
State ex rel. Stovall v. Martinez, 27 Kan. App. 2d 9, 996 P.2d 371, 2000 Kan. App. LEXIS 20 (2000)
State Farm Fire & Cas. Co. v. Martinez, 26 Kan. App. 2d 869, 995 P.2d 890, 2000 Kan. App. LEXIS 5 (2000)

Disposition: Affirmed.

Core Terms

injunction, district court, unauthorized practice of law, trial court, statute of limitations, services, damages, practices, argues, allegations, unconscionable, consumer, insurer, attorney's, violations, engineering, lawsuit, business insurance, legal malpractice, amend, civil penalty, engaging, rights, cases, client relationship, vicarious liability, consumer fraud, limitations, enjoined, hired

Counsel: Dan Martinez, appellant, Pro se.

Holly A. Dyer and Stephen M. Kerwick, of Foulston & Siefkin L.L.P., of Wichita, for the appellees, State Farm Fire & Casualty, Don Mustain, and Peggy Schmidt.

Kenneth M. Clark, of Powell, Brewer, Gough & Withers L.L.P., of Wichita, for the appellees, Marc Powell and Powell & Brewer, L.L.P.

Judges: Before JOHNSON, P.J., PIERRON, J., and BUCHELE, S.J.

Opinion

MEMORANDUM OPINION

Per Curiam: Dan Martinez, d/b/a/ Insurance Claims Consultants, appeals the dismissal of his lawsuit against Marc Powell for violations of the Kansas Consumer Protection Act (KCPA) and legal malpractice; against State Farm Fire & Casualty (State Farm), Don Mustain, and Peggy Schmidt for negligence; and against State Farm vicarious liability for Powell's representation of Martinez in the Kansas Attorney General's KCPA and unauthorized practice of law action against him. We affirm all decisions made below on these issues.

The early facts of this case are documented in two opinions from our court, *State v. Martinez, 27 Kan. App. 2d 9, 996 P.2d 371 (2000)*, and *State Farm Fire & Cas. Co. v. Martinez, 26 Kan. App. 2d 869, 995 P.2d 890*, **[*2]** *rev. denied* 269 Kan. 934 (2000). Martinez operated a business under the name of Insurance Claims Consultants in Wichita after serving a number of years as an insurance adjuster and claims examiner for State Farm Insurance Company. Martinez purchased a business insurance policy from State Farm. Martinez heavily advertised his services as an alternative to representation by an attorney and represented claimants under a contingency fee contract. In representing a claimant, Martinez compiled a settlement packet, made written demand upon the insurance company, advised the claimant regarding the reasonableness of a settlement, and negotiated with the insurance company. Martinez was not licensed to practice law.

Not surprisingly, in 1997, the Kansas Attorney General filed an action in the district court alleging that Martinez was engaged in the unauthorized practice of law and that his representations to consumers regarding his qualifications violated the KCPA, K.S.A. 50-623 et seq. 27 Kan. App. 2d at 10. State Farm retained legal services for Martinez in connection with the lawsuit against him, reserving the right to assert that it might not be liable to indemnify him under the policy. A [*3] jury convicted Martinez of three violations of the deceptive acts and practices provisions of the KCPA, including a single violation under K.S.A. 50-626(b)(4) that he "disparaged the services of another that [Wichita] attorneys would charge a fee of 25-40% on a workers' compensation award." 26 Kan. App. 2d at 869-70.

The allegations of unconscionable acts and unauthorized practice of law were tried to the district court. The court found 201 violations of the KCPA. The court entered judgment for $115,500 in civil penalties for violations of the KCPA and permanently enjoined Martinez from the unauthorized practice of law and the business practices that gave rise to the penalties. A district court later found no liability on the part of State Farm to indemnify Martinez under the business insurance policy.

In *Martinez*, 27 Kan. App. 2d 9, 996 P.2d 371, Martinez appealed the permanent injunction and civil penalties. The Court of Appeals found there was sufficient evidence to support his conviction for the unauthorized practice of law despite Martinez' argument he performed the same services while employed at State Farm. The court stated Martinez' relationship with individual clients distinguished the service [*4] he offered from the work he did while employed by State Farm. 27 Kan. App. 2d at 11-12.

The *Martinez* court also denied Martinez' other eight claims. 27 Kan. App. 2d at 12-17.

In *State Farm*, 26 Kan. App. 2d 869, Martinez appealed the district court's summary judgment finding of no ambiguity in the business insurance policy and no liability on the part of State Farm to indemnify Martinez. The court found that none of the theories of liability for which Martinez was convicted fell within the indemnity provisions of the business insurance policy. 26 Kan. App. 2d at 871-76. The court also found the trial court did not err in holding that the business insurance policy did not provide coverage for the civil penalties sought by the Attorney General and that it would be contrary to public policy to allow a wrongdoer to insure against civil penalties associated with his or her own actions. 26 Kan. App. 2d at 876-78.

While his appeals in the above two cited cases were pending, Martinez filed a consumer protection action and legal malpractice action against his trial counsel, Marc Powell. Martinez alleged violations of the KCPA for deceptive and/or unconscionable acts and negligent legal representation, [*5] including improper discovery practices, misrepresentations as to discovery and intentional, misleading statements regarding discovery. Judge Bell found that Martinez could not bring his allegations within the context of the KCPA and dismissed them, but allowed the allegations of legal malpractice to proceed. Judge Roth eventually entered judgment dismissing Martinez' remaining claims without prejudice.

On May 21, 2001, Martinez refiled his consumer protection and legal malpractice action against Powell. Additionally, Martinez added defendants State Farm, Don Mustain, and Peggy Schmidt. Concerning Powell, Martinez alleged unconscionable and deceptive acts and practices in violation of the KCPA and negligence in Powell's representation. Against State Farm, Mustain and Schmidt, Martinez alleged their negligence in forcing him to use State Farm's selected trial counsel, allowing Mustain and Schmidt to oversee the proceedings, restricting trial counsel's representation, and misrepresenting that they would zealously offer a defense.

Different judges heard motions to dismiss from Powell and then from the rest of the defendants. Judge Vining granted State Farm's motion to dismiss. The court [*6] found that Martinez' action against State Farm, Mustain, and Schmidt was barred by the statute of limitations. The court also found that Martinez had improperly named Mustain and Schmidt as individual defendants since there was no allegation they acted outside the course and scope of their employment. Last, the court found Powell was an independent contractor and there was no vicarious liability on behalf of State Farm for Powell's alleged failure to zealously defend Martinez. The court stated Martinez' claim for legal malpractice was against Powell, not State Farm.

Judge Roth granted Powell's motion to dismiss. The court found Martinez had failed to allege specific acts that if true would be unconscionable acts and practices under the KCPA. The court also dismissed Martinez' claim for negligence against Powell since Martinez

suffered no damages in being enjoined from engaging in the unauthorized practice of law. However, the court requested additional briefing on Martinez' claim regarding the KCPA as it applied to attorney/client interactions and allegations of misrepresentations in the context of that professional relationship. Upon further briefing, the court dismissed Martinez' **[*7]** remaining claim against Powell. The court found the KCPA did not apply to the facts and allegations made by Martinez in his petition.

Our standard of review when a motion to dismiss has been granted in the district court was restated in *Colombel v. Milan, 24 Kan. App. 2d 728-29, 952 P.2d 941 (1998)*:

> "'Disputed issues of fact cannot be resolved or determined on a motion to dismiss for failure of the petition to state a claim upon which relief can be granted. The question for determination is whether in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.'
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> "'In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what **[*8]** happened, or if these allegations are contradicted by the description itself.'" (quoting *Ripley v. Tolbert, 260 Kan. 491, Syl.¶¶ 1, 2, 921 P.2d 1210 [1996]*).

Martinez first argues the statute of limitations did not commence running until this court affirmed his civil penalties and injunction in *Martinez, 27 Kan. App. 2d 9, 996 P.2d 371*, on February 11, 2000. Consequently, he contends his action filed on May 21, 2001, was within any 2-, 3-, or 5-year statute of limitations. Martinez maintains the business insurance policy, a written contract, he obtained from State Farm requires application of a 5-year statute of limitations for his lawsuit pursuant to K.S.A. 60-511.

The interpretation and application of a statute of limitations is a question of law for which the court's review is unlimited. *Brown v. State, 261 Kan. 6, 8, 927 P.2d 938 (1996)*.

Martinez raises several negligence claims against State Farm in the form of negligence in its handling of his case or its vicarious liability for the alleged negligence of Powell. These negligence claims are subject to a 2-year statute of limitations under K.S.A. 60-513(a)(4) as actions "for injury to the rights of another, not arising on contract, and not herein **[*9]** enumerated." See *Henrichs v. Peoples Bank, 26 Kan. App. 2d 582, Syl. ¶ 3, 992 P.2d 1241*, *rev. denied* 267 Kan. 888, 1999 Kan. LEXIS 378 (1999) (2-year statute of limitations applicable to negligence claim against bank).

Although Martinez raised a general claim that State Farm violated the KCPA, he did not argue any specific facts to support this argument. In any event, a claim for a violation of the KCPA would carry a 3-year statute of limitations pursuant to K.S.A. 60-512(2) as an action "upon a liability created by a statute other than a penalty or forfeiture." See *Beltz v. Dings, 27 Kan. App. 2d 507, Syl. ¶ 4, 6 P.3d 424 (2000)* (3-year statute of limitations applies to actions filed under the KCPA where damages and civil penalties are requested).

As the district court pointed out below, Martinez does not cite to a specific provision of the business insurance contract for his lawsuit. Rather, he raises a claim that State Farm had a good faith duty to hire a competent attorney, not one with "questionable morals and character." The duty that Powell allegedly breached was a duty of reasonable care imposed by law. The contract only gave rise to the duty. The claim that Powell breached an implied term of the **[*10]** business insurance contract, to render competent and diligent legal services, is only a claim that he failed to exercise due care. As an action based on warranty or other contractual provisions implied by law, Martinez' claims are subject to a 3-year statute of limitations as set forth in K.S.A. 60-512(1). See *Zenda Grain & Supply Co. v. Farmland Industries, Inc., 20 Kan. App. 2d 728, 740-45, 894 P.2d 881 (1995)* (3-year statute of limitations applies to statutorily implied warranties, not express provisions of the written agreement).

With the proper determination of the period of limitations, we next address Martinez' challenge to the date chosen by the district court to commence running the period of limitations. Generally, a statute of limitations does not begin to run until the underlying litigation is finally determined. *Pizel v. Zuspann, 247 Kan. 54, 77, 795*

P.2d 42 (1990). Martinez argues his case was not finally determined until we issued our opinion in *Martinez*. We disagree. The statute of limitations commenced running on January 23, 1998, the day the trial court entered judgment against Martinez for civil penalties and imposed an injunction.

The court in Pancake House, Inc. v. Redmond, 239 Kan. 83, 716 P.2d 575 (1986), **[*11]** discussed several theories for the determination of when the cause of action in a legal malpractice action shall be deemed to have accrued. The court stated the facts and circumstances of each case dictate which of four rules to apply: (1) the occurrence rule; (2) the damage rule; (3) the discovery rule; and (4) the continuous representation rule. 239 Kan. at 87. Application of the first three of these rules commences the statute of limitations upon the journal entry of January 23, 1998, at the very latest. There is no doubt Martinez knew of the alleged negligence during the trial, and his damages were concretely set forth in the journal entry of January 23, 1998. We hold the continuous representation rule does not provide any help in extending the statute of limitations either since Martinez was already alleging improper handling of his case by Powell and State Farm in September 1997 when he filed his counterclaim in State Farm's coverage lawsuit. See Gansert v. Corder, 26 Kan. App. 2d 151, Syl. ¶¶ 2, 3, 980 P.2d 1032 (1999) (The purpose of the continuous representation rule is to avoid unnecessarily disrupting the attorney-client relationship. A client's cause of action can accrue **[*12]** upon the de facto termination of the attorney-client relationship rather than upon the attorney's subsequent withdrawal of record.).

Using the date of the journal entry, January 23, 1998, as the starting date, Martinez' negligence claims expired 2 years later on January 23, 2000. His KCPA and breach of duty of good faith claims expired 3 years later on January 23, 2001. Having filed his petition on May 21, 2001, the district court did not err in finding the statute of limitations on Martinez' claims against State Farm, Mustain, and Schmidt had expired.

Martinez argues that when the district court dismissed his counterclaim against State Farm in the declaratory judgment action in November 1997 as being premature and not a final judgment, it served as a stay of the proceedings against State Farm until we issued our opinion in February 2000 in the underlying Attorney General's action. The journal entry of dismissal of Martinez' counterclaim, dated November 5, 1997, stated in relevant part that the Attorney General's action against Martinez:

> "[H]as not, as yet, resulted in a final 'judgment' in that although a trial was conducted in the matter the week of September 22, 1997, with certain **[*13]** findings rendered by the jury empaneled in the case, certain matters taken under advisement by the presiding trial judge, Judge Anderson, which are deemed to be questions for the trial judge to adjudicate, have not been ruled upon and obviously, no appeal (as may reasonably be anticipated) has as yet been undertaken or ruled upon."

When the district court dismissed Martinez' counterclaim against State Farm, the factual issues had been resolved by the jury at the trial in finding Martinez guilty. However, the legal question of Martinez' civil penalties, fines, or injunction had not been decided until the trial court entered its judgment on January 23, 1998. Clearly, a final judgment had not yet been entered on November 5, 1997, since the damages had not been determined. We also do not find that the court's dismissal of the counterclaim tolled the statute of limitations, nor did the trial court enter such an order.

The court in Dearborn Animal Clinic, P.A. v. Wilson, 248 Kan. 257, Syl. ¶ 5, 806 P.2d 997 (1991), stated that if it is clear that the plaintiff in a potential legal malpractice action has incurred an injury, and if it is reasonably ascertainable that such injury was the result **[*14]** of the attorney's negligence, then the statute of limitations begins to run at the time that it was reasonably ascertainable that the injury was caused by the attorney's malpractice even though the underlying action may not have been finally determined.

In Hunt v. Bittman, 482 F. Supp. 1017, 1021-22 (D.D.C. 1980), *aff'd*, 652 F.2d 196, 209 U.S. App. D.C. 203 (D.C. Cir.), *cert. denied* 454 U.S. 860, 102 S. Ct. 315, 70 L. Ed. 2d 158 (1981), Hunt argued that his attorney committed malpractice in advising him to plead guilty, and that the statute of limitations in his attorney malpractice action did not begin to run until the court of appeals affirmed his conviction. The court held the statute ran on the date that Hunt was incarcerated, *i.e.*, when he was actually harmed. Again, the guiding principle is that the statute of limitations commences when actual damage results from alleged malpractice, and that the commencement of the statute will not be put off until one learns the full extent of his other damages. See also Brown v. Babcock, 273 Or. 351,

356, 540 P.2d 1402 (1975) (suggesting "some damage" or "appreciable harm" is sufficient to commence statute of limitations in attorney malpractice actions).

There are also public policy reasons against [*15] holding that a case is not "finally determined" until all possible appellate avenues have been exhausted. Tolling the statute during an appeal would place the statute of limitations for legal malpractice in the power of the client, who could cause the statute to be tolled indefinitely and, hence, thwart the purpose of the statute of limitations, which is to require diligent prosecution of known claims thereby providing necessary finality and predictability in legal affairs, and ensuring that claims will be resolved while the evidence bearing on the issues is reasonably available and fresh. Worton v. Worton, 234 Cal. App. 3d 1638, 1652, 286 Cal. Rptr. 410 (1991).

The district court did not err in its application of the appropriate statute of limitations.

Martinez also argues the district court erred in ruling that Mustain and Schmidt, State Farm's managers, could not be individually named in the lawsuit.

Initially, we note the district court's finding on Mustain and Schmidt as individual defendants was dicta to its overall decision. The court had already decided that Martinez' claims were barred by the statute of limitations. In any event, the district court held that Martinez improperly [*16] named Mustain and Schmidt as individuals in the lawsuit because he had made no claim they acted outside the course and scope of their employment. Although we find the court's rationale erroneous, the end result was right for a different reason. See Bergstrom v. Noah, 266 Kan. 847, 875-76, 974 P.2d 531 (1999) (If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.).

The court in Russell v. American Rock Crusher Co., 181 Kan. 891, 895, 317 P.2d 847 (1957), addressed a similar argument of no liability of an employee acting within the course of employment.

> "An agent cannot escape liability to third persons by pleading he acted at the command or on account of the principal. This is for the reason that the tort liability of the agent is not based on the contractual relationship between the principal and agent, but on the common law obligation that every person must so act or use that which he controls as not to injure another. (2 Am. Jur., Agency § 326; Restatement of the Law, Agency, § 343, p. 753.)
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> "The contention that the defendant would be liable only if acting outside [*17] the scope of his employment and authority is not correct. He is liable to third parties in either event. The corporation is liable only if he was acting within the scope of his employment and authority or if there had been some later ratification or acceptance of benefits of his act." 181 Kan. at 895.

The district court improperly dismissed claims against Schmidt and Mustain based on whether they acted within their scope of employment. The court's concern would be the appropriate determination in deciding whether Schmidt and Mustain's actions brought liability upon State Farm, not whether they could be individually named in the lawsuit. See Cross v. Aubel, 154 Kan. 507, 119 P.2d 490 (1941) (The question is well settled that the acts of an agent within the scope or apparent scope of his or her authority are binding upon his or her principal.); Russell, 181 Kan. at 894 (A corporation is liable for the torts of its agent when committed within the scope of the agent's authority and course of employment even though it did not authorize or ratify the tortious acts.).

Although properly listed as defendants, the claims against Schmidt and Mustain were properly dismissed since Martinez failed [*18] to allege a specific duty that would create individual liability on their part. Schmidt and Mustain were not specific parties to Martinez' contract with State Farm. The court in Wolverton v. Bullock, 35 F. Supp. 2d 1278, 1281 (D. Kan. 1998), held that in Kansas a plaintiff who had been injured in a collision with an automobile and had obtained a judgment against the other motorist and assignment from the motorist of rights against the automobile insurer and insurer's adjuster had no right of action against the adjuster for negligence and bad faith in handling of claim, where the adjuster was not a party to the insurance contract and had no other contractual relationship with the motorist. Martinez' business insurance policy was with State Farm, not Schmidt or Mustain, and any duties under the contract rest with State Farm, not with its employees.

Next, Martinez argues the district court erred in holding that State Farm was not vicariously liable for Powell's

actions. Martinez contends that Powell was not an independent contractor, was under State Farm's control, and was serving State Farm's best interests. Martinez bases his argument on the dissenting opinion in State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998), [*19] copied verbatim into his appellate brief, where the dissent addressed the tripartite relationship between insurer, insured, and defense counsel who is being paid by, and perhaps dependent upon, the business of the insurer.

The district court found Powell was an independent contractor and consequently State Farm could not be vicariously liable for his alleged failure to zealously defend Martinez. The court stated Martinez' claim for legal malpractice was against Powell, not State Farm.

Our research does not reveal any Kansas Supreme Court cases addressing this issue. However, the Kansas federal court has embraced vicarious liability for insurers who hire negligent attorneys. In Pacific Employers Ins. Co. v. P.B. Hoidale Co., 789 F. Supp. 1117 (D. Kan. 1992), the court held that any negligence on the part of an attorney hired by a primary insurer to defend an insured in a personal injury action was attributable to the insurer for purposes of bad faith in defending the claim. In a later holding in the same case, the court restated its previous ruling:

> "Bachmann was the attorney hired by Employers [insurance company] to fulfill Employers' fiduciary duty to defend in good faith and due care [*20] the claim against its insured Hoidale. Under Kansas law, "[w]henever an injury to a third party results from the failure of the employer to perform a duty which he owes to such party he will not be permitted to avoid his liability by letting the performance of the work to another." St. Louis & San Francisco R.R. Co. v. Madden, 77 Kan. 80, 84-85, 93 P. 586 (1908). See also Trout v. Koss Constr. Co., 240 Kan. 86, 93, 727 P.2d 450 (1986). As the court stated in its previous order:
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> > 'Hoidale--through Pacific--seeks to hold Employers liable for its attorney's negligence in fulfilling the insurance company's contractual duty to defend it in good faith and with due care. To the extent that Bachmann's conduct did not conform to this standard, Employers cannot claim that it, as Hoidale's insurer, has performed its duty.' 789 F. Supp. at 1123.
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> "Thus, the court finds misplaced Employers' exclusive reliance on the rule of *Brinkley*, which addresses only one of the exceptions to the general rule of non-liability for acts of independent contractors. See Balagna v. Shawnee County, 233 Kan. 1068, 1080, 668 P.2d 157 (1983) (Kansas cases recognize many exceptions and limitations to the general rule)." 804 F. Supp. 137, 142 (D. Kan. 1992)

Other [*21] jurisdictions have held in line with the trial court's decision of no vicarious liability. See Traver, 980 S.W.2d at 628-29; Ingersoll-Rand Equipment Corp. v. Transp. Ins. Co., 963 F. Supp. 452, 454-55 (M.D. PA 1997); Aetna Cas. & Sur. Co. v. Prot. Nat. Ins. Co., 631 So. 2d 305, 306-07 (Fla. Dist. App. 1993). Other courts have held contrary to the district court and found vicarious liability of the insurer. See Boyd Bros. Transp. v. Fireman's Fund Ins., 729 F.2d 1407, 1410-11, (11th Cir. 1984); Smoot v. State Farm Mutual Automobile Insurance Co., 299 F.2d 525, 530 (5th Cir. 1962).

The main problem with Martinez' argument was his involvement with and selection of Powell as his attorney. The defense of Martinez' case with the Attorney General was initially assigned to Corlin Pratt, but Martinez fired Pratt after Pratt allegedly told Martinez, "You don't tell me what to do, I tell you. State Farm is paying me not you." Martinez stated in his petition that Powell "was hired by and selected by State Farm to defend Plaintiff in a lawsuit filed by the Attorney General." However, in a letter dated April 3, 1997, to State Farm, Martinez stated:

> "I had the opportunity to visit with Mark Powell [*22] and to go over the particulars in regards to my lawsuit.
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> "After 2 hours of discussion, I am satisfied Mr. Powell has the knowledge and skills to effectively handle my case. He also has the personality in which I feel we can both communicate effectively. I would like Mr. Powell to handle my case to conclusion and would like for you to give him the okay to represent me starting April 2, 1997."

The cases finding an insurance company vicariously liable for the negligence of defense counsel had three key facts, the insurance company selected, compensated, and controlled the hired counsel. Martinez' claim for vicarious liability is missing a key ingredient because Martinez selected and approved his attorney. The trial court did not err in finding that Powell was an independent contractor and State Farm could

not be liable for his alleged failure to provide zealous representation. Martinez' claims of a conflict of interest on the part of State Farm are also dispelled under the independent contractor relationship because Powell's professional loyalty was to his representation of Martinez. See *Model Rules of Professional Conduct 1.7* & *1.8* (2001 Kan. Ct. R. Annot. 354, 359).

Martinez also argues **[*23]** the district court erred by not allowing him to amend his petition to include claims for tortious interference and the unauthorized practice of law.

K.S.A. 2000 Supp. 60-215(a) provides in part:

> "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.*" (Emphasis added.)

In regard to the proper construction of *K.S.A. 60-215*, we have stated: "A trial court is given broad discretionary power under *K.S.A. 60-215* to permit or deny the amendment of pleadings, and its actions will not constitute reversible error unless it affirmatively appears that the amendment allowed or denied is so material it affects the substantial rights of the adverse party." *Rowland v. Val-Agri, Inc., 13 Kan. App. 2d 149, Syl. ¶ 1, 766 P.2d 819 (1988)*. Judicial discretion is abused only **[*24]** when no reasonable person would take the view adopted by the trial court. *Klose v. Wood Valley Racquet Club, Inc., 267 Kan. 164, 173, 975 P.2d 1218 (1999)*.

The trial court denied Martinez' amendment as follows:

> "We'll first I'm going to deal with the supplemental motion to amend supplemental pleadings. I don't find anything in the motion that would suggest to me that it's a new cause of action or should be allowed. Plus, I am having a lot of difficulty understanding exactly what kind of amendment is being suggested. It's not in the form or required — it's not in the required form or format that the rules would suggest. I think it's just a restatement of allegations that are in the original petition. Best I can deduce, it's just another attempt to get another bite at the apple and keep the case alive in that regard. So the motion to amend is going to be denied based upon those rulings."

In requesting an amendment, Martinez argued that if the trial court found Powell to be an independent contractor and not a "captive law firm," then he asked to amend or supplement his pleadings to include a cause of action against State Farm for tortious interference. Martinez does not address his concerns **[*25]** of the unauthorized practice of law on appeal. From his prior pleadings in the district court, it appears Martinez argues Mustain and Schmidt engaged in the unauthorized practice of law by controlling Powell's defense strategies and expenses.

We hold the trial court did not err in denying Martinez' motion to amend. We agree with the district court that Martinez' arguments were simply a repetition of the allegations in his original petition and that Martinez failed to procedurally request leave of court to amend his petition as required under *K.S.A. 2001 Supp. 60-215(a)*. Further, there were no facts unknown to Martinez that would have prevented him from including these allegations in the original petition. The trial court did not abuse its discretion in denying Martinez' motion.

Martinez further argues the trial court incorrectly ruled that Martinez' other business practices were not affected by the injunction.

Martinez challenged the injunction in the direct appeal, and we will not revisit the issue already decided against Martinez, except to reiterate our original holding:

> "Defendant challenges the injunction as overly broad. An injunction is an equitable remedy governed by the principles **[*26]** of equity. The trial court's decision to grant or deny an injunction will not be disturbed on appeal absent a showing of abuse of discretion. *Wichita Wire, Inc. v. Lenox, 11 Kan. App. 2d 459, 461-62, 726 P.2d 287 (1986)*.
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> "Defendant claims the injunction deprives him of his constitutional right to pursue lawful employment. Beyond being conclusory, this claim disregards the fact that before the trial court issued the permanent injunction, it first found defendant's employment was not lawful.
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> "Defendant claims he should have been afforded some administrative proceeding in which the State

could have given him direction in conducting his business within the bounds of the law. This argument is without merit. Defendant opted to place himself and his business in the unregulated gap between law and insurance. Defendant does not suggest what State agency is or should be charged with overseeing such a business, and he does not provide authority for his position.

"The district court has given defendant guidance in the form of an injunction. The KCPA authorizes declaratory and injunctive remedies. K.S.A. 50-632(a)(1) and (2). Having declared the acts enumerated in paragraph 17 of the journal entry [*27] constitute the unauthorized practice of law, and having determined the transactions described in paragraphs 10, 11, and 16 were violations of the KCPA, the district court permanently enjoined defendant from engaging in those acts and practices. The injunction prohibits defendant from providing specific insurance consulting services to individual consumers yet allows him to provide the same services to an insurance company. Defendant is thus not entirely precluded from pursuing his business, but he is precluded from entering into a relationship of trust with individual consumers. The injunction is narrowly tailored to define and prevent future KCPA violations and the unauthorized practice of law while allowing defendant to utilize his training and experience." 27 Kan. App. 2d at 12-13.

Again, the injunction does not prohibit Martinez' business ventures that do not involve the unauthorized practice of law. Further, as State Farm correctly points out, any challenges Martinez might have with the breadth of the injunction can properly be remedied by a motion to vacate or modify the injunction pursuant to K.S.A. 60-910.

Martinez also argues the trial court incorrectly ruled that Mustain and [*28] Schmidt were not engaged in the unauthorized practice of law.

There is not an all-encompassing definition of what constitutes the practice of law. Instead, every matter involving the unauthorized practice of law is decided on its own facts on a case-by-case basis. State ex rel. Stephan v. Williams, 246 Kan. 681, 689, 793 P.2d 234 (1990). From our research of the general cases, and given the lack of any authority cited by Martinez, the allegations of acts by Mustain and Schmidt, as employees of State Farm, are not the unauthorized practice of law.

Martinez further argues the trial court incorrectly held the KCPA does not apply to Powell and his law firm, Powell and Brewer, L.L.P. Martinez also argues that it is a violation of his equal protection rights not to apply the KCPA to Powell and the attorney/client relationship.

In denying Martinez' KCPA claims, the trial court held as follows:

"Plaintiff has failed to allege specific acts that if true would be unconscionable acts and practices as defined under the KCPA, specifically K.S.A. 50-627. Plaintiff's allegation concerning alleged misrepresentations could be considered alleged deceptive acts potentially covered by K.S.A. 50-626. Those [*29] alleged misrepresentations as a matter of law are not unconscionable within the context of the KCPA. The remainder of the unconscionable acts alleged by Plaintiff, if true, are not as a matter of law, unconscionable acts prohibited by the KCPA specifically K.S.A. 50-627. Those allegations include the Defendant intentionally waiving his rights under his professional liability insurance coverage for the purpose of prohibiting Plaintiff from recovering damages from him; and taking advantage of Plaintiff's ignorance of the law by being untruthful about discovery practices during representation. The Court notes that Plaintiff was permanently enjoined from the unauthorized practice of law for, among other things, claiming and representing to clients that he had extensive legal knowledge. A review of the Kansas Comments and annotated cases in K.S.A. 50-627 reveals these acts are not of the type prohibited by subsection (b)1 and (b)7 as alleged by Martinez."

Martinez does not cite any Kansas cases that have applied the KCPA to the attorney/client relationship. Rather, Martinez uses the definitions found in K.S.A. 2001 Supp. 50-624(b), (c), (g), (i), and (j) to bring Powell within the purview [*30] of the KCPA. Martinez also argues there is no evidence who Powell truly represented since there was a lack of evidence whether Powell was in an attorney/client relationship with Martinez or whether Powell was an agent for State Farm.

Regarding his equal protection claim, Martinez argues it would be remarkable for us to rule that the Kansas

Supreme Court has the inherent power to define and regulate the practice/unauthorized practice of law, but to exclude attorneys from the KCPA and its purpose of prosecuting consumer rights violations. Martinez argues it is a violation of his equal protection rights for him to be prosecuted for the unauthorized practice of law for KCPA violations by the Attorney General, but then to find Powell, a practicing attorney, is not subject to the KCPA.

The KCPA was enacted in 1973 to promote the following policy, among others: "to protect consumers from suppliers who commit deceptive and unconscionable practices." *K.S.A. 50-623(b)*. In order to promote this policy, the "KCPA is to be construed liberally. *Willman v. Ewen, 230 Kan. 262, 267, 634 P.2d 1061 (1981)*." *Stair v. Gaylord, 232 Kan. 765, 775, 659 P.2d 178 (1983)*.

Our research has not revealed any Kansas **[*31]** cases that have specifically addressed the applicability of the KCPA to the attorney/client relationship. The closest discussion of the issue by the Kansas Supreme Court occurred recently in *Moore v. Bird Engineering Co., P.A., 273 Kan. 2, Syl. ¶ 3, 41 P.3d 755 (2002)*. In *Moore*, the court discussed that courts generally hold that the KCPA does not apply to regulate professional services. However, the court departed from the general rule and held that the KCPA applied to a professional engineer selling his or her engineering services to a consumer. The *Moore* court lightly touched on the attorney/client relationship as follows:

> "In the present case, Moore is a consumer within the meaning of the statute in that he is an individual who sought services for personal purposes. Bird is a supplier within the meaning of the statute in that he is a person who, in the ordinary course of business, engages in consumer transactions. The consumer transaction in this case is Bird's sale of his engineering services to Moore. Those services consist of Bird's work in designing the bridge for Moore. The comfortable fit of the present parties and transaction within the statutory definitions confirms the **[*32]** district court's impression that the KCPA applies.
>
> "Bird Engineering argues that, notwithstanding the apparent fit within the definitions, this court never has applied the KCPA to professional services and should not start now. It contends that the KCPA was not intended to cover the odd transaction between individuals and the engineers for the reasons that '[f]ew consumers shop for engineering services, and engineers who provide such services are not in the business of mass-producing, advertising or selling such services.'
>
> "Bird Engineering relies on *Vort v. Hollander, 257 N.J. Super. 56, 607 A.2d 1339 (1992)*. Vort, an attorney, sued his clients for his fees; the clients counterclaimed alleging malpractice and violation of the Consumer Fraud Act. It was dismissed on summary judgment, and the clients appealed. With regard to the consumer fraud claim, the appellate division stated:
>
> > 'Defendants' contention that they have a right to establish their entitlement to damages under the Consumer Fraud Act, *N.J.S.A. 56:8-1 to-48*, is without merit. "The purpose of the [Consumer Fraud] Act was to prevent deception, fraud or falsity, whether by acts of commission or omission, in connection with the **[*33]** sale and advertisement of merchandise and real estate." *Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376-77, 371 A.2d 13 (1977)*. Although the sale of certain services also falls within the purview of the Act, it is clear that attorney's services do not fall within the intendment of the Consumer Fraud Act.
> >
> > 'In *Neveroski v. Blair, 141 N.J. Super. 365, 358 A.2d 473 (1976)*, this court concluded that real estate brokers were exempt from the Act, under the following reasoning:
> >
> > > "A real estate broker is in a far different category from the purveyors of products or services or other activities. He is in a semi-professional status subject to testing, licensing, regulations and penalties through other legislative provisions. Although not on the same plane as other professionals such as lawyers, physicians, dentists, accountants or engineers, the nature of his activity is recognized as something beyond the ordinary commercial seller of goods or services--an activity beyond the pale of the act under consideration." [*Id. at 379, 358 A.2d 473* (citation omitted) (emphasis added)].
> > >
> > > 'In 1975 the Legislature amended the Act to include deceptive practices in connection with the sale of real estate.

> L.1975, c. 294, § 1 **[*34]** , eff. Jan. 19, 1976. The Legislature, however, has not amended the Act to include professionals generally, despite our longstanding holding in *Neveroski.* Moreover, the practice of law in the State of New Jersey is in the first instance, if not exclusively, regulated by the New Jersey Supreme Court. N.J. Const. (1947), Art. VI, § II, par. 3; *In re Li Volsi, 85 N.J. 576, 583, 428 A.2d 1268 (1981)*. Had the Legislature intended to enter the area of attorney regulation it surely would have stated with specificity that attorneys were covered under the Consumer Fraud Act.' *257 N.J. Super. at 61-62*.

> "The New Jersey court distinguished the legal profession on the basis that it is regulated exclusively by the state Supreme Court. *257 N.J. Super. at 62*. Historically, attorneys were held to be exempt from liability under the Sherman Antitrust Act. That exemption was known as the "learned profession" exemption. The learned profession originally included only lawyers, medical doctors, and clergy. See "The Learned Profession Exemption of the North Carolina Deceptive Trade Act: The Wrong Bright Line?" 15 Campbell L. Rev. 223, 250-51 (1993).

> "However, the application of the KCPA to the legal **[*35]** profession is not before us. The narrow issue before this court is whether the engineering services rendered in the present case are covered by the KCPA. We make no determination here as to application of the KCPA to other professional services." *Moore, 273 Kan. at 12*.

While *Moore* is certainly not dispositive of the issue of the application of the KCPA, the Court's reliance on *Vort*, as similarly relied upon by State Farm, indicates a leaning toward finding the KCPA generally not applicable to the attorney/client relationship. The same analysis applied by the court in *Vort* and the New Jersey Consumer Fraud Act would apply equally to the KCPA.

In its holding, the trial court below did not so much address the applicability of the KCPA to the attorney/client relationship as it did the finding that the facts and allegations raised by Martinez simply did not constitute unconscionable or deceptive acts or practices pursuant to *K.S.A. 2001 Supp. 50-626* and *K.S.A. 2001 Supp. 50-627*. The determination of whether an act is deceptive or unconscionable is a question of law for the court. *State ex rel. Miller v. Midwest Serv. Bur. of Topeka Inc., 229 Kan. 322, 324, 623 P.2d 1343 (1981)*.

Martinez does **[*36]** not allege any unconscionable or deceptive acts or practices during the hiring of Powell as his attorney. Instead, he contends the legal malpractice by Powell during the pendency of his case with the Attorney General constituted violations of the KCPA. Martinez' claims are directed toward the competence and strategy Powell employed during Powell's representation, and these type of claims do not fall within the purview of the KCPA. Powell's actions do not constitute unconscionable or deceptive acts or practices in violation of the KCPA.

Additionally, we are not persuaded by Martinez' equal protection claims. Powell correctly relates the significance of the distinction between regulating the practice of law, which is an inherent function of the Kansas Supreme Court, and prohibiting the unauthorized practice of law by those who are not properly licensed attorneys which is a function of all courts. Martinez is not a similarly situated individual, a necessary element to showing a violation of his equal protection rights. An unlicensed person engaging in the unauthorized practice of law is not the same as a licensed attorney who allegedly commits legal malpractice.

The district court did not **[*37]** err in dismissing Martinez' KCPA claims against Powell and his law firm.

Finally, Martinez argues the trial court erred in finding he had no cause of action for negligence against Powell. Martinez contends that Powell's advice to not publish an advertisement in the Feist Yellow Pages caused sufficient damages to support a claim for negligence against Powell. Powell advised Martinez that if he ran the advertisement, the Attorney General's office would try to impose more fines. Martinez claims damages resulting from the costs of the advertisement and in jobs he had to refuse.

In dismissing Martinez' negligence claim, the trial court stated:

> "Plaintiff conceded during oral argument that if the above-mentioned business ventures were not

prohibited by the injunction, he would not have suffered damages and therefore would not have a cause of action against the Defendants for negligence. The injunction entered on January 23, 1998, prohibits Plaintiff from engaging in the unlawful practice of law. Specifically, the injunction enjoins him from practicing law by providing legal advice and counsel, representing that he has legal knowledge beyond that of a layman, preparing settlement proposals on **[*38]** personal injury and/or workers compensation claims, and advising clients as to their legal rights related to workers compensation, insurance and bankruptcy claims. In essence, all of the business practices that Plaintiff is enjoined from doing he is already prohibited from engaging in because they constitute the unlawful practice of law. The injunction prohibits Plaintiff from engaging in the unauthorized practice of law, an illegal act. It is axiomatic to state that Plaintiff is prohibited from doing illegal acts, including the unauthorized practice of law. Plaintiff stated in oral arguments that he wanted an opinion on whether his proposed business ventures would violate the injunction and would constitute the unlawful practice of law. This Court should not and will not issue an advisory opinion as to Plaintiff's proposed business ventures. Either Plaintiff's proposed business ventures involve the unlawful practice of law and are therefore prohibited by law and by the injunction, or they do not constitute the unlawful practice of law and do not violate the injunction. Under either scenario the Plaintiff has suffered no damages as a result of the alleged legal malpractice of the Defendants. **[*39]** Either Plaintiff has suffered no damages because he wants to engage in illegal acts which are prohibited even without the injunction, or he has suffered no damages because his acts are not illegal and he is not enjoined from engaging in those business acts."

We do not find the trial court erred in dismissing Martinez' claim for negligence based on the lack of demonstrated damages. The court in *Phillips v. Carson, 240 Kan. 462, Syl. ¶ 5, 731 P.2d 820 (1987)*, set forth the following elements for a claim of legal malpractice: (1) an attorney-client relationship giving rise to a duty; (2) the attorney breached the duty; (3) the attorney's breach was the proximate cause of the client's damages; and (4) actual damages by the client. Clearly Martinez cannot claim damages from lost profits from an illegal enterprise, and as stated above and in previous decisions, the injunction is narrowly tailored to prevent future violations of the KCPA.

We affirm all other decisions of the district court raised on appeal that we have not addressed primarily because we cannot determine Martinez' alleged error and/or decipher his argument.

Affirmed.

Taylor v. Allstate Ins. Co.

Court of Appeals of Texas, First District, Houston

March 31, 2011, Opinion Issued

NO. 01-09-00457-CV

Reporter
356 S.W.3d 92; 2011 Tex. App. LEXIS 2418

ROBERT B. TAYLOR AND R.B.T INVESTMENTS, INC. F/K/A GULF OXYGEN COMPANY, INC., Appellants v. ALLSTATE INSURANCE COMPANY AND ALLSTATE COUNTY MUTUAL INSURANCE COMPANY, Appellees

Subsequent History: Rehearing denied by *Taylor v. Allstate Ins., 2011 Tex. App. LEXIS 10303 (Tex. App. Houston 1st Dist., May 19, 2011)*
Petition for review denied by *Taylor v. Allstate Ins. Co., 2011 Tex. LEXIS 983 (Tex., Dec. 16, 2011)*
Related proceeding at *Taylor v. Alonso, 2012 Tex. App. LEXIS 7662 (Tex. App. Houston 1st Dist., Aug. 30, 2012)*

Prior History: **[**1]** On Appeal from the 190th District Court, Harris County, Texas. Trial Court Case No. 08-08861/A.
Taylor v. Joiner, 2010 Tex. App. LEXIS 10305 (Tex. App. Houston 1st Dist., Dec. 30, 2010)

Disposition: The court reversed that portion of the judgment granting summary judgment on the breach of contract and statutory causes of action and remanded. The court affirmed the judgment in all other respects.

Core Terms

insured, third party claim, summary judgment, tortious interference, cause of action, trial court, handling, contractual, rights, summary judgment motion, automobile accident, negligence claim, allegations, asserts, pet, fiduciary relationship, vicarious liability, court of appeals, statutory claim, pleadings, replead, duties, cases, pled, granting summary judgment, breach of contract claim, trial court's judgment, breach of contract, no cause of action, acted negligently

Case Summary

Procedural Posture
Appellants, an insured and a company, challenged a decision of the 190th District Court, Harris County (Texas), which granted summary judgment under *Tex. R. Civ. P. 166a(c)* in favor of appellee insurer in connection with claims of negligence, vicarious liability, tortious interference, breach of contract, and statutory claims.

Overview
The insured was involved in an automobile accident. The insured sued the insurer, among others, to recover costs the insured paid to settle litigation related to the accident. The trial court granted the insurer summary judgment. On appeal, the court reversed the judgment as to the breach of contract and statutory causes of action and remanded, but otherwise affirmed. Because the attorney misconduct alleged fell within the category of representative conduct over which the attorney had to exercise control, the insured could not hold the insurer vicariously liable. Texas law did not recognize an insured's negligence claim against his insurer based on the alleged mishandling of the defense of a third party claim. Texas law also did not recognize a cause by an insured against the insurer for tortious interference with the insured's relationship with his attorney, under the circumstances of this case. The insurer did not meet its burden of proving that it was entitled to summary judgment on the statutory claims. The court disagreed that a breach of contract claim could never lie against an insurer for its conduct in handling the defense of a third party claim against the insured.

Outcome
The court reversed that portion of the judgment granting summary judgment on the breach of contract and statutory causes of action and remanded. The court affirmed the judgment in all other respects.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Written Motions

HN1 The appellate court reviews the trial court's grant of summary judgment de novo. The appellate court reviews the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. *Tex. R. Civ. P. 166a(c)*.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Implausible Claims

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2 A defendant-movant may establish its right to summary judgment by demonstrating that the law does not recognize the cause of action pleaded. In such an instance, the movant meets its summary judgment burden not by proving or disproving facts, but by showing that the plaintiff has not pled a viable cause of action. To determine whether a cause of action exists under the circumstances pleaded, the court construes the pleading broadly and assumes the facts pleaded are true.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

Legal Ethics > Client Relations > General Overview

Torts > Vicarious Liability > General Overview

HN3 In light of the special relationship between attorney and client and the special duties owed by an attorney to the client, an attorney must exercise unfettered control and discretion over his or her representation of the client. This vesting of control and responsibility in the attorney necessarily precludes an insurer from exercising control over the attorney's representation of the insured to the degree necessary to justify the imposition of vicarious liability. Thus, an insured cannot bring a claim against his insurer on the basis of vicarious liability for the conduct of the insured's attorney in a third party action.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

Torts > Negligence > Types of Negligence Actions > General Overview

HN4 Texas law does not recognize a negligence claim by an insured against his insurer based on alleged mishandling of the defense of a third party claim. The court is not aware of any authority from the Texas Supreme Court expressly permitting an insured to sue its insurer for negligent handling of a claim outside the scope of G.A. Stowers Furniture Co. v. Am. Indem. Co., and the court is unwilling to expand the scope of an insurer's duties to the insured without express authorization from the Texas Supreme Court.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

HN5 The Texas Supreme Court has declined to recognize a duty of good faith and fair dealing between an insurer and its insured, stating that Texas law recognizes only one tort duty in this context, that being the duty stated in G.A. Stowers Furniture Co. v. Am. Indem. Co. An insured is fully protected against his insurer's refusal to defend or mishandling of a third-party claim by his contractual and Stowers rights. An insurer's common law duty in this third party context is limited to the Stowers duty to protect the insured by accepting a reasonable settlement offer within policy limits. Stowers is the only common law tort duty in the context of third party insurers responding to settlement demands.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

HN6 The G.A. Stowers Furniture Co. v. Am. Indem. Co. duty is the only common law tort duty Texas currently recognizes in third party insurance claims.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

HN7 Texas law does not recognize a cause of action for an insurer's negligent defense of a third party claim beyond G.A. Stowers Furniture Co. v. Am. Indem. Co.

and a court has declined to expand the scope of the Stowers duty to allow for such a claim.

Torts > Business Torts > Commercial Interference > General Overview

HN8 The court has previously declined to recognize a cause of action for tortious interference with a fiduciary relationship.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

HN9 The court does not recognize a common law duty of good faith and fair dealing for an insurer in handling third party claims because the insured is fully protected against the insurer's refusal to defend or mishandling of a third party claim through his contractual and G.A. Stowers Furniture Co. v. Am. Indem. Co. rights.

Legal Ethics > Client Relations > Attorney Duties to Client > Effective Representation

Torts > Business Torts > Commercial Interference > General Overview

HN10 The court has reasoned that the elevated duties owed by an attorney to a client require the attorney to exercise the kind of unfettered control over his representation of the client that forestalls meaningful outside influence over the representation. In the context of handling the client's legal matter, an attorney's contractual relationship with his client is also, necessarily, a fiduciary relationship. Thus, unlike the other party to the contract in a typical tortious interference claim, an attorney is not free to act in his own best interest in performing, or choosing not to perform, his contractual obligations to his client.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

Legal Ethics > Client Relations > Attorney Duties to Client > Effective Representation

HN11 Texas case law has given the insurer room to protect its legitimate interests in the defense of a third party claim by placing a burden of absolute loyalty to the insured on the attorney, who must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. Recognizing potential liability on the part of the insurer for advocating a defense strategy with which the insured disagrees undermines this balance and, where it exists, the insurer's right of control over the defense. The insurer's right of control is not absolute, and the insured is permitted to refuse the insurer's defense under certain circumstances, such as a serious conflict of interests between the insured and the insurer.

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

Legal Ethics > Client Relations > General Overview

Torts > Business Torts > Commercial Interference > General Overview

HN12 Under current Texas Supreme Court authority, Texas law does not recognize a cause of action by an insured against his insurer for tortious interference with the insured's relationship with his attorney arising out of the insured's handling of the defense of a third party claim under certain circumstances.

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

Insurance Law > Claim, Contract & Practice Issues > Subrogation > General Overview

Torts > Negligence > Types of Negligence Actions > General Overview

HN13 Consistent with the Texas Supreme Court's prior holdings, courts of appeals cases hold that Texas law does not recognize a claim for negligence based on the insurer's handling of the defense of a third party claim, whether the claims is asserted outside of the G.A. Stowers Furniture Co. v. Am. Indem. Co. doctrine or as an extension of the doctrine. These cases do not hold that Texas law does not recognize a cause of action for breach of contract between an insured and its insurer. The court, therefore, disagrees that a breach of contract claim may never lie against an insurer for its conduct in handling the defense of a third party claim against the insured. The nature and extent of the duties owed under a contract are determined by the contract's terms. To determine the insured's rights against his insurer to which a co-insurer may be subrogated, the Texas Supreme Court did not deny the existence of a breach of contract clause under Texas law but, rather, reviewed the policy in question to determine what rights were afforded the insured by the contract.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview

HN14 None of cited authority supports the position that Texas law prohibits an insured from bringing otherwise valid statutory claims against an insurer.

Counsel: For APPELLANT: Andrew Todd McKinney IV, McKinney & Cooper, L. L. P., Houston, TX; Spencer G. Markle, Vascoe, Valdes & Markle, L.L.P., Houston, TX.

For APPELLEE: Ronald J. Restrepo, Doyle, Restrepo, Harvin & Robbins, L.L.P, Houston, TX.

Judges: Panel consists of Chief Justice Radack and Justices Alcala and Bland.

Opinion by: Elsa Alcala

Opinion

[*94] Appellants Robert B. Taylor and R.B.T. Investments, Inc. f/k/a Gulf Oxygen Company, Inc. (collectively, "Taylor") appeal from a summary judgment rendered in favor of appellees Allstate Insurance Company and Allstate County Mutual Insurance Company (collectively, "Allstate") on the grounds that Taylor's sole cause of action against Allstate is a *Stowers* [1] claim, and no *Stowers* claim can be made under **[*95]** the facts of this case. In two issues, Taylor asserts that the trial court erred by granting Allstate's "no cause of action" motion for summary judgment and by denying Taylor's motion for leave to replead his claims against Allstate.

We conclude that the trial court properly rendered **[**2]** summary judgment with respect to Taylor's claims against Allstate for negligence, vicarious liability, and tortious interference with Taylor's fiduciary and contractual relationship with his attorney but that the trial court erred in determining that no cause of action exists with respect to Taylor's breach of contract and statutory claims. We also conclude that the trial court did not abuse its discretion by denying Taylor's motion for leave to replead because Taylor had already been provided an opportunity to replead, and Taylor had in fact amended his pleadings at the time summary judgment was granted. We, therefore, affirm in part and reverse and remand in part.

Background

According to his pleadings, Taylor was involved in an automobile accident in 2005 in which the passenger of the other vehicle was catastrophically injured. The family of the injured passenger brought suit against Taylor. Allstate retained John Causey, an independent contractor, as counsel for Taylor in the automobile accident suit. Taylor claims he had defenses to that suit, including his contention that he was entirely in his lane of traffic when the collision occurred, he was still or moving slowly at the time, **[**3]** and the passenger's failure to wear a seatbelt caused the injuries. At mediation, Taylor settled the automobile accident suit for an amount that exceeded his insurance coverage. Allstate tendered policy limits. Taylor filed this action against his former legal counsel and various insurance providers, ultimately including Allstate, to recover costs paid by Taylor to settle litigation against him arising out of the automobile accident.

Taylor's initial claim against Allstate was for negligence with respect to Allstate's handling Taylor's defense in the automobile accident case. Allstate filed special exceptions and moved for traditional summary judgment on the grounds that a Stowers claim is the only common law claim cognizable under Texas law for an insurer's alleged mishandling of a third party claim against the insured, and the facts pled by Taylor would not support a *Stowers* claim. Taylor filed a second amended petition to add claims against Allstate for breach of contract, tortious interference with Taylor's contractual and fiduciary relationship with Causey, vicarious liability for Causey's conduct in representing Taylor, and violations of provisions of the Insurance Code and Deceptive **[**4]** Trade Practices Act ("DTPA"). In response to Taylor's new claims, Allstate filed a supplement to its motion for summary judgment. Citing additional authority, the supplement referenced Taylor's new claims and re-urged its argument that a *Stowers* claim was Taylor's exclusive cause of action against Allstate.

Taylor filed a response to Allstate's motion for summary judgment, in which he disputed that a *Stowers* claim was his exclusive remedy under Texas law, distinguishing some of the cases relied on by Allstate and pointing out that the Texas Supreme Court had remanded certain insured-insurer claims in one of the cases relied on by Allstate. Taylor then filed a supplement to his second amended petition to add claims against Allstate for additional violations of the DTPA and Insurance Code and asserting that Allstate breached the standard of care implicit in its contractual duty to defend.

[1] *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved).

[*96] The trial court rendered summary judgment in Allstate's favor. Taylor filed a motion to reconsider the summary judgment and for leave to replead, which the trial court denied. Subsequently, the trial court entered an order severing Taylor's claims against Allstate into a separate cause. After severance, **[**5]** Taylor filed a motion for new trial, which was not granted, and this appeal ensued. [2]

Standard of Review

HN1 We review the trial court's grant of summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009)*; *Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005)*. We review the evidence presented in the motion and response in the light most favorable to the party **[**6]** against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Fielding, 289 S.W.3d at 848*; *see City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005)*. Issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal. *Tex. R. Civ. P. 166a(c)*.

HN2 A defendant-movant may establish its right to summary judgment by demonstrating that the law does not recognize the cause of action pled. *E.g.*, *Peeler v. Hughes & Luce, 909 S.W.2d 494, 497-98 (Tex. 1995)*; *Higbie Roth Constr. Co. v. Houston Shell & Concrete, 1 S.W.3d 808, 811 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)*. In such an instance, the movant meets its summary judgment burden not by proving or disproving facts, but by showing that the plaintiff has not pled a viable cause of action. *Higbie Roth Constr. Co., 1 S.W.3d at 811*. To determine whether a cause of action exists under the circumstances pled, we construe the pleading broadly and assume the facts pled are true. *Id. at 811-12*. The summary judgment at issue in this **[**7]** appeal is largely a motion for judgment on the pleadings. Allstate filed only one piece of evidence in support of its motion for summary judgment — an affidavit tending to disprove certain facts relevant to a *Stowers* claim.

Taylor's Tort Claims Against Allstate

Taylor alleges common law causes of action against Allstate for negligence and tortious interference with his contractual and fiduciary relationship with Causey, Taylor's legal counsel in the automobile accident suit; Taylor also alleges that Allstate is vicariously liable for conduct by Causey in the defense of that suit. Allstate argues, on appeal as it did below, that the only common law cause of action recognized under Texas law in the context of an insurer's handling of a third party claim against an insured is a *Stowers* claim, and no *Stowers* claim exists here. [3] **[*97]** *See G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved)*. We hold that the trial court properly granted summary judgment on Taylor's tort claims against Allstate.

A. Vicarious Liability

With respect to Taylor's vicarious liability claim, Allstate argues that Taylor's claims fail as a matter of law under the Texas Supreme Court's holding in *State Farm Mutual Automobile Insurance Co. v. Traver, 980 S.W.2d 625, 627-29 (Tex. 1998)*. We agree. In *Traver*, the Texas Supreme Court explains that, ***HN3*** in light of the special relationship between attorney and client and the special duties owed by an attorney to the client, an attorney must exercise unfettered control and discretion over his or her representation of the client. *Id. at 627*. The Court holds that this vesting of control and responsibility in the attorney necessarily precludes an insurer from exercising control over the attorney's representation of the insured to the degree necessary to justify the imposition of vicarious liability. *Id*. Thus, the Court

[2] Although no party challenges our jurisdiction, we conclude in our sua sponte review that the language of the trial court's orders unambiguously expresses the trial court's intention that the summary judgment order become final and appealable upon issuance of the severance order. *See In re Certain Underwriters at Lloyd's London*, No. 01-09-00851-CV, 2010 Tex. App. LEXIS 393, 2010 WL 184300, at *2 (Tex. App.—Houston [1st Dist.] Jan. 15, 2010, no pet.) (mem. op.) (finding finality where judgments stated: "This judgment is [a] final judgment. All relief not expressly granted herein is denied."); *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010) (indicating that a statement that the judgment in question is "appealable" is a clearer indication of finality than a statement that the judgment is "final.").

[3] Taylor does not allege that Allstate ever refused him defense in the automobile accident suit. To the contrary, the parties appear to agree that Allstate **[**8]** performed its duty to defend — whether negligently or not — and tendered the full limits of its policy after receiving notice of the claim.

concludes that an insured cannot bring a claim against his insurer on the basis of vicarious liability for the conduct of the insured's attorney in a third party action. *Id.*

Because the attorney misconduct alleged **[**9]** by Taylor falls within this category of representative conduct over which the attorney must exercise absolute control, Taylor may not hold Allstate vicariously liable for Causey's alleged actions. We affirm the trial court's summary judgment with respect to Taylor's vicarious liability claim.

B. Negligence

Taylor's negligence claim alleges that Allstate "failed to exercise ordinary care in discharging [its] duties and obligations to [Taylor] by conducting an inadequate investigation and providing an inadequate defense in the [automobile accident suit]." Allstate argues that ***HN4*** Texas law does not recognize a negligence claim by an insured against his insurer based on alleged mishandling of the defense of a third party claim. We agree.

This court has previously declined to recognize a negligence claim against an insurer where the insurer does not refuse to defend or settle but, rather, the insured is dissatisfied with the quality of the defense provided. *See Wayne Duddlesten, Inc. v. Highland Ins. Co., 110 S.W.3d 85, 96-97 (Tex. App.—Houston [1st Dist.] 2003, pet. denied)*. In *Duddlesten*, an insured asserted that its insurer acted negligently by paying several workers' compensation claims that **[**10]** the insured believed were invalid. *Id.* After the trial court granted special exceptions and struck the insured's negligence claims, the insured appealed the decision. We affirmed the trial court's judgment, stating that we were not aware of any authority from the Texas Supreme Court expressly permitting an insured to sue its insurer for negligent handling of a claim outside the scope of *Stowers* and were unwilling to expand the scope of an insurer's duties to the insured without express authorization from the Texas Supreme Court. *Id. at 97*. In making this determination, we looked to the Texas Supreme Court's decision in *Maryland Insurance Co. v. Head Indus. Coatings and Serv., Inc. [Head], 938 S.W.2d 27, 28 (Tex. 1996)* (superseded in part by statute), as well as the Fifth Circuit's decision in *Ford v. Cimarron Insurance Co., 230 F.3d 828, 832 (5th Cir. 2000)*.

In *Head*, ***HN5*** the Texas Supreme Court declined to recognize a duty of good faith and **[*98]** fair dealing between an insurer and its insured, stating: "Texas law recognizes only one tort duty in this context, that being the duty stated in [*Stowers*]." *Head, 938 S.W.2d at 28*. The context in *Head* was a claim in the name of an insured against its **[**11]** insurer for failing to defend and pay a third party claim. The Court also noted that "an insured is fully protected against his insurer's refusal to defend or mishandling of a third-party claim by his contractual and *Stowers* rights." *Id. at 28-29*.

Four years after *Duddlesten*, the Texas Supreme Court reinforced the position it took in *Head* in a context where the claims arose out of the insurer's conduct in handling and settling a third party claim rather than a refusal to defend. *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 776 (Tex. 2007)*. In *Mid-Continent*, one insurer asserted contribution and subrogation claims against a co-insurer for costs incurred in settling third party claims against a shared insured. *Id.* Among other arguments, the insurer asserted claims on the basis of its subrogation to the common law rights of the insured. *Id.* Citing *Head*, the Texas Supreme Court observed: "An insurer's common law duty in this third party context is limited to the *Stowers* duty to protect the insured by accepting a reasonable settlement offer within policy limits. *Stowers* is the only common law tort duty in the context of third party insurers responding to settlement **[**12]** demands." *Id.* (internal citation omitted). Because the elements of a *Stowers* claim had not been met, the Court concluded that the insured had no common law rights to which the co-insurer could be subrogated. *Id.*

In *Ford*, an insured sued his insurer for negligently handling his claim after a letter from the insurer stating that the insured was partially negligent in causing the fire was obtained by the fire extinguisher certification company that the insured was suing. *Ford, 230 F.3d at 829-30*. Looking to Texas Supreme Court authority, the Fifth Circuit rejected the insured's claim, observing that ***HN6*** "the *Stowers* duty is the only common law tort duty Texas currently recognizes in third party insurance claims." *Id. at 832*.

Other courts of appeals have taken similar tacks since *Duddlesten*. Our sister court, the Fourteenth Court of Appeals, recently handled an appeal involving facts similar to *Duddlesten*. *See Methodist Hosp. v. Zurich Am. Ins. Co., 329 S.W.3d 510, 2009 WL 3003251, at *3 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)*. *Methodist Hospital* involved an insured, Methodist, who alleged that its insurer, Zurich, had acted negligently in

handling and settling workers' [**13] compensation claims asserted against Methodist. 329 S.W.3d 510, Id. at *1-2. As Allstate has done here, Zurich moved for summary judgment on Methodist's negligence claims on the grounds that Texas law does not recognize a cause of action by an insured for its insurer's negligent handling of a third party claim outside the context of a *Stowers* claim. 329 S.W.3d 510, Id. at *4. The trial court granted summary judgment on Methodist's negligence claims, and the Fourteenth Court of Appeals affirmed. 329 S.W.3d 510, Id. at *6. The court held that, because the relationship between Methodist and Zurich was that of insured/insurer with respect to the third party claims at issue, "Texas law negates Methodist's contention that Zurich owed a duty to perform with care." *Id.*

The Dallas Court of Appeals has reached a consistent result under facts similar to those presented here. Cain v. Safeco Lloyds Inc. Co., 239 S.W.3d 895, 897-98 (Tex. App.—Dallas 2007, no pet.). Faced with negligence claims arising out of the insurer's handling of an automobile [*99] accident suit against its insured, the Dallas Court of Appeals held that ***HN7*** Texas law does not recognize a cause of action for an insurer's negligent defense of a third party claim beyond *Stowers* and declined [**14] to expand the scope of the *Stowers* duty to allow for such a claim. *Id.* (citing *Traver* and *Head*, as well as Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994)).

Taylor relies largely on *Traver* to argue that his claim for negligent defense is actionable, pointing out that: (1) the Court in *Traver* distinguished itself from *Head* on the basis that the claim asserted in *Traver* arose not out of a refusal to defend but allegations of inadequate defense, and (2) the *Traver* court remanded "any remaining claims that [the insured] pled or might plead against [his insurer]." We are unpersuaded by these arguments. While Taylor's allegations of negligent defense can be factually distinguished from the allegations of improper refusal to defend in Head, this same distinction cannot be made with respect to *Mid-Continent, Duddlesten, Methodist*, or *Cain*, each of which involved allegations of negligence in the handling of a third party claim. Mid-Continent, 236 S.W.3d at 776 (insurer allegedly acted negligently in negotiating and refusing to participate in settlement of third party claim); Duddlesten, 110 S.W.3d at 97 (insurer allegedly acted negligently in failing to adequately investigate [**15] and dispute third party claims); Methodist, 329 S.W.3d 510, 2009 WL 3003251, at *3-4 (insurer allegedly acted negligently in handling third party claims); Cain, 239 S.W.3d at 897-98 (insurer allegedly negligent in controlling details of defense of third party claim). Thus, questions potentially left open in Traver have been decided in subsequent decisions.

In accordance with Texas Supreme Court authority, as interpreted by this Court and other Texas courts of appeals addressing the issue, we hold that Texas law does not recognize a negligence cause of action under the circumstances of this case. We affirm the trial court's summary judgment on Taylor's negligence claims against Allstate.

C. Tortious Interference

Taylor asserts that Allstate committed tortious interference with a contractual and fiduciary relationship by:

> tacitly, expressly and through the implied promise of future business, required Mr. Causey — and Mr. Causey assented — to put Allstate's interests ahead of Mr. Taylor's interests by consciously limiting Mr. Taylor's defense solely to engineering a settlement — a settlement in which Mr. Causey, although clearly not ready for trial and the case clearly was not ready for trial, coerced Mr. [**16] Taylor into accepting by telling him that the case would go to trial in a week and that there was a medical lien in excess of $8,000 which the jury would weigh heavily in [the automobile accident victim's family's] favor and against Mr. Taylor. None of these statement (sic) were true.

Allstate's argument for summary judgment broadly states that, under existing precedent, *Stowers* provides the sole tort duty in third party insurance cases. The motion does not distinguish between Taylor's negligence claim and Taylor's tortious interference claim. In his response, Taylor globally contends insurance companies should be subject to the same laws as others, but he does not point us to any specific argument or authority permitting an insured's claim against his insurer for tortious interference with the attorney-client relationship between the insured and legal counsel retained by the insurer.

[*100] 1. Tortious Interference with a Fiduciary Relationship

HN8 We have previously declined to recognize a cause of action for tortious interference with a fiduciary

relationship. *Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 407 (Tex. App.?Houston [1st Dist.] 2005, pet. denied)* (declining to recognize the **[**17]** cause of action in a suit brought by an attorney's former client against both the attorney and the attorney's own legal counsel after the attorney allegedly breached his fiduciary duty to the former client); *see also* Traver, 980 S.W.2d at 632 (Gonzalez, J., joined by Abbott, J., concurring and dissenting) (noting that "[s]ome courts have recognized that the tortious interference cause of action is applicable to the attorney-client relationship" but admitting that "we have not been able to find a reported case reviewing a claim for tortious interference under similar facts[.]"). [4] Based on the arguments presented, we decline to recognize a cause of action for tortious interference with a fiduciary duty in this case.

2. Tortious Interference with a Contractual Relationship

In *Head*, ***HN9*** the Court did not recognize a common law duty of good faith and fair dealing for an insurer **[**18]** in handling third party claims because the insured is fully protected against the insurer's refusal to defend or mishandling of a third party claim through his contractual and *Stowers* rights. *Head, 938 S.W.2d at 28-29 (Tex. 1996)*. Here, Taylor's claims against Allstate arise out of its conduct in handling a third party claim; therefore, under analogous reasoning, Taylor is fully protected by his contractual and *Stowers* rights such that it is unnecessary to recognize cause of action for tortious interference in this context.

The control-based analysis in *Traver* may be read to counsel against a claim for tortious interference in this context. ***HN10*** The Court in *Traver* reasoned that the elevated duties owed by an attorney to a client require the attorney to exercise the kind of unfettered control over his representation of the client that forestalls meaningful outside influence over the representation. *Traver, 980 S.W. 2d at 627*. In the context of handling the client's legal matter, an attorney's contractual relationship with his client is also, necessarily, a fiduciary relationship. Thus, unlike the other party to the contract in a typical tortious interference claim, an attorney is not **[**19]** free to act in his own best interest in performing, or choosing not to perform, his contractual obligations to his client. Here, Taylor's claim for tortious interference with his contractual relationship with Causey is based on the same alleged conduct that is the basis for Taylor's claim for tortious interference with his fiduciary relationship with Causey, and all of this alleged conduct falls within Causey's legal representation of Taylor, over which Causey alone must exercise unfettered control.

We also note that ***HN11*** Texas case law has given the insurer room to protect its legitimate interests in the defense of a third party claim by placing a burden of absolute loyalty to the insured on the attorney, who "must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions." *Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., Inc., 261 S.W.3d 24, 27 (Tex. 2008)*. Recognizing **[*101]** potential liability on the part of the insurer for advocating a defense strategy with which the insured disagrees undermines this balance and, where it exists, the insurer's right of control over the defense. The insurer's right of control is not absolute, **[**20]** and the insured is permitted to refuse the insurer's defense under certain circumstances, such as a serious conflict of interests between the insured and the insurer. *See, e.g., N. Cnty. Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 689 (Tex. 2004)* (holding that the alleged conflict of interest between the insured and the insurer over the best venue for the action did not destroy the insurer's right of control but noting that an insured "may rightfully refuse an inadequate defense and may also refuse any defense conditioned on an unreasonable, extra-contractual demand that threatens the insured's independent legal rights.").

We conclude that, ***HN12*** under current Texas Supreme Court authority, Texas law does not recognize a cause of action by an insured against his insurer for tortious interference with the insured's relationship with his attorney arising out of the insured's handling of the defense of a third party claim under the circumstances alleged by Taylor in this action.

D. Taylor's Contract Claims Against Allstate

Taylor contends that the trial court should not have granted summary judgment on his breach of contract claims on the basis of Allstate's "no cause of action" summary judgment. **[**21]** Taylor points out that the Texas Supreme Court expressly contemplates the

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[4] This court has also declined to recognize a cause of action against an attorney for aiding and abetting a client's breach of fiduciary duty to a third party by conduct within the scope of the attorney's representation of the client. Span Enters. v. Wood, 274 S.W.3d 854, 859 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

existence of some contractual right in the following statement: "The court overlooked the fact that an insured is fully protected against his insurer's refusal to defend or mishandling of a third-party claim by his contractual and *Stowers* rights." *Head, 938 S.W.2d at 28-29*; *see also Traver, 980 S.W.2d at 629* ("We further concluded that rights granted under *Stowers* together with rights under the contract of insurance fully protected the insured against an insurance company's erroneous refusal to defend a third-party liability claim.").

Allstate re-urges its argument that the *Stowers* doctrine represents the insured's exclusive basis for recovery against its insurer with respect to the insurer's handling of third party claims. In the context of Taylor's contract claims, Allstate relies largely on three courts of appeals' opinions: *Cain, Duddlesten* and *Methodist*. *See Duddlesten, 110 S.W.3d at 96-97*; *Methodist, 329 S.W.3d 510, 2009 WL 3003251, at *7*; *Cain, 239 S.W.3d at 897-98*. Allstate asserts that these cases hold, essentially, that the insurer's contractual duty to defend does not impose upon the insurer a duty to defend "with **[**22]** care."

The no-cause-of-action analysis in *Cain, Duddlesten* and *Methodist* dealt with the insured's tort claims. *See Duddlesten, 110 S.W.3d at 96-97*; *Methodist, 329 S.W.3d 510, 2009 WL 3003251, at *7*; *Cain, 239 S.W.3d at 897-98*. ***HN13*** Consistent with the Texas Supreme Court's prior holdings, these courts of appeals cases hold that Texas law does not recognize a claim for negligence based on the insurer's handling of the defense of a third party claim, whether the claims is asserted outside of the *Stowers* doctrine or as an extension of the doctrine. *Duddlesten, 110 S.W.3d at 96-97*; *Methodist, 329 S.W.3d 510, 2009 WL 3003251, at *7*; *Cain, 239 S.W.3d at 897-98*. These cases do not hold that Texas law does not recognize a cause of action for breach of contract between an insured and its insurer. We, therefore, disagree that a breach of contract claim may never lie against an insurer for its conduct in handling the defense of a third party claim against the insured.

[*102] The nature and extent of the duties owed under a contract are determined by the contract's terms. *See Duddlesten, 110 S.W.3d at 89-90* ("We will determine appellee's contractual duties by looking at language of the policy itself."). In fact, in each of the cases relied **[**23]** on by Allstate wherein a breach of contract claim was asserted, the court specifically analyzes the contract in question to determine the nature of the insurer's contractual duties. *See Duddlesten, 110 S.W.3d at 89-90*; *Methodist, 329 S.W.3d 510, 2009 WL 3003251, at *8-10*. Likewise, in *Mid-Continent*, to determine the insured's rights against his insurer to which a co-insurer may be subrogated, the Texas Supreme Court did not deny the existence of a breach of contract clause under Texas law but, rather, reviewed the policy in question to determine what rights were afforded the insured by the contract. *Mid-Continent, 236 S.W.3d at 775-76*. Furthermore, in *Head*, the Texas Supreme Court permitted the insured to recover breach of contract damages against its insurer. *Head, 938 S.W.2d at 29*.

Here, Allstate provided no analysis of the terms of Taylor's insurance contract with Allstate and did not file the contract with its motion for summary judgment. Without such analysis, we conclude that Allstate has not met its burden of proving that it was entitled to summary judgment on Taylor's breach of contract claims as a matter of law. *Cf. Tex. R. Civ. P. 166a(c)* (to prevail on a motion for traditional summary judgment, **[**24]** the movant must demonstrate that no genuine issue of material fact exists and it is entitled to judgment as a matter of law); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999)* (same). We reverse and remand the trial court's judgment with respect to Taylor's breach of contract claims.

E. Taylor's Statutory Claims Against Allstate

Taylor's statutory claims against Allstate include numerous alleged violations of DTPA and Insurance Code. Taylor essentially argues that the trial court erred in granting summary judgment on these claims because the *Stowers* doctrine does not supplant an insured's statutory rights of action. Allstate makes no argument specific to Taylor's statutory claims. To the extent Allstate's broad assertions about the exclusivity of the Stowers claim can be read as an argument that the *Stowers* doctrine necessarily supplants all statutory causes of action an insured might otherwise have against its insurer in the context of defending third party claims, we disagree. ***HN14*** None of the authority presented by Allstate supports the position that Texas law prohibits an insured from bringing otherwise valid statutory claims against an insurer. *E.g.*, **[**25]** *Duddlesten, 110 S.W.3d at 90-94* (reviewing insured's evidence and concluding evidence was insufficient to support insured's claims under DTPA and Insurance Code). Allstate makes no argument as to whether or not

Taylor's DTPA and Insurance Code claims are otherwise invalid under the facts of this case as pled by Taylor.

Because Allstate asserts only a general "no cause of action" basis for summary judgment on Taylor's statutory claims and does not attack any of the elements of the statutory claims Taylor asserts, we conclude that Allstate has not met its burden of proving that it was entitled to summary judgment on Taylor's statutory causes of action as a matter of law. *Cf. Tex. R. Civ. P. 166a(c)*; *KPMG Peat Marwick, 988 S.W.2d at 748*. We reverse and remand the trial court's judgment with respect to Taylor's statutory causes of action.

F. Taylor's Warranty Claims Against Allstate

[*103] Although Taylor's pleadings refer to breach of warranty claims against Allstate, Taylor's appellate briefing does not address those claims. Nor did Taylor provide the trial court with a basis for denying summary judgment on these claims. For this reason, we hold that any error in granting summary judgment on these **[**26]** claims is waived. *Wheeler v. Methodist Hosp., 95 S.W.3d 628, 646 (Tex. App.—Houston [1st Dist.] 2002, no pet.)*. We affirm the trial court's judgment with respect to Taylor's warranty claims.

We therefore sustain in part and overrule in part, Taylor's first issue.

Opportunity to Amend Pleadings

In his second issue, Taylor contends he should be given an opportunity to re-plead his claims. Taylor asserts: "When a 'no cause of action' summary judgment is granted, the Trial Court abuses its discretion by not allowing the nonmovant the opportunity to replead," citing *Perry v. S.N., 973 S.W.2d 301, 303 (Tex. 1998)*.

The record shows that on the same day Allstate filed its motion for summary judgment, Allstate specially excepted to Taylor's allegations against Allstate on the grounds asserted in its motion for summary judgment. We agree with Allstate that, like the plaintiff in *Perry*, Taylor was put on notice of Allstate's summary judgment grounds and given an opportunity to replead before the trial court signed the summary judgment order. *See Perry, 973 S.W.2d at 303*. Taylor did, in fact, amend his pleadings after Allstate filed its special exceptions and motion for summary judgment and before **[**27]** the trial court ruled on the summary judgment motion. We conclude that the trial court properly denied Taylor's motion for leave to amend his pleadings. We overrule Taylor's second issue.

Conclusion

We reverse the portion of the trial court's judgment granting summary judgment on Taylor's breach of contract and statutory causes of action and remand those claims for further proceedings; we affirm the judgment in all other respects.

Elsa Alcala

Justice

Caution Last updated April 03, 2016 11:06:32 pm GMT
Caution When saved to folder April 03, 2016 11:06:32 pm GMT

State Farm Mut. Auto. Ins. Co. v. Traver

Supreme Court of Texas

April 24, 1997, Argued ; December 31, 1998, Delivered

No. 96-1201

Reporter
980 S.W.2d 625; 1998 Tex. LEXIS 158

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER v. RONALD H. TRAVER, EXECUTOR OF THE ESTATE OF MARY E. DAVIDSON, RESPONDENT

Prior History: [**1] ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS.

This Opinion Substituted on Overrule of Rehearing for Withdrawn Opinion of August 25, 1998, Previously Reported at: *1998 Tex. LEXIS 136*.

Disposition: Remand to Trial Court.

Core Terms

insured, insurance company, court of appeals, malpractice, vicariously, cause of action, good faith, vicarious liability, trial court, duties, fair dealing, attorney's, settlement, tortious interference, defense counsel, tripartite, bills, pays, circumstances, allegations, company's, insured's defense, liability insurer, duty to defend, policy limit, attorney-client, violations, defending, remanding, breached

Case Summary

Procedural Posture

Petitioner insurer, on application for a writ of error to the Court of Appeals for the Second District of Texas, sought review of said court's decision which held that it was responsible for the conduct of the attorney it provided to defend respondent insured.

Overview

Respondent insured argued that petitioner insurer's independent attorney committed malpractice in defending a claim against the decedent, resulting in a judgment in excess of policy limits. Petitioner sued respondent for negligence, breach of duty to defend, breach of the Stowers duty, breach of the duty of good faith and fair dealing, and Deceptive Trade Practices Act (DTPA) and the Tex. Ins. Code Ann. violations. The trial court granted summary judgment for petitioner on all causes of action. The court of appeals, holding that an insurer was responsible for the conduct of the attorney it provided to defend an insured, reversed and remanded the malpractice claim, along with the DTPA and Insurance Code claims. On review, the court reversed all claims based on vicarious liability of petitioner and remanded. The court held that an insurer was not vicariously liable for the malpractice of an independent attorney. The court further ruled that, due to respondent's failure to separately apply for writ of error, the appellate court's judgment on the Stowers claim was final. The court remanded to allow respondent to pursue any remaining claims against petitioner.

Outcome

The court reversed and rendered judgment for petitioner insurer on all claims based on vicarious liability, as it held that an insurer was not vicariously liable for the malpractice of an independent attorney. The court also ruled that respondent's failure to separately apply for writ of error made the appellate court's judgment final. The court remanded to allow respondent the opportunity to pursue any remaining claims.

LexisNexis® Headnotes

Business & Corporate Law > Agency Relationships > General Overview

Torts > Vicarious Liability > Agency Relationships > General Overview

HN1 In determining whether a principal is vicariously responsible for the conduct of an agent, the key question is whether the principal has the right to control the agent with respect to the details of that conduct.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

HN2 A liability policy may grant the insurer the right to take complete and exclusive control of the insured's defense.

Legal Ethics > Client Relations > Attorney Duties to Client > Effective Representation

HN3 A defense attorney, as an independent contractor, has discretion regarding the day-to-day details of conducting the defense, and is not subject to the client's control regarding those details.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > Vicarious Liability > Agency Relationships > General Overview

HN4 While the attorney may not act contrary to the client's wishes, the attorney is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to the control of the court, if he is not permitted to act as he thinks best. Moreover, because the lawyer owes unqualified loyalty to the insured, the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. Under these circumstances, the insurer cannot be vicariously responsible for the lawyer's conduct.

Business & Corporate Law > Agency Relationships > Authority to Act > Subagency

Business & Corporate Law > Agency Relationships > Types > Insurance Agents & Insurance Companies

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

HN5 An insurer's duty to its insured extends to the full range of the agency relationship.

Torts > Vicarious Liability > Agency Relationships > General Overview

HN6 A liability insurer is not vicariously responsible for the conduct of an independent attorney it selects to defend an insured.

Judges: CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE ENOCH, JUSTICE SPECTOR, JUSTICE OWEN, JUSTICE BAKER, and JUSTICE HANKINSON join. JUSTICE GONZALEZ filed a concurring and dissenting opinion, in which JUSTICE ABBOTT joins. JUSTICE GONZALEZ, concurring and dissenting, joined by JUSTICE ABBOTT.

Opinion by: THOMAS R. PHILLIPS

Opinion

[*626] We withdraw our opinion of August 25, 1998, and substitute the following in its place. We overrule the motions for rehearing of State Farm and Ronald Traver. Ronald Traver, an estate executor, argues that the attorney provided by decedent Mary Davidson's liability insurer, State Farm, committed malpractice in defending a personal injury claim against Davidson, resulting in a judgment in excess of policy limits. Traver sued State Farm for negligence, breach of its duty to defend, breach of the *Stowers* duty, [1] breach of the duty of good faith and fair dealing, and violations of the Deceptive **[**2]** Trade Practices Act and Insurance Code. The trial court granted summary judgment for State Farm on all causes of action. The court of appeals, holding that an insurer is responsible for the conduct of the attorney it provides to defend an insured, reversed and remanded the malpractice claim, along with the DTPA and Insurance Code claims relating to the malpractice, for trial. *Traver v. State Farm Mut. Auto Ins., Co., 930 S.W.2d 862*. The court of appeals further held, however, that Traver could not recover for breach of the *Stowers* duty, for breach of the duty of good faith and fair dealing, or for any claim under the DTPA or Insurance Code relating to those duties. Because we hold that an insurer is not vicariously liable for the malpractice of an independent attorney it selects to defend an insured, we reverse the judgment of the court of appeals and render judgment for State Farm on all claims based on vicarious liability. Further, because Traver has not separately applied for writ of error, the court of appeals'

[1] *See G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544* (Tex. Comm. App. 1929, holding approved) (recognizing cause of action by policyholder against liability insurer for negligently refusing a settlement offer within policy limits).

judgment on the *Stowers* claim and good faith claim (and related statutory claims) is final. We remand the cause to the trial court to allow Traver to pursue any remaining claims that he pled or might plead **[**3]** against State Farm.

I

In January 1989, Mary Davidson collided with Calvin Klause in an automobile accident. Mary Jordan, a passenger in Klause's car, was severely injured. By coincidence, both Davidson and Klause were insured by State Farm Mutual Automobile Insurance Company. Each had an automobile liability policy with a per-person liability limit of $ 25,000.

Jordan sued both drivers in one action. State Farm retained separate attorneys to represent Davidson and Klause. After settlement attempts failed, the case went to trial. The jury found Davidson 100 percent responsible for the accident. The trial court rendered judgment on the verdict, awarding Jordan $ 375,000, plus about $ 100,000 in prejudgment interest, against Davidson. The record does not **[**4]** disclose whether this judgment was appealed or satisfied.

Davidson died shortly after trial. Her executor, Ronald Traver, brought this present action against State Farm. Traver alleged that State Farm was negligent, breached its duty to defend Davidson in the Jordan lawsuit, breached its *Stowers* duty, breached a duty of good faith and fair dealing, and violated the Deceptive Trade Practices Act and article 21.21 of the Insurance Code. Traver specifically alleged that Charles Bradshaw, the attorney retained by State Farm to represent Davidson in the Jordan lawsuit, committed malpractice by failing to attend several key depositions and by failing to offer a meaningful defense at trial. Traver further alleged that State Farm deliberately orchestrated this malpractice to avoid potential *Stowers* liability to Klause arising from the settlement negotiations. [2] Thus, Traver alleges, **[*627]** State Farm acted in its own self-interest by shifting responsibility from Klause to Davidson. Traver also sued Bradshaw, but the attorney filed Chapter 7 bankruptcy proceedings shortly thereafter, and the trial court severed the claims against him.

[5]** The trial court rendered summary judgment for State Farm on all claims. The court of appeals reversed in part. It held that, under the language of Ranger County Mutual Insurance Co. v. Guin, 723 S.W.2d 656, 659 (Tex. 1987), State Farm was responsible for any injury caused by the malpractice of the attorney it retained for Davidson. Traver, 930 S.W.2d at 871. Because State Farm had not negated the existence of such malpractice, the court of appeals remanded Traver's negligence claim for trial, along with any claims under the DTPA or Insurance Code relating to this negligence. 930 S.W.2d at 871-72. The court of appeals further held, however, that State Farm had conclusively negated Traver's *Stowers* claim, 930 S.W.2d at 868, and that an insurer owes no duty of good faith to its insured in the context of a third-party liability claim. 930 S.W.2d at 870. *See* Maryland Ins. Co. v. Head Indus. Coatings & Servs., 938 S.W.2d 27, 28 (Tex. 1996). [3]

[6] II**

Davidson's policy with State Farm required State Farm either to defend or settle covered third-party liability claims. The policy also required Davidson to "cooperate with [State Farm] in the investigation, settlement or defense of any claim or suit." Under this contractual obligation to defend, State Farm selected Bradshaw, an independent attorney who was not a State Farm employee, to represent Davidson against Jordan's claims, and State Farm paid Bradshaw's bills. Traver argues that, under these circumstances, State Farm is vicariously responsible for the attorney's conduct. We disagree.

HN1 In determining whether a principal is vicariously responsible for the conduct of an agent, the key question is whether the principal has the right to control the agent with respect to the details of that conduct. *See* Newspapers, Inc. v. Love, 380 S.W.2d 582, 590 (Tex. 1964). We have recognized that ***HN2*** a liability policy may grant the insurer the right to take "complete and

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[2] Jordan initially made a joint settlement demand to both defendants for their combined policy liability limits ($ 50,000), plus Klause's underinsured motorist coverage ($ 20,000). State Farm refused, offering instead Davidson's policy liability limit ($ 25,000), Klause's underinsured motorist coverage ($ 20,000), but only $ 5,000 of Klause's liability coverage. Jordan refused this counteroffer. Although State Farm later increased its offer to include Klause's full liability coverage (thus meeting Jordan's original demand), Jordan also refused this offer.

[3] Although the court of appeals' opinion predated our decision in *Head*, the court of appeals anticipated this result based on the Court's writings in Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312 (Tex. 1994).

exclusive control" of the insured's defense. G.A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved); *see also* Continental Cas. Co. v. Huizar, 740 [**7] S.W.2d 429, 434 (Tex. 1987); Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 269 (1994) ("Because of its financial interest in the effective resolution of a claim, the insurer has a contractual right to control its insured's defense."); Sweeney, *Tank v. State Farm: Conducting a Reservation of Rights Defense in Washington*, 11 U. PUGET SOUND L. REV. 139, 163 (1987) ("When defending unconditionally, the insurer has complete control of the defense."). Here, the standard form Texas Personal Auto Policy provides that the insurer "will settle or defend, as [it] considers appropriate, any [covered] claim or suit . . ." The insurer's control of the insured's defense under this policy thus includes authority to accept or reject settlement offers and, where no conflict of interest exists, to make other decisions that would normally be vested in the client, here the insured. However, even assuming that the insurer possesses a level of control comparable to that of a client, this does not meet the requisite for vicarious liability.

HN3 A defense attorney, as an independent contractor, has discretion [**8] regarding the day-to-day details of conducting the defense, and is not subject to the client's control regarding those details. *See* *RESTATEMENT (SECOND) OF AGENCY, § 385, cmt. a*. ***HN4*** While the attorney may not act contrary to the client's wishes, the attorney "is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to [*628] the control of the court, if he is not permitted to act as he thinks best." *Id.* Moreover, because the lawyer owes unqualified loyalty to the insured, *see* Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973), the lawyer must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. Under these circumstances, the insurer cannot be vicariously responsible for the lawyer's conduct. *See* Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co., 963 F. Supp. 452, 454-55 (M.D. Pa. 1997) ("The attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability."); Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. [**9] 511, 526 (Cal. Ct. App. 1973) ("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."); Aetna Cas. & Sur. Co. v. Protective Nat'l Ins. Co., 631 So. 2d 305, 306-07 (Fla. Ct. App. 1993) (adopting *Merritt's* reasoning); Feliberty v. Damon, 72 N.Y.2d 112, 527 N.E.2d 261, 265, 531 N.Y.S.2d 778 (N.Y. 1988) ("The insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client."); Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367, 372 (N.C. Ct. App. 1988), *aff'd*, 326 N.C. 387, 390 S.E.2d 150 (1990); *see also* 1 WINDT, INSURANCE CLAIMS AND DISPUTES § 4.40, at 275 (3d ed. 1995) ("There is . . . no theoretical justification for imputing a defense counsel's negligence to the insurer."); Sweeney, 11 U. PUGET SOUND L. REV. at 163 ("The client, as principal, should turn to his attorney, as agent, for relief if the attorney acts improperly, since the attorney is supposed [**10] to be independent of the insurer's influence and must act as though the policyholder is paying the bills."). [4]

Traver, like the court of appeals, relies on Ranger County Mutual Insurance Company v. Guin, 723 S.W.2d 656 (Tex. 1987), in asserting liability against the insurer. We stated in *Ranger* that ***HN5*** an insurer's duty to its insured "extends to the full range of the agency relationship." *Id. at 659*. We upheld a jury instruction stating that the

[attorney retained by the insurer] is deemed, under the law, to be the sub-agent of the [**11] insurance company. As such, the insurance company is as responsible to the insured for the conduct of the sub-agent with reference to the litigation as the insurance company is for its own conduct. Therefore, the insurance company is liable to the insured for damages caused to the insured, if any, by the negligence, if any, of the sub-agent in conducting the affairs of the insured with reference to the litigation.

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[4] *But see* Boyd Bros. Transp. Co. v. Fireman's Fund Ins. Cos., 729 F.2d 1407, 1409-10 (11th Cir. 1984); Smoot v. State Farm Mut. Auto. Ins. Co., 299 F.2d 525, 530 (5th Cir. 1962); Pacific Employers Ins. Co. v. P.B. Hoidale Co., 789 F. Supp. 1117, 1122-23 (D. Kan. 1992); Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 294 (Alaska 1980); Stumpf v. Continental Cas. Co., 102 Ore. App. 302, 794 P.2d 1228, 1231-32 (Or. Ct. App. 1990).

Id. at 658. If this language were the holding of *Ranger*, it would support Traver's position. As we noted in *American Physicians Insurance Exchange v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994)*, however, the only negligence claim at issue in *Ranger* was a *Stowers* claim for negligent failure to settle. Indeed, the Court expressly recognized in *Ranger* that there was "no contention that Ranger was negligent in investigation or trial of the [underlying personal injury suit]." *Ranger, 723 S.W.2d at 659*. We concluded in *Garcia* that *Ranger*'s broad language about the scope of the insurer's responsibilities was *dicta*. *See Garcia, 876 S.W.2d at 849*. Although reaffirming the *Stowers* duty, we emphasized that *Ranger* was a *Stowers* **[**12]** case only, and that "evidence concerning claims investigation, trial defense, and conduct during settlement negotiations is necessarily subsidiary to the [*Stowers* issue]." *Id*. We thus did not hold in *Ranger* that an insurer is vicariously responsible for the conduct of the attorney it selects to defend an insured.

In sum, we hold that ***HN6*** a liability insurer is not vicariously responsible for the conduct of an independent attorney it selects to defend an insured. Traver thus cannot recover **[*629]** against State Farm on any common law or statutory claim based solely on Bradshaw's conduct.

III

We disagree, however, with State Farm's contention that the court of appeals limited its remand to claims based on vicarious liability and that Traver's failure to bring a separate application waived any claims based on State Farm's own misconduct. We further reject State Farm's contention that our decision in *Maryland Insurance Company v. Head Industrial Coatings & Services, Inc., 938 S.W.2d 27 (Tex. 1996)* necessarily limits Traver's damages to the policy limits and defense costs.

In *Head*, we said it was unnecessary to recognize a duty of good faith and fair dealing in the **[**13]** context of third-party liability insurance because the duty of reasonable care adopted in *Stowers* already offered greater protection for the insured. *Head, 938 S.W.2d at 28-29*; *see Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 319 (Tex. 1994)*(Cornyn, J. concurring). We further concluded that rights granted under *Stowers* together with rights under the contract of insurance fully protected the insured against an insurance company's erroneous refusal to defend a third-party liability claim. *Head, 938 S.W.2d at 29*. The factual circumstances alleged in the present case are quite different from those in *Head*, however. Here, the plaintiff's allegations are not that the insurer merely refused a defense, but that the insurer consciously undermined the insured's defense.

* * * * *

We render judgment for State Farm on all claims based on vicarious liability. Because Traver has not challenged the court of appeals' judgment on the *Stowers* duty, the duty of good faith and fair dealing, or any statutory claim relating to those duties the court of appeals' judgment regarding those claims is final. We remand the cause to the trial court to allow Traver to pursue **[**14]** any remaining claims that he pled or might plead against State Farm.

Thomas R. Phillips

Chief Justice

Opinion Delivered: December 31, 1998

Concur by: RAUL A. GONZALEZ (In Part)

Dissent by: RAUL A. GONZALEZ (In Part)

Dissent

The broad issue in this case is when, if ever, is an insurance company responsible for the malpractice of an attorney the company hires to defend its insured. The Court holds that an insurance company has no vicarious responsibility, and remands this cause to the trial court without indicating what other theories of liability might be viable. State Farm contends it owes no duties to its insured other than *Stowers* [1] duties, and therefore cannot be liable under Traver's DTPA or Insurance Code causes of action. In my opinion, an insurance company may be **directly** liable for its own conduct if it causes harm in the course of defending the insured, whether the theory is based on statute or applicable common law. Furthermore, there may be exceptional situations in which insurance companies should be held **vicariously** liable even though they did

[1] *See G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544, 546-47* (Tex. Comm. App. 1929, holding approved) (recognizing a cause of action by insured for insurer's negligent rejection of a settlement offer within policy limits).

not participate directly in the malpractice. Finally, I note that the rules we developed to deal with the ethical **[**15]** problems and economic tensions inherent in the tripartite relationship between insurer, insured and insurance defense counsel do not fit today's market driven reality. One way to avoid the problems presented in this case is to allow third parties to bring a direct cause of action against insurance companies. I will address these issues in turn.

I

In order to put the issues before us in context, we need to briefly review the underlying facts that gave rise to this lawsuit. Mary Davidson was involved in a two-car, head-on collision with a car driven by Calvin Klause. Mary Jordan, a passenger in Klause's car, was severely injured. As it happened, both Davidson and Klause were **[*630]** insured by State Farm and there were differences in coverage on their respective policies. **[**16]** Jordan sued both drivers in the same lawsuit. The jury found that Davidson was solely responsible for the accident and Jordan obtained a judgment against Davidson. Davidson died after the trial and her executor, Ronald Traver, brought the present suit against State Farm alleging breach of its duty to defend, negligence in the handling of the claim against Davidson, breach of duty of good faith and fair dealing, and DTPA and Insurance Code violations. The trial court granted summary judgment for State Farm, and the court of appeals reversed and remanded. 930 S.W.2d 862.

II

Traver's theory is that State Farm deliberately caused malpractice in the defense of one of its insureds to protect itself from excess liability of one of its insureds involved in the same litigation. Traver contends that State Farm orchestrated a vigorous defense of the insured with *Stowers* exposure and an inept defense of its other insured. The pleadings are broad enough to include vicarious and direct liability theories. Among the claims the Court remands are Traver's allegations that State Farm's conduct violates the DTPA and the Insurance Code. From the very nature of the tripartite relationship **[**17]** between the insurer, the insured, and the insurance defense counsel, an insurer, as the party that retains counsel for the insured and pays the lawyer's bills, has both the opportunity and the motive to exert improper influence over that attorney. *See, e.g.*, Mattias, et al., *Tripartite Relationships and Reservation of Rights Letters: The Need for Independent Counsel*, 516 PLI/Lit 253 (1994) ("The relationship between counsel and insurer often is supported not only by defense counsel's strong financial interest in pleasing the insurer but also is 'strengthened by real friendships.'") (quoting 2 MALLEN & SMITH, LEGAL MALPRACTICE § 23.3 at 364 (3rd ed. 1989)). If the insurer uses its influence with the retained attorney to the detriment of the insured, the insurer's liability to the insured for its own conduct is direct.

As previously noted, Traver pled that State Farm breached a common law duty of good faith and violated the DTPA and Insurance Code. While Traver also pled in the trial court that State Farm breached its duty to defend Davidson, it is not clear whether he intended to assert a breach of contract action in addition to his tort and statutory claims. In any event, **[**18]** the court of appeals did not remand a breach of contract action, and Traver does not complain about the court of appeals' judgment. Under these circumstances, there is no breach of contract action still pending. However, there may be circumstances wherein an insurer would breach its contractual duty to defend by retaining incompetent counsel or failing to adequately fund the defense.

III

State Farm asserts two procedural obstacles to a direct liability claim. State Farm argues that Traver did not plead any direct misconduct by State Farm, only vicarious responsibility, and that the court of appeals' judgment remanding the case only included vicarious liability. I disagree on both counts. First, Traver has consistently claimed that State Farm directly engaged in harmful conduct. Traver contends in this Court that "State Farm's counsel's wrongful actions were in large part directed by State Farm to save it from certain exposure to Klause for significant damages under *Stowers*." Likewise, Traver alleged the following in the trial court:

In order to reduce Defendant's own exposure in [the Jordan suit], Defendant failed to defend Mary E. Davidson during the pretrial and trial, **[**19]** while vigorously defending its other insured, Calvin C. Klause, thus causing the judgment in the trial to be entered solely against Mary E. Davidson. This was in Defendant State Farm's selfish interest and not in the interest of Ms. Davidson. Previously State Farm had wrongfully failed to pay to Mary Jordan within a reasonable time, after Ms. Jordan had so demanded, the policy limits of Mr. Klause's policy. Such action subjected State Farm

to significant exposure under the doctrine commonly referred to in Texas as the Stowers Doctrine.. . . In its **[*631]** handling of Mary Jordan's claim against Mary Davidson, and in its handling of Mary Davidson's defense in the suit filed by Mary Jordan, Defendant and Defendant's agents, acting within the scope of their authority, engaged in an unconscionable course of action by failing to protect Mary Davidson's interest for its own self interest.

Thus, Traver has contended all along that State Farm itself committed misconduct by orchestrating the malpractice for its own financial benefit.

Second, I disagree with State Farm's argument that the court of appeals' judgment remanded the DTPA and Insurance Code claims as *vicarious liability* claims only, **[**20]** and therefore Traver was required to file his own application for writ of error in this Court to preserve any claim for direct liability. *See Archuleta v. International Ins. Co., 667 S.W.2d 120, 123 (Tex. 1984)* (holding that a party who seeks a different and more favorable judgment in this Court than that rendered by the court of appeals must file his or her own application for writ of error). Our holding in *Archuleta* does not require this result in this case. Even if State Farm is correct about the scope of the court of appeals' judgment, this Court's judgment remanding the DTPA and Insurance Code claims based on State Farm's own conduct is not more favorable to Traver than the court of appeals' judgment allowing Traver to establish liability vicariously.

Regarding the merits, State Farm does not argue that Traver's allegations of interference, if true, do not constitute a violation of the DTPA or the Insurance Code, or that State Farm factually negated Traver's allegations. Rather, State Farm argues that, under *Maryland Ins. Co. v. Head Indus. Coatings and Services, Inc., 938 S.W.2d 27 (Tex. 1997)*, a liability insurer owes its insured no duties other than the *Stowers* **[**21]** duties, including the duties otherwise imposed by the DTPA and the Insurance Code. I disagree.

The issue in *Head* was whether a liability insurer owed its insured a common law duty of good faith and fair dealing to investigate and defend claims by a third party against its insured. While we said that "Texas law recognizes only one tort duty in this context, that being the [*Stowers* duty]," *938 S.W.2d at 28*, we did not purport to strip liability insureds of their statutory protections under the DTPA and Insurance Code. We expressly adopted the reasoning of the concurring opinion in *Texas Farmers Insurance Co. v. Soriano, 881 S.W.2d 312, 318 (Tex. 1994)* (Cornyn, J. concurring), *see 938 S.W.2d at 28*, where the concurring justices concluded that "the *Stowers* doctrine is the exclusive *common-law* remedy available to an insured *in this situation*." *881 S.W.2d at 319* (emphasis added). Although in *Head* we vacated the treble damages awarded by the court of appeals under the Insurance Code, *see 938 S.W.2d at 29*, the court of appeals premised this statutory recovery on breach of the common law duty of good faith and fair dealing, as incorporated into the Insurance **[**22]** Code under Board Order 18663. *See Maryland Ins. Co. v. Head Indus. Coatings Servs., 906 S.W.2d 218, 225-27* (Tex. App.--Texarkana 1995), *reversed*, *938 S.W.2d 27 (Tex. 1996)*. I do not read the opinion in *Head* as eliminating all common-law duties between the insurer and the insured. Our statement that "Texas law recognizes only one tort duty *in this context*, that being the duty in Stowers. . . ." *Head, 938 S.W.2d at 28*, was in the context of duties arising out of the relationship created by the contract of insurance. In my opinion, this statement does not apply to duties that do not depend on the existence of a special relationship. In particular, I do not believe that the per curiam opinion in *Head* was meant to eliminate statutory causes of action such as the DTPA and the Insurance Code. Thus, our holding that the insured had no common law cause of action necessarily negated the Insurance Code claim. Here, on the other hand, Traver has pled direct violations of the DTPA and the Insurance Code.

IV

The DTPA protects "consumers." *See TEX. BUS. & COM. CODE § 17.50*. Subject to the limitations of *section 17.45(4) of the Business and Commerce Code*, the purchaser **[**23]** of an insurance policy is a consumer. *See id. § 17.50(a)(4)* (allowing DTPA cause of action for violations of *Article 21.21 of the Insurance* **[*632]** *Code*); *Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 132 (Tex. 1988)* (recognizing DTPA cause of action by insured). *Article 21.21 of the Insurance Code* allows a private cause of action by "any person who has sustained actual damages caused by another's engaging in [certain prohibited acts and practices.]" TEX. INS. CODE art. 21.21, § 16(a). While this language does not extend to third parties suing an insured, *see Allstate Ins. Co. v. Watson, 876 S.W.2d 145, 149-50 (Tex. 1994)*, Davidson, the party on whose behalf Traver seeks relief, was State Farm's insured. Both the DTPA and Article 21.21 are to be liberally

construed, *see TEX. BUS. & COM. CODE § 17.44(a)*; TEX. INS. CODE art. 21.21, § 1(b), and there is no indication under either statute that liability insureds are excluded from protection.

I do not express an opinion about whether Traver has stated a claim under any particular provision of the DTPA or Insurance Code. Neither party has briefed or argued this issue. As noted, however, State Farm has offered no **[**24]** meritorious challenge to the court of appeals' judgment remanding these claims to the extent they are based on State Farm's own misconduct.

V

I also believe that common-law causes of action that do not depend on a special relationship survive the per curiam opinion in *Head*. For example, tortious interference with contract or business relations is a violation of a duty owed regardless of the relationship between the parties. Allegations that an insurance company directly exerted improper influence over the insured's attorney may state a claim of tortious interference with the attorney-client relationship. Some courts have recognized that the tortious interference cause of action is applicable to the attorney-client relationship. *See* Annotation, *Liability in Tort for Interference with Attorney-Client Relationship*, 90 A.L.R.4th 621, 632 (1991 and Supp. 1997). *See also Stuessy v. Byrd, Davis & Eisenberg, 381 S.W.2d 126, 129* (Tex. Civ. App.--Austin 1964, no writ). Although we have not been able to find a reported case reviewing a claim for tortious interference under similar facts, the facts of this case may lend themselves to such an allegation. In fact, State Farm **[**25]** admitted to the possibility in its briefing before this Court: "[a] cognizable claim might exist against an insurer . . . for wrongfully interfering in defense counsel's relationship with the insured."

There are four elements to a tortious interference claim: 1) an attorney-client relationship existed; 2) the interference was willful and intentional; 3) proximate cause; and 4) actual damage. *Cf. ACS Investors, Inc. v. McLaughlin, 943 S.W.2d 426, 430 (Tex. 1997)*; *Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 210 (Tex. 1996)*. In most insurer-insured disputes, it would not be appropriate to attempt to prove that the insurer has willfully injured its insured, since this would be akin to the insurer putting a gun to its own head. Clearly, such a claim may not be asserted for mere incompetence on the part of the attorney selected or for a miserly defense. However, when there is a conflict between the interests of the insured and the insurer, as is alleged in this case, in which the insurer has a financial incentive to see to it that the insured fares poorly in the litigation, a claim for tortious interference may arise.

VI

Although, as I have said, an insurance company's **[**26]** own actions harming the insured are actionable, the same harm may be caused by more subtle improper influences over the retained attorney. The Court's holding that an insurance company has no responsibility for the attorneys it selects to represent the insured is overly broad because it is based on an idyllic and perhaps naive view of the current status of insurance defense practice. The Court reasons that an insurance company has no vicarious responsibility because it has no legal right to control the attorney's conduct. However, in many cases this professional paradigm does not fit today's world. This rule is appropriate when an insurance company maintains an arms-length relationship with the attorney it chooses to represent a policy holder. But it ignores the last decade's evolving trends in modern insurance defense practices.

[*633] The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle. There is a lot of wisdom in the old proverb: **[**27]** He who pays the piper calls the tune. The lawyer wants to provide a competent defense, yet knows who pays the bills and who is most likely to send new business. This so-called tripartite relationship has been well documented as a source of unending ethical, legal, and economic tension. *See, e.g.*, Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH. L. REV. 139 (1996); Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer and Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265 (1994); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994).

In 1973, we clearly define the tripartite relationships in terms of professional ethics. *See Employers Cas. Co. v. Tilley, 496 S.W.2d 552, 558-59 (Tex. 1973)*. Under *Tilley*, the lawyer owes unqualified loyalty to the policy

holder. *Id. at 558*. Defining the attorney's allegiance was designed to make everyone's role in the relationship clear. This rule has existed for twenty-five years and serves well in perhaps a majority of cases. **[**28]** It allows the attorney to provide a single-minded defense to the insured. That was my view when I wrote in *Ranger County Mutual Insurance Co. v. Guin, 723 S.W.2d 656, 660-63 (Tex. 1987)* (Gonzalez, J., dissenting). In *Ranger,* I argued that insurance companies should not have the full spectrum of vicarious liability that goes with a true principal-agent relationship. *Id. at 663*. I adhere to that view today, but it may be necessary to modify the rule in *Tilley* to account for current trends in insurance defense law practice.

Since *Tilley* and *Ranger*, in part because of tort reform of the 1990s, the business of insurance and the practice of insurance defense have undergone revolutionary changes. In the last two decades, the insurance industry has seen fierce competition, a changing investment climate, and constant pressures to contain costs. To weather changing market forces and dramatic shake-outs within the industry, companies have changed the way they operate. I am concerned that these changes have weakened the protection *Tilley* envisioned.

For example, one trend that has serious ethical implications is the so-called "captive law firm." A captive law firm **[**29]** may take any number of forms, but the key feature is its almost total dependence on a limited number of clients. At one extreme is the firm that is little more than a front for a single insurance company. It may have all the appearances of a regular firm. However, some if not all of the office personnel, including the attorneys, are the insurance company's salaried employees. The sole reason for a captive law firm's existence is to provide legal services at a low cost to the insurance company. I venture to say that in most cases, the policy holder is not aware of this arrangement. As we previously discussed, in these situations, it is probably impossible for an attorney to provide the insured the unqualified loyalty *Tilley* requires. You bite the hand that feeds you at your own peril. As the Supreme Court of Michigan noted, defense counsel faces

> a great temptation to favor [the insurance company] who pays the bills and will send further business, and where long-standing personal relations may exist . . . . An attorney employed by an insurer to represent an insured may be confronted with serious conflicts of interest issues almost from the outset of the relationship. **[**30]** *Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 475 N.W.2d 294, 297, n.6 (Mich. 1991)* (citations omitted).

Captive law firms are not the only setting in which the insurance company's influence over the attorney can compromise or at least call into question the attorney's professional responsibilities to the client, the insured. Tort reform has perceptibly reduced the amount of insurance defense work to go around. Competition for insurance work **[*634]** weakens the defense lawyer's hand while it allows insurance companies to demand ever-stringent cost containment measures. In some insurance companies a case administrator, who may not even be a lawyer, decides legal strategy and tactics in the policy holder's defense. Some insurance companies impose billing restrictions and subject the lawyers to billing audits. These audits threaten the attorney-client privilege. Some companies even dictate whether an attorney or a paralegal does some of the work.

Cost containment is not bad in itself. However, measures designed to produce a no-frills defense can easily result in only a token defense. I am concerned that defense lawyers may be reluctant to resist cost-cutting measures that detrimentally **[**31]** affect the quality of the insured's defense. There is a real risk that these efforts at cost containment compromise a lawyer's autonomy and independent judgment on the best means for defending an insured.

In short, the market-based, economic paradigm of today's world makes the rules our Court and the Legislature have developed in a non-market paradigm suspect, ineffective, and obsolete. The lawyers are under tremendous pressure trying to serve two masters. As one court observed:

> We cannot escape the conclusion that it is impossible for one attorney to adequately and fairly represent two parties in litigation in the face of the real conflict of interest that existed here. Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interest of his real client--the one who is paying his fee and from whom he hopes to receive future business--the insurance company.

Although it has perhaps become trite, the biblical injunction found in Matthew 6:24 retains a particular relevancy in circumstances such as these, "No man can serve two masters. . . ."

United States Fidelity [**32] & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978).

Whether insureds are getting the value and the level of representation they are paying for deserves serious, thorough study. I do not mean to imply that all insureds are entitled to a "Cadillac" defense when all they paid for is a "Chevrolet." My concern, however, is that because of recent market changes in insurance defense practice, some insureds who have paid for a "Chevrolet" defense are getting a "Yugo" defense. It may be that the Legislature is best suited to resolve these issues. Because of the nature of appellate review, our Court has limited means to determine how pervasive the problem might be. A problem can fester for years before we see it in the cases that reach our Court through the appellate process. The Legislature, however, has the power to hold hearings and determine the scope of the problem. I commend this important issue to the next session of the Legislature.

VII

If I am wrong, and a cause of action for vicarious liability is not viable, then a departure from the long held doctrine opposing direct actions against the insurance company would remove the very conflict of interest [**33] that led to this dispute in the first place. In states that have adopted this system, the injured party sues the insurance company directly, bypassing the insured. Under this alternative, the attorney would clearly represent only one party, the insurance company. Other states have followed this approach for decades without harm to the fairness of their judicial system. *See* Southern Farm Bureau Cas. Ins. Co. v. Robinson, 236 Ark. 268, 365 S.W.2d 454, 457 (Ark. 1963); Written v. Travelers Indem. Co., 304 So. 2d 715, 718 (La. Ct. App. 1974); Bossert v. Douglas, 557 P.2d 1164, 1167 (Okla. Ct. App. 1976); State Auto Property and Cas. Ins. Co. v. Gibbs, 314 S.C. 345, 444 S.E.2d 504, 506 (S.C. 1994); Storm v. Nationwide Mut. Ins. Co., 199 Va. 130, 97 S.E.2d 759, 762 (Va. 1957); Rauch v. American Family Ins. Co., 115 Wis. 2d 257, 340 N.W.2d 478, 482 (Wis. 1983) (all acknowledging that an injured third party's rights become vested at the time of the injury).

In addition, many states, including Texas, have long since abandoned the strict privity requirement and adopted some form of direct action against an insurance company, usually after a judgment has been rendered [**34] against [*635] the insured. *See* State Farm County Mut. Ins. Co. of Tex., 768 S.W.2d 722, 723 (Tex. 1989); Great Am. Ins. Co. v. Murray, 437 S.W.2d 264, 265 (Tex. 1969) (allowing third party beneficiaries of a liability insurance party to enforce the policy directly against the insurer after securing a judgment or agreement against the insured). It is not a great step from the abandonment of the privity requirement to adoption of direct action, and it would solve the problems at hand.

VIII

I would hold that Traver is not precluded from pursuing his DTPA and Insurance Code claims against State Farm and give him an opportunity to try to make a case for vicarious liability against State Farm. Also in a proper case, breach of contract and tortious interference with a contract may be viable causes of action to redress the harm caused in these types of cases. I commend these issues to the legislature for their consideration.

Raul A. Gonzalez

Justice

OPINION DELIVERED: December 31, 1998

Caution Last updated April 03, 2016 11:07:14 pm GMT
Caution When saved to folder April 03, 2016 11:07:14 pm GMT

Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.

Supreme Judicial Court of Massachusetts

January 6, 2003, Argued ; May 16, 2003, Decided

SJC-08815

Reporter
439 Mass. 387; 788 N.E.2d 522; 2003 Mass. LEXIS 428

HERBERT A. SULLIVAN, INC., & others [1] vs. UTICA MUTUAL INSURANCE COMPANY.

Subsequent History: [***1] As Corrected July 10, 2003.

Prior History: Suffolk.
Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 1998 Mass. Super. LEXIS 147 (Mass. Super. Ct., 1998)

Disposition: Judgment affirmed in all respects except as pertains to the legal fees component of SRMG's damages. We remand that matter to the Superior Court for further proceedings in accordance with this opinion.

Core Terms

insured, discovery, amended complaint, errors and omissions, lost profits, coverage, damages, summary judgment, legal fees, hired, insurance company, expenses, handling, asserts, reservation of rights, expert testimony, obligations, duty to defend, trial judge, allegations, withdrawal, attorney's fees, customers, contends, premiums, vicariously liable, cause of action, materials, parties, summary judgment motion

Case Summary

Procedural Posture

Both plaintiff insured and defendant insurer appealed a judgment of the Superior Court Department, Suffolk (Massachusetts), on a jury verdict in favor of the insured on its claims of negligent provision of a defense to a third-party claim. The insured argued that the trial court should not have granted summary judgment to the insurer on the insured's other claims and the insured argued it was entitled to judgment notwithstanding the verdict.

Overview

When the insured was sued by one of its customers, it requested that its liability insurer provide a defense, which it did, under a reservation of rights, since the insurance policy covered negligence claims only. The insured was dissatisfied with the counsel provided, and that counsel was ultimately replaced. When the third party amended its complaint to focus on overcharges and dropped all negligence claims, the insurer stopped providing any defense. The high court held that it was entitled to stop, because at that point all the claims against the insured fell outside the policy, but that the insurer, while not vicariously liable for the poor performance of the first defense counsel, was liable for its own negligence in providing a defense during the period in which it was obliged to do so. The damages recoverable for negligence during the period in which the insurer was obliged to provide a defense included lost profits, if provable, and attorneys' fees, but only those fees incurred in the insured's efforts to protect itself against the effects of the insurer's negligence in meeting its defense obligations, while the third party's claim still contained a negligence count.

Outcome

The court affirmed the judgment in nearly all respects, but reversed the award of attorneys' fees and remanded for a determination as to which fees were incurred as a result of the compensable portion of the insured's negligence.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

[1] J. Herbert Sullivan Insurance Agency, Inc.; Petroleum Insurance Agency, Inc.; Cost Control Corporation; and John Herbert Sullivan.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1 Pursuant to Mass. R. Civ. P. 56(c), summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN2 On review of a grant of summary judgment, the Supreme Judicial Court of Massachusetts examines the record in the light most favorable to the party opposing summary judgment.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Labor & Employment Law > Employer Liability > Third Party Insurers

HN3 The interpretation of an insurance contract and the application of policy language to known facts present questions of law for the judge to decide. On review of a summary judgment in such a matter, the critical issue is whether the summary judgment record alleges a liability arising on the face of the complaint and policy.

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Insurance Law > ... > Policy Interpretation > Reasonable Expectations > General Overview

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

HN4 The question of the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions: if the allegations of the complaint are reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense. The scope of an insurer's duty to defend is based on the facts alleged in the complaint and those facts that are known to the insurer. Specifically, the process is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy. The duty to defend is broader than the duty to indemnify. The underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. However, when the allegations in the underlying complaint lie expressly outside the policy coverage and its purpose, the insurer is relieved of the duty to investigate or defend the claimant.

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Torts > Negligence > General Overview

HN5 When a party binds himself by contract to do a work or to perform a service, he agrees by implication to do a workmanlike job and to use reasonable and appropriate care and skill in doing it. Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished from mere failure to perform it, causing damage, is a tort.

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > Negligence > General Overview

HN6 An insurer may be liable in contract for negligent failure to satisfy a promise to defend and liable in tort for negligent handling of the defense.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > Negligence > General Overview

HN7 An insurer's action in undertaking the defense of its insured gives rise to a duty of reasonable performance, the violation of which is tortious. Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of

loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction. Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there is a pre-existing obligation or duty to avoid harm when one acts.

Contracts Law > Contract Conditions & Provisions > Implied Warranties > General Overview

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > Negligence > General Overview

HN8 There is little practical difference between the elements of proof in a tort action for negligence and a contract action for the negligent provision of legal services.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Insurance Law > Remedies > Costs & Attorney Fees > General Overview

Insurance Law > Remedies > Costs & Attorney Fees > Declaratory Judgments

Insurance Law > Remedies > Declaratory Judgments > General Overview

Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Duty to Defend

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

HN9 Massachusetts has adopted the American rule which allows successful litigants to recover their attorney's fees and expenses only in a limited class of cases. One exception to the American rule is the case in which an insured successfully establishes in a declaratory judgment action the insurer's duty to defend.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Conforming Pleadings to Evidence

Civil Procedure > ... > Pleadings > Time Limitations > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

HN10 While, pursuant to *Mass. R. Civ. P. 15(b)*, a motion to amend the pleadings to conform to the evidence may be made post-trial, the timing of such a motion is a factor that may be considered by the judge in ruling on the motion. A judge may also weigh the prejudice to the nonmoving party.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN11 An amendment pursuant to *Mass. R. Civ. P. 15(b)* requires the moving party to show that the issue to be added was tried by express or implied consent of the parties.

Torts > Business Torts > Unfair Business Practices > General Overview

Torts > Negligence > General Overview

HN12 Negligence, standing by itself, does not amount to a violation of *Mass. Gen. Laws ch. 93A*.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Commercial Law (UCC) > Secured Transactions (Article 9) > Default > General Overview

HN13 In its review of a ruling on motion for summary judgment, the Supreme Judicial Court of Massachusetts is confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > Pretrial Matters > Continuances

HN14 A party opposing summary judgment may file an affidavit pursuant to *Mass. R. Civ. P. 56(f)* representing that for reasons stated it could not present by affidavit facts essential to justify its opposition to the motion for summary judgment, and requesting a continuance to

take depositions or to obtain additional materials through discovery.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Governments > Courts > Judges

HN15 It is within the inherent authority of a Massachusetts trial judge to reconsider decisions made on the road to final judgment. Absent a certificate conforming to the requirements of Mass. R. Civ. P. 54(b), an order for partial summary judgment is not a judgment, but merely an order for judgment, interlocutory in nature, subject to revision at any time by the trial court prior to the entry of a judgment disposing of all claims against all parties to the action. While the power to reconsider a case, an issue, or a question of fact or law, once decided, remains vested in the court until a final judgment or decree is entered, a judge is not obligated to exercise such power. In fact, the judge should hesitate before undoing the work of another judge.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN16 The standard of review for the denial of a motion for judgment notwithstanding the verdict is whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the nonmoving party. With this standard in mind, the Supreme Judicial Court of Massachusetts considers the evidence in the light most favorable to the nonmoving party.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN17 In Massachusetts, an insurer is held to a standard of reasonable conduct in its defense of its insured.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN18 The test for determining whether a particular matter is a proper one for expert testimony is whether the testimony will assist the jury in understanding issues of fact beyond their common experience.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > ... > Proof > Custom > Business Customs

Torts > ... > Proof > Custom > Expert Testimony

Torts > ... > Proof > Custom > Professional Customs

Torts > ... > Proof > Evidence > Inferences & Presumptions

Torts > ... > Proof > Evidence > Expert Testimony

Torts > ... > Duty > Standards of Care > General Overview

Torts > ... > Standards of Care > Reasonable Care > General Overview

Torts > ... > Standards of Care > Special Care > Highly Skilled Professionals

HN19 The standard of reasonable conduct for an insurer acting pursuant to its contractual obligation to defend any claim made against its insured is not a matter within the common knowledge of the ordinary layperson where that standard is not specifically set forth in the contract. Such standard of care is analogous to the standard of care owed by other professionals to their clients and is elucidated by expert testimony. Only where professional negligence is so gross or obvious that jurors can rely on their common knowledge to recognize or infer negligence may the case be made without expert testimony.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Legal Ethics > Client Relations > Representation > Acceptance

Torts > Vicarious Liability > Independent Contractors > General Overview

HN20 Defense counsel is an independent contractor with separate and distinct obligations to its client, the insured.

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Reservation of Rights

Insurance Law > Claim, Contract & Practice Issues > Reservation of Rights > General Overview

Insurance Law > Claim, Contract & Practice Issues > Reservation of Rights > Notice to Insured Parties

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

HN21 In Massachusetts, an insurer's defense of its insured pursuant to reservation of rights does not estop the insurer from subsequently disclaiming liability, because the insured has been put on notice of such possible disclaimer and can thus take necessary steps to protect its rights. At the same time, this does not mean that an insurer can reserve its rights to disclaim liability while also insisting on retaining control of the insured's defense. When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.

Torts > Vicarious Liability > Independent Contractors > General Overview

HN22 Generally speaking, the employer of an independent contractor is not liable for harm caused to another by the independent contractor's negligence, except where the employer retained some control over the manner in which the work was performed. One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. In order for the preceding rule to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress, or to receive reports, to make suggestions or recommendations that need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Torts > Vicarious Liability > Independent Contractors > General Overview

HN23 Since an insurer is not permitted to practice law, it must rely on independent counsel for conduct of litigation, and in doing so it does not assume a nondelegable duty to present an adequate defense. Since the conduct of the litigation is the responsibility of trial counsel, the insurer is not vicariously liable for the negligence of the attorneys who conduct the defense for the insured.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Legal Ethics > Client Relations > Conflicts of Interest

HN24 See Mass. *Sup. Ct. R. 3:07*, *R. Prof. Conduct 5.4(c)*.

Insurance Law > ... > Business Insurance > Commercial General Liability Insurance > Duty to Defend

Legal Ethics > Client Relations > Representation > Acceptance

Torts > Vicarious Liability > Agency Relationships > Negligence

Torts > Vicarious Liability > Independent Contractors > General Overview

HN25 A lawyer hired by an insurer to represent an insured owes an unqualified duty of loyalty to the insured and must act at all times to protect the insured's interests. It is the lawyer who controls the strategy, conduct, and daily details of the defense. To the extent that the lawyer is not permitted to act as he or she thinks best, the lawyer properly can withdraw from the case. In these circumstances, an insurer cannot be vicariously liable for the lawyer's negligence.

Torts > ... > Types of Damages > Compensatory Damages > General Overview

Torts > ... > Types of Damages > Costs & Attorney Fees > General Overview

Torts > Negligence > General Overview

HN26 A cause of action based on negligence requires that both negligence and harm be shown, with a causal connection between these two elements. The requirement that a plaintiff sustain actual loss, or appreciable harm, will be met where the plaintiff incurs additional fees and expenses necessary to ameliorate the harm that would not have occurred but for the defendant's negligence.

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Property Damages > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN27 The long-standing rule Massachusetts, in accordance with the majority of jurisdictions that have considered the issue, is that purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN28 Where an appellant has not made an argument, it is waived.

Torts > Business Torts > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN29 Prospective profits may be recovered in an appropriate action when the loss of them appears to have been the direct result of the wrong complained of and when they are capable of proof to a reasonable degree of certainty. Lost profits are notoriously difficult to prove with precision. The plaintiff is not required to prove its lost profits with mathematical precision. Under Massachusetts cases, an element of uncertainty is permitted in calculating damages and an award of damages can stand on less than substantial evidence. This is particularly the case in business torts, where the critical focus is on the wrongfulness of the defendant's conduct.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN30 It is the function of the jury to assess and weigh the soundness and credibility of an expert opinion.

Headnotes/Syllabus

Headnotes

Insurance, Defense of proceedings against insured. *Contract*, Performance and breach, Insurance. *Actionable Tort*. *Estoppel*. *Practice, Civil*, Motion to amend, Reconsideration, Judgment notwithstanding verdict, Attorney's fees. *Consumer Protection Act*, Insurance. *Negligence*, Insurance company. *Evidence*, Expert opinion. *Agency*, Independent contractor. *Damages*, Attorney's fees, Loss of profits.

Counsel: Lon A. Berk (Anna M. Stafford, of Virginia, & Russell F. Conn with him) for the defendant.

William A. McCormack for the plaintiffs.

Richard J. Riley & Peter C. Kober for Complex Insurance Claims Litigation Association & another, amici curiae, submitted a brief.

Owen Gallagher for Gallagher & Associates, P.C., amicus curiae, submitted a brief.

Judges: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

Opinion by: SPINA

Opinion

[527]** **[*389]** SPINA, J. In this complex case, we consider the obligations of an insurance company, and the counsel it hires, to defend an insured against a third-party claim. The plaintiffs, collectively known as Sullivan Risk Management Group (SRMG), commenced an action against Utica Mutual Insurance Company (Utica Mutual), seeking damages for Utica Mutual's alleged failure to provide SRMG with an adequate defense to claims brought against it by St. Mary's Refining Company (St. Mary's). [2] A judge in the Superior Court granted Utica Mutual's motion for summary judgment with respect to four of SRMG's claims. A jury trial was held on SRMG's sole remaining claim, alleging negligence. In response to special questions, the **[***2]** jury attributed fifty-eight per cent of the negligence in the case to Utica Mutual and the counsel it had hired to defend SRMG; the jury attributed forty-two per cent of the negligence to SRMG. Judgment entered in the Superior Court (1) ordering that SRMG recover the sum of $ 976,975.69 from Utica Mutual on

[2] St. Mary's Refining Company is a West Virginia corporation that operates an oil refinery and ships petroleum products by barges to other States.

its negligence claim, and (2) dismissing those claims set forth in SRMG's amended complaint that had been the subject of the prior summary judgment order. We granted SRMG's application for direct appellate review, and now affirm in part and remand in part for further proceedings. [3]

1. *Background*. The basic facts are as follows. [4] SRMG is a Waltham-based risk management and insurance agency [***3] that [*390] services a national, niche market of small petroleum companies. It was the named insured under an errors and omissions liability policy (errors and omissions [**528] policy) issued by Utica Mutual that provided coverage for "negligent acts, errors, or omissions in the conduct of the insured's business" and obligated Utica Mutual to defend SRMG with respect to any such claims. The errors and omissions policy contained a specific exclusion for any claims relating to the payment of premiums to SRMG.

On December 30, 1993, St. Mary's filed a complaint against SRMG in the United States District Court for the Northern District of West Virginia (St. Mary's action). St. Mary's had retained SRMG to secure various lines of coverage for insurable risks associated with St. Mary's business. In its complaint, St. Mary's asserted claims for (1) violation of West Virginia statutes and unjust enrichment where St. Mary's had allegedly [***4] been overcharged for premiums; (2) breach of contract where SRMG had allegedly failed to procure environmental impairment liability coverage and had obtained redundant automobile liability coverage; and (3) negligence where SRMG had allegedly failed to secure an "occurrence" policy for excess or "umbrella" liability, thereby placing St. Mary's at risk of being uninsured for claims falling after a particular time period.

On February 14, 1994, James Lee Crumrine, a claims examiner, sent a letter to SRMG advising it that Utica Mutual would defend SRMG in the St. Mary's action, subject to a reservation of rights. Utica Mutual reserved its right to withdraw from the defense and to deny coverage on the ground that while the errors and omissions policy provided coverage for loss arising out of "negligent acts, errors, or omissions," the policy excluded coverage for claims relating to the payment of premiums. Utica Mutual retained Christopher Bastien, a West Virginia attorney, to defend SRMG in the St. Mary's action.

In early 1995, St. Mary's filed an amended complaint which was, in significant ways, different from its original complaint. St. Mary's asserted claims for (1) violation of West [***5] Virginia statutes and unjust enrichment where St. Mary's had allegedly been overcharged for premiums; (2) breach of contract where SRMG had allegedly collected monies in excess of the premiums; and (3) fraud where SRMG had allegedly concealed [*391] from St. Mary's the types and costs of the insurance that it had procured. [5] St. Mary's amended complaint no longer included a claim for negligence, and each of the restated causes of action related to premium overcharges, which were specifically excluded from coverage. As a result, on July 18, 1995, Utica Mutual sent a letter to SRMG stating that, pursuant to its prior reservation of rights in February, 1994, it would withdraw its defense of SRMG in the St. Mary's action effective August 4, 1995, and would not reimburse SRMG for any defense fees and costs incurred in the St. Mary's action after that date. [6]

[***6] On July 28, 1995, SRMG filed a complaint against Utica Mutual arising from Utica Mutual's withdrawal of its defense of SRMG in the St. Mary's action. A five-count [**529] amended complaint was substituted. Count I was for declaratory judgment to resolve the controversy over whether the errors and omissions policy provided coverage for any damages judgment in the St. Mary's action or provided for SRMG's ongoing defense by Utica Mutual. Count II was for negligence and alleged, inter alia, that Utica Mutual had failed to employ competent counsel to represent SRMG

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[3] We acknowledge the amicus briefs filed by Gallagher & Associates, P.C., and by Complex Insurance Claims Litigation Association and Alliance of American Insurers.

[4] We relate additional facts and procedural background in our separate discussion of each issue.

[5] An affiliate of St. Mary's, Go-Mart, Inc., a West Virginia corporation, was added as a plaintiff.

[6] In June, 1996, the St. Mary's action went to trial. At the close of the plaintiffs' case, judgment was entered, as a matter of law, in favor of SRMG on those counts of St. Mary's amended complaint alleging breach of contract and statutory violations. At the close of all the evidence, judgment was entered in favor of SRMG on the remaining count of fraud. St. Mary's filed an appeal with the United States Court of Appeals for the Fourth Circuit, which was unsuccessful. See St. Mary's Ref. Co. v. Herbert A. Sullivan, Inc., 112 F.3d 510 (4th Cir. 1997).

in the St. Mary's action and had failed to properly supervise the actions of such counsel. Count III was for breach of contract and alleged that because Utica Mutual had failed to provide SRMG with a competent defense in the St. Mary's action, had subsequently terminated its obligation to defend SRMG in that action, and had failed to provide coverage for any judgment or settlement that might result from such action, Utica Mutual had breached the terms of the errors and omissions policy. Count IV was for unfair and deceptive insurance practices and alleged that the actions of Utica Mutual had violated the provisions of G. L. c. 176D. [***7] [*392] Count V was for alleged violations of G. L. c. 93A, §§ 9 and 11.

On March 11, 1998, prior to the completion of discovery, Utica Mutual and SRMG filed cross motions for summary judgment. A judge in the Superior Court allowed Utica Mutual's motion for summary judgment with respect to Counts I, III, IV, and V of SRMG's amended complaint. The judge denied summary judgment with respect to Count II, alleging negligence. SRMG's cross motion for summary judgment was denied, as was its subsequent motion for reconsideration. On April 5, 1999, SRMG filed a motion for leave to file a second amended complaint. The motion was denied as untimely and as seeking to resurrect claims that had already been eliminated through summary judgment.

Trial commenced on May 23, 2000, on SRMG's negligence claim. In response to special questions, the jury concluded that Utica Mutual had been negligent in its handling of the St. Mary's action, that Christopher Bastien, who had been acting as an agent of Utica Mutual, had been negligent in his legal representation of SRMG, and that SRMG had been negligent in its responsibilities as the client in the St. Mary's action. [***8] The jury awarded SRMG $ 607,000 for out-of-pocket expenses, including legal fees, and $ 500,000 for lost profits. Following the judge's issuance of rulings on a multitude of posttrial motions by both parties, judgment was entered in favor of SRMG in the amount of $ 976,975.69 (after factoring in SRMG's comparative negligence). Counts I, III, IV, and V of SRMG's amended complaint were dismissed with prejudice pursuant to the prior summary judgment order entered in 1998.

Utica Mutual filed a motion for judgment notwithstanding the verdict on the grounds that SRMG had failed to introduce evidence at trial that was central to its claim for negligence, that the jury's award of damages for alleged lost profits had no basis in the evidence and was merely speculative, and that the judge's calculation of interest on the damages award was wholly without support. The judge, who did an excellent job in handling this lengthy and complicated case, denied the motion. Both parties filed timely notices of appeal from the final judgment and from various orders that had been entered in the Superior Court both before and after trial.

[*393] SRMG has now raised the following issues for our review: (1) whether [***9] the motion judge erred in declaring that Utica Mutual properly withdrew its defense of SRMG when St. Mary's amended its complaint to eliminate a claim for negligence; [**530] (2) whether the motion judge erred in failing to enter summary judgment in favor of SRMG on its breach of contract claim; (3) whether the trial judge erred in denying SRMG's motion for attorney's fees where Utica Mutual breached its duty to defend SRMG in the St. Mary's action; (4) whether Utica Mutual's conduct estopped it from disclaiming its duty to defend SRMG; and (5) whether the evidence at trial warranted judgment in SRMG's favor on its claim pursuant to G. L. c. 93A. In its cross appeal, Utica Mutual asserts that the trial judge erred in failing to grant its motion for judgment notwithstanding the verdict where SRMG (a) failed to present expert testimony as to the standard of care owed by an insurance company in managing its insured's defense; (b) failed to establish that Utica Mutual should be held vicariously liable for the alleged negligence of Christopher Bastien; and (c) failed to prove that its alleged damages were caused by any conduct of either Utica Mutual or Bastien.

2. *Duty to defend covered claims* [***10] . SRMG contends that summary judgment should not have been allowed with respect to Count I of its amended complaint, seeking declaratory relief, because Utica Mutual had no basis for withdrawing its defense of SRMG in the St. Mary's action. SRMG asserts that the duty to defend arises as long as the underlying complaint hints, even through general allegations, at the "possibility" that all or a portion of the claims set forth therein are covered by the errors and omissions policy. Here, SRMG argues that, even after amendment, St. Mary's complaint continued to allege facts that were "reasonably susceptible" to an interpretation suggesting that SRMG had committed negligent acts.

HN1 Pursuant to Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974), summary judgment "shall be rendered . . . [if] there is no genuine issue as to any material fact and . .

. the moving party is entitled to a judgment as a matter of law." See Community Nat'l Bank v. Dawes, 369 Mass. 550, 553, 340 N.E.2d 877 (1976). ***HN2*** We examine the record in the light most favorable to SRMG. See Coveney v. **[*394]** President & Trustees of the College of the Holy Cross, 388 Mass. 16, 17, 445 N.E.2d 136 (1983).. **[***11]** ***HN3*** The interpretation of an insurance contract and the application of policy language to known facts present questions of law for the judge to decide. See Sherman v. Employers' Liab. Assur. Corp., 343 Mass. 354, 356-357, 178 N.E.2d 864 (1961); Kelleher v. American Mut. Ins. Co., 32 Mass. App. Ct. 501, 503, 590 N.E.2d 1178 (1992). The critical issue is whether the summary judgment record alleges "a liability arising on the face of the complaint and policy." Sterilite Corp. v. Continental Cas. Co., 17 Mass. App. Ct. 316, 324, 458 N.E.2d 338 (1983). We conclude that the summary judgment record here does not.

HN4 "The question of the initial duty of a liability insurer to defend third-party actions against the insured is decided by matching the third-party complaint with the policy provisions: if the allegations of the complaint are 'reasonably susceptible' of an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense." Continental Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 146, 461 N.E.2d 209 (1984), quoting **[***12]** Sterilite Corp. v. Continental Cas. Co., supra at 318. See Liberty Mut. Ins. Co. v. SCA Servs., Inc., 412 Mass. 330, 331-332, 588 N.E.2d 1346 (1992). The scope of an insurer's duty to defend is based on "the facts alleged in the complaint and those facts which are known to the insurer." Boston Symphony Orch., Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 11, 545 N.E.2d 1156 (1989). Specifically, "the process **[**531]** is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." Sterilite Corp. v. Continental Cas. Co., supra at 318. The duty to defend is broader than the duty to indemnify. See Liberty Mut. Ins. Co. v. SCA Servs., Inc., supra at 337. "The underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage." **[***13]** Sterilite Corp. v. Continental Cas. Co ., supra at 319, quoting Union Mut. Fire Ins. Co. v. Topsham, 441 A.2d 1012, 1015 (Me. 1982). However, "when the allegations in the underlying complaint 'lie expressly **[*395]** outside the policy coverage and its purpose, the insurer is relieved of the duty to investigate' or defend the claimant." Timpson v. Transamerica Ins. Co., 41 Mass. App. Ct. 344, 347, 669 N.E.2d 1092 (1996), quoting Terrio v. McDonough, 16 Mass. App. Ct. 163, 168, 450 N.E.2d 190 (1983).

In its original complaint, St. Mary's asserted a cause of action for negligence, alleging that SRMG had failed to secure appropriate insurance policies. That claim was covered by the errors and omissions policy, and Utica Mutual agreed to defend SRMG subject to a reservation of rights. St. Mary's original cause of action for negligence was expressly removed from its amended complaint. St. Mary's amended complaint resulted in the assertion of claims that all concerned alleged premium overcharges and fraudulent acts of concealment by SRMG. The allegations in the amended complaint, even when viewed in the light most favorable to SRMG, were not "reasonably susceptible" of a construction **[***14]** that would bring them within the purview of claims covered under the errors and omissions policy. As such, the motion judge did not err in concluding that Utica Mutual no longer had a duty to defend SRMG in the St. Mary's action after St. Mary's filed its amended complaint, and that SRMG was not entitled to declaratory relief on Count I of its amended complaint.

3. *Breach of contract.* SRMG asserts that the motion judge, and later the trial judge, erred in failing to enter judgment in SRMG's favor on Count III of its amended complaint, alleging breach of contract. It contends that the duty of care owed by Utica Mutual to SRMG arose out of the errors and omissions policy, and that SRMG was deprived of the benefit of its contractual bargain because the defense provided by Utica Mutual in the St. Mary's action was negligent. As such, SRMG claims that it was entitled to the full amount of damages that the jury found it had incurred, with no deduction for its comparative negligence, plus reimbursement for attorney's fees and expenses both in the Superior Court action and in this appeal.

HN5 "When a party binds himself by contract to do a work or to perform a service, he agrees by implication **[***15]** to do a workmanlike job and to use reasonable and appropriate care and skill in **[*396]** doing it." Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 143, 10 N.E.2d 82 (1937). "Although the duty arises out of the contract and is measured by its terms, negligence in the manner of performing that duty as distinguished

from mere failure to perform it, causing damage, is a tort." *Id. at 144*. See *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 118, 628 N.E.2d 14 (1994)* ***HN6*** (insurer may be liable in contract **[**532]** for negligent failure to satisfy promise to defend and liable in tort for negligent handling of defense).

The insurer in *Abrams v. Factory Mut. Liab. Ins. Co., supra*, by undertaking the defense of its insured as mandated by contract, engaged in affirmative action, and that action exposed its insured's legally protected interests to the risk of harm. ***HN7*** The insurer's action, therefore, gave rise to a duty of reasonable performance, the violation of which was tortious. See *Larabee v. Potvin Lumber Co., 390 Mass. 636, 640, 459 N.E.2d 93 (1983)* (cause of action in tort may arise out of contractual **[***16]** relationship); *Attleboro Mfg. Co. v. Frankfort Marine, Acc. & Plate Glass Ins. Co., 240 F. 573, 578-579 (1st Cir. 1917)* (same). "Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction." W.L. Prosser & W.P. Keeton, Torts § 92, at 656 (5th ed. 1984). "Entering into a contract with another pursuant to which one party promises to do something does not alter the fact that there was a preexisting obligation or duty to avoid harm when one acts." *Id.* at 657.

Here, we have concluded that, because the allegations in St. Mary's amended complaint were not reasonably susceptible of a construction that brought them within the purview of claims covered under the errors and omissions policy, Utica Mutual did not breach that contract by terminating its defense of SRMG when St. Mary's amended its complaint. However, SRMG also claims that Utica Mutual breached the provisions of the errors and omissions policy **[***17]** "by failing to provide a competent defense" to the St. Mary's action during the time period that Utica Mutual did supply a defense. That claim, while arising out of the contract, is in essence a tort. Prior to its proper **[*397]** withdrawal and notwithstanding its reservation of rights, Utica Mutual had a duty of reasonable performance that was separate from its contractual obligation to defend. Utica Mutual fulfilled its contractual obligation by hiring Christopher Bastien to represent SRMG in the St. Mary's action. To the extent that SRMG has alleged that Utica Mutual breached its related duty of reasonable performance, its cause of action is for tortious conduct, specifically negligence. Accordingly, we conclude that the motion judge did not err in granting summary judgment to Utica Mutual with respect to SRMG's claim for breach of contract. [7]

[*18]** 4. *Attorney's fees for breach of duty to defend.* SRMG contends that, regardless of the theory on which its case was tried, the judge erred in denying its posttrial motion for attorney's fees where Utica Mutual breached its duty to defend SRMG in the St. Mary's action. Having paid its insurance premiums, SRMG claims that it was entitled, under the terms of the errors and omissions policy, to a competent defense. SRMG argues that without an award of attorney's fees, it will remain uncompensated for having to assume the obligation of its own defense when Utica Mutual withdrew.

HN9 **[**533]** Massachusetts has adopted the "American rule" which allows successful litigants to recover their attorney's fees and expenses only in a limited class of cases. See *Waldman v. American Honda Motor Co., 413 Mass. 320, 321-323, 597 N.E.2d 404 (1992)*. One exception to the "American rule" is the case in which an insured successfully establishes in a declaratory judgment action the insurer's duty to defend. See *Hanover Ins. Co. v. Golden, 436 Mass. 584, 766 N.E.2d 838 (2002)*; *Rubenstein v. Royal Ins. Co., 429 Mass. 355, 708 N.E.2d 639 (1999)*; **[***19]** *Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 686 N.E.2d 989 (1997)*.

Here, in its declaratory judgment action, SRMG failed successfully to establish that Utica Mutual had a continuing duty to defend SRMG after St. Mary's amended its complaint, and we **[*398]** have upheld the motion judge's proper conclusion to that effect. Because this is not a case where the insurer's obligation to defend was established by the insured, the exception to the American rule set forth in *Hanover Ins. Co. v. Golden, supra*; *Rubenstein v. Royal Ins. Co.; supra*; and *Preferred Mut. Ins. Co. v. Gamache, supra*, is not applicable.

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HN8 There is little practical difference between the elements of proof in a tort action for negligence and a contract action for the negligent provision of legal services. Cf. *Thomas v. Massachusetts Bay Transp. Auth., 389 Mass. 408, 409-410, 450 N.E.2d 600 (1983)*. See W.L. Prosser & W.P. Keeton, Torts § 92, at 655 (5th ed. 1984) ("The distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make").

5. *Estoppel theory of recovery*. SRMG asserts that the trial judge should have allowed it to recover contract damages and attorney's fees under the theory that Utica Mutual's conduct estopped it from disclaiming its duty to defend SRMG in the

St. Mary's action. We disagree.

On October 26, 2000, over four months after the jury had rendered their verdict, SRMG filed a motion to amend the pleadings to conform to the evidence by adding two causes of action, estoppel by prejudice and estoppel by control. [8] See Mass. R. Civ. P. 15 (b), 365 Mass. 761 (1974). **[***20]** The judge denied SRMG's motion to amend. He took note of SRMG's claims that discovery had resulted in the production of evidence that was not available at the time a motion judge had removed estoppel theories from the case. [9] The judge also noted that no motion for reconsideration citing newly discovered evidence had been presented to the motion judge. The trial judge concluded that SRMG's assertions coming several months after trial were "too little, too late."

[*21]** ***HN10*** While, pursuant to *rule 15 (b)*, a motion to amend the pleadings to conform to the evidence may be made after trial, the timing of such a motion is a factor that may be considered by the judge in ruling on the motion. See *Castellucci v. United States Fid. & Guar. Co., 372 Mass. 288, 291-292, 361 N.E.2d 1264 (1977)*; *Bullock* **[*399]** *v. Zeiders, 12 Mass. App. Ct. 634, 637, 428 N.E.2d 311 (1981)*. A judge may also weigh the prejudice to the nonmoving party. See *Hamed v. Fadili, 408 Mass. 100, 105, 556 N.E.2d 1020 (1990)*.

Based on the record before us, the judge acted well within his discretion in denying SRMG's motion to amend the pleadings. Such motion was filed over five years after **[**534]** SRMG had commenced its action and over two years after summary judgment had narrowed the issues for trial down to the single issue of negligence. To the extent that ongoing discovery resulted in the production of evidence relevant to any estoppel claims, SRMG should have, in the first instance, moved to delay the summary judgment proceedings until discovery could be completed, thereby allowing SRMG fully to assess its potential claims. In the alternative, at the very **[***22]** least, SRMG should have filed a motion for reconsideration of the motion judge's decision to remove estoppel theories from the case. There is no evidence in the record that SRMG took either action. The case proceeded to trial as a negligence action. SRMG's attempt to amend its pleadings after trial to add estoppel claims was clearly untimely and arguably prejudicial to Utica Mutual.

HN11 An amendment pursuant to *rule 15 (b)* also requires the moving party to show that the issue to be added was "tried by express or implied consent of the parties." Utica Mutual vigorously opposed every effort by SRMG to introduce its estoppel theory. There has been no showing of the existence of the requisite level of consent. See *Hamed v. Fadili, supra at 105-106*. We conclude that the trial judge did not abuse his discretion in denying SRMG's motion to amend its pleadings.

6. *Claim pursuant to G. L. c. 93A*. SRMG asserts that the uncontested evidence presented at trial warranted entry of judgment in its favor on its *G. L. c. 93A* claim. SRMG points out that Utica Mutual's own documents showed that its conduct was not merely negligent, but that it had intentionally and wilfully mistreated **[***23]** SRMG while handling the St. Mary's action. Based on that evidence, SRMG contends that the trial judge should have vacated the 1998 order of summary judgment on Count V of SRMG's amended complaint and awarded SRMG relief under *c. 93A*.

On March 11, 1998, the parties filed cross motions for summary **[*400]** judgment, prior to the completion of discovery. Summary judgment was allowed with respect to Count V of SRMG's amended complaint on the ground, inter alia, that ***HN12*** negligence, standing by itself, does not amount to a violation of *c. 93A*. SRMG subsequently moved for reconsideration based, in pertinent part, on its receipt of additional discovery materials, namely a "UNI-Claims Plus -- Remarks Display Diary" (diary), which set forth a summary of

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[8] This motion has not been included in the joint appendix. Because the motion was brought after the trial, to conform the pleadings to the evidence, we assume that it was brought pursuant to Mass. R. Civ. P. 15 (b), 365 Mass. 761 (1974), not 15 (a).

[9] It is unclear from the record when the estoppel theories were first raised and then removed from the case. On April 5, 1999, SRMG filed a motion for leave to file a second amended complaint that would have reinstated its claims for breach of contract and violation of G. L. c. 93A. Because this motion has not been included in the joint appendix, we do not know whether it, in fact, included any estoppel claims. The motion was denied as untimely and as seeking to resurrect claims already disposed of unfavorably to SRMG by way of summary judgment.

events and comments pertaining to the St. Mary's action as it was being handled by Utica Mutual. SRMG argued that the diary, on its face, evidenced Utica Mutual's bad faith in the handling of the St. Mary's action, thereby creating an issue for trial as to whether Utica Mutual's conduct constituted a violation of G. L. c. 93A. The motion for reconsideration was denied on the ground that the judge had decided the earlier motion based on the summary judgment [***24] record and would not reconsider based on subsequent discovery. Additional motions by SRMG at trial and after trial to reinstate its c. 93A claim were likewise denied.

The evidence on which SRMG primarily relies to support its c. 93A claim, the diary and Utica Mutual's Claims Technical Manual, was not considered by the motion judge because SRMG had not yet obtained these materials through the discovery process. ***HN13*** "In our review of a motion for summary judgment we are 'confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant.'" *Cullen Enters., Inc. v. Massachusetts [**535] Prop. Ins. Underwriting Assn., 399 Mass. 886, 889-890 n.9, 507 N.E.2d 717 (1987)*, quoting *Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985)*, cert. denied sub nom. *Saugus v. Voutour*, 474 U.S. 1100, 88 L. Ed. 2d 916, 106 S. Ct. 879 (1986). There is nothing in the record before us indicating that ***HN14*** SRMG filed an affidavit pursuant to *Mass. R. Civ. P. 56 (f)*, 365 Mass. 824 (1974), representing that "for reasons stated [it could not] present [***25] by affidavit facts essential to justify [its] opposition" to Utica Mutual's motion for summary judgment, and requesting a continuance to take depositions or to obtain additional materials through discovery. Had SRMG filed such an affidavit and obtained a continuance of the summary judgment proceedings, it could have gone forward with discovery and secured necessary [*401] evidence to support its c. 93A claim. [10] By failing to invoke *rule 56 (f)*, SRMG waived its right to further discovery before the judge issued his decision on Utica Mutual's motion for summary judgment. See *Alake v. Boston, 40 Mass. App. Ct. 610, 611 n.3, 666 N.E.2d 1022 (1996)*. Accordingly, we conclude that the motion judge did not abuse his discretion in granting summary judgment to Utica Mutual on SRMG's c. 93A claim when he did. Cf. *First Nat'l Bank v. Slade, 379 Mass. 243, 244-245, 399 N.E.2d 1047 (1979)*; *Brick Constr. Corp. v. CEI Dev. Corp., 46 Mass. App. Ct. 837, 840, 710 N.E.2d 1006 (1999)*.

[***26] We recognize that ***HN15*** it is within the inherent authority of a trial judge to "reconsider decisions made on the road to final judgment." *Franchi v. Stella, 42 Mass. App. Ct. 251, 258, 676 N.E.2d 56 (1997)*. See *Riley v. Presnell, 409 Mass. 239, 242, 565 N.E.2d 780 (1991)* (trial judge can reconsider motion for summary judgment sua sponte). "Absent a certificate conforming to the requirements of [*Mass. R. Civ. P. 54 (b)*, 365 Mass. 820 (1974)], an order for partial summary judgment is not a judgment, but merely an order for judgment, interlocutory in nature, subject to revision at any time by the trial court prior to the entry of a judgment disposing of all claims against all parties to the action." *Acme Eng'g & Mfg. Corp. v. Airadyne Co., 9 Mass. App. Ct. 762, 764, 404 N.E.2d 693 (1980)*. While the power to reconsider a case, an issue, or a question of fact or law, once decided, remains vested in the court until a final judgment or decree is entered, a judge is not obligated to exercise such power. See *Peterson v. Hopson, 306 Mass. 597, 600, 29 N.E.2d 140 (1940)*. In fact, the judge should hesitate before undoing the work [***27] of another judge. See *Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 622, 537 N.E.2d 99 (1989)*; Peterson v. *Hopson, supra at 603*. After hearing the evidence in this case and again after considering SRMG's posttrial motions, the judge declined to grant SRMG relief with respect to its claim under G. L. c. 93A, a claim that had already been considered and denied on several prior occasions. We conclude that his decision did not constitute an abuse of his discretion.

7. *Judgment notwithstanding the verdict*. Utica Mutual [*402] contends that the judge erred by failing to grant its motion for judgment notwithstanding the verdict on the negligence claim. Based on our extensive review of the record, we disagree.

HN16 The standard of review for the denial of a motion for judgment notwithstanding the verdict is "whether 'anywhere [**536] in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [nonmoving party].'" *Boothby v. Texon, Inc., 414 Mass. 468, 470, 608 N.E.2d 1028 (1993)*, quoting *Dobos v. Driscoll, 404 Mass. 634, 656, 537 N.E.2d 558*, [***28] cert. denied sub nom. *Kehoe v. Dobos*, 493 U.S. 850, 107 L. Ed. 2d 107, 110 S. Ct. 149

[10] SRMG has not claimed that it could have proved that Utica Mutual's conduct in the St. Mary's action violated G. L. c. 93A in the absence of the Diary and the Claims Technical Manual.

(1989). With this standard in mind, we consider the evidence in the light most favorable to SRMG. See Commonwealth v. Johnson Insulation, 425 Mass. 650, 660, 682 N.E.2d 1323 (1997).

(a) *Breach of the duty of care.* Utica Mutual first argues that SRMG failed to establish the duty of care for an insurance company managing the defense of its insured in a third-party action. It asserts that this is an area of specialized knowledge, not within the ken of a lay jury. As such, Utica Mutual contends that SRMG was obligated to present expert testimony on the appropriate standard of care for an insurance company claims handler, and that it failed to do so.

We have held that, ***HN17*** in this Commonwealth, an insurer is held to a standard of reasonable conduct in its defense of its insured. See Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 118, 628 N.E.2d 14 (1994). See also Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677, 683-684, 195 N.E.2d 514 (1964) (general covenant to defend imposes on insurer obligation to defend insured **[***29]** at least in good faith and without negligence); 7C J.A. Appleman, Insurance Law and Practice § 4687, at 192 (rev. ed. 1979) ("The insurer has a duty to reasonably protect insured's interests and must provide the insured with competent counsel"). ***HN18*** The test for determining whether a particular matter is a proper one for expert testimony is whether the testimony will assist the jury in understanding issues of fact beyond their common experience. See Simon v. Solomon, 385 Mass. 91, 105, 431 N.E.2d 556 (1982), and cases cited. ***HN19*** The standard of reasonable conduct for an insurer acting pursuant to its contractual obligation to defend any claim made against its insured is not a matter within the common knowledge **[*403]** of the ordinary lay person where that standard is not specifically set forth in the contract. Cf. First State Ins. Co. v. Utica Mut. Ins. Co., 870 F. Supp. 1168, 1177 n.22 (D. Mass. 1994), aff'd, 78 F.3d 577 (1st Cir. 1996) (expert testimony provided as to sound insurance industry practice). Such standard of care is analogous to **[**537]** the standard of care owed by other professionals to their clients and is elucidated by expert testimony. **[***30]** See Fishman v. Brooks, 396 Mass. 643, 647, 487 N.E.2d 1377 (1986) (expert testimony usually required to establish attorney negligence); Harris v. Magri, 39 Mass. App. Ct. 349, 353, 656 N.E.2d 585 (1995) (expert evidence required to show failure to meet standard of care in legal malpractice action). Only where professional negligence is so gross or obvious that jurors can rely on their common knowledge to recognize or infer negligence may the case be made without expert testimony. See Pongonis v. Saab, 396 Mass. 1005, 486 N.E.2d 28 (1985). See also Matter of Tobin, 417 Mass. 81, 86, 628 N.E.2d 1268 (1994) (expert testimony not necessary to prove ethical violations by lawyers).

In its amended complaint, SRMG alleged, inter alia, that Utica Mutual negligently failed to employ seasoned trial counsel, negligently investigated the facts relating to the St. Mary's action, negligently failed to defend it in the St. Mary's action, and negligently failed to supervise and monitor the actions of retained counsel. SRMG was, therefore, required to present expert testimony on the standard of care owed by an insurance company to **[***31]** its insured in overseeing the defense of a third-party claim. We conclude that such opinion testimony was given by Utica Mutual's own claims examiners, James Lee Crumrine and Debra Cabral, and was further explicated by the observations of a percipient witness, John Herlihy, an attorney. Crumrine was asked for his opinion as a claims examiner, and we construe this inquiry as suggesting that Crumrine was providing testimony as an expert witness. Nonetheless, because Crumrine and Cabral were Utica Mutual's agents, their testimony constituted admissions as to the duty of care owed by an insurance company to its insured. Such admissions were the functional equivalent of expert testimony, from which a jury could infer the elements of negligence and causation. See Collins v. Baron, 392 Mass. 565, 568-569, 467 N.E.2d 171 (1984)
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[*404] In his deposition, which was admitted in evidence, Crumrine, the claims examiner who first handled the St. Mary's action, testified that as long as an insurance company is providing the defense, it has an obligation to make sure that the defense is adequate. He acknowledged that Christopher Bastien's initial report to Utica Mutual dated April 21, 1994, was **[***32]** relatively devoid of content and, thus, did not fulfil the purpose of an initial report. Bastien next provided a status report to Utica Mutual on September 22, 1994. Crumrine again expressed dissatisfaction about the thoroughness of the report. [11] **[***33]** Crumrine testified that he knew that there were discovery problems in the

[11] The "UNI-Claims Plus -- Remarks Display Diary," which sets forth a summary of events and comments pertaining to a particular case, was admitted in evidence without objection. On May 25, 1994, an entry was made by Crumrine in which he

case, although he was unaware of the magnitude of such problems. Bastien provided a status report to Utica Mutual on November 11, 1994, in which he stated that he was going to give St. Mary's an extensive set of discovery requests. Crumrine testified that he did not recall making any follow-up inquiries as to whether such discovery had been conducted. Notwithstanding receipt of a letter from SRMG on February 6, 1995, expressing dissatisfaction with Bastien's handling of the St. Mary's action, no offer of substitute counsel was made. [12]

Utica Mutual also presented the testimony of Debra Cabral, **[*405]** the claims examiner who handled the St. Mary's action after Crumrine was promoted. With respect to her responsibilities, she testified that she was part of a team consisting of the insured, the defense attorney, and the claims **[**538]** examiner. They all worked together to try to resolve a case, whether it was to take the case all the way to trial or to settle if they felt that the insured might be liable. On cross-examination, Cabral stated that even if the insurance company believed that there might not be coverage for one count of a claim but that there might be coverage for another, **[***34]** the insurance company had to defend both counts and could not compromise the effort made to defend the noncovered count. Counsel for SRMG then read into the record portions of Cabral's deposition testimony in which she discussed the duties of a claims examiner in the errors and omissions department. Cabral testified that every claims adjuster should look at the facts of a case, determine if the insured had any liability, determine the applicability of coverage and exclusions under the insurance policy, and evaluate whether particular witnesses would be advantageous to the case. Cabral further stated that if witnesses had not been deposed by defense counsel, the adjuster would contact counsel with instructions to conduct discovery. She acknowledged that such action was not taken in this case. Finally, Cabral testified that as part of the insured's team, the claims examiner would assist in directing, monitoring, and managing the case.

SRMG presented the testimony of John Herlihy, an attorney and former claims handler, who, although not qualified as an expert claims handler, was allowed to respond to hypothetical questions as to the proper handling of insurance claims by claims adjusters, **[***35]** drawing on his observations as a percipient witness. He stated that no claims adjuster could understand a case without monitoring the discovery process. Herlihy testified that the claims department should be intimately involved in that whole process so as to assist both the insured and its defense counsel, especially in light of the insured's duty to cooperate. He stated that it was part of an insurance company's obligation to monitor and supervise discovery work taken or not taken by the attorney that the insurance company had retained for the insured.

[*406] Based on our review of the record here, we conclude that the opinion testimony of Crumrine and Cabral, coupled with the observations of Herlihy, established the duty of care that an insurance company owes to its insured in managing its defense against a third-party claim. Considering that evidence, as we must, in the light most favorable to SRMG, a reasonable inference could be drawn that Utica Mutual failed to satisfy this duty of care and, therefore, was negligent in managing SRMG's defense in the St. Mary's action. Such negligence is separate and apart from any negligent conduct by Bastien, to which we now turn.

(b) *Vicarious* **[***36]** *liability*. Utica Mutual contends that SRMG failed to establish that Christopher Bastien's representation of SRMG was controlled by Utica Mutual to render it responsible for his negligence. To the contrary, Utica Mutual argues, the evidence demonstrated that Bastien acted solely on behalf of SRMG. Utica Mutual further argues that, as a matter of law, ***HN20*** defense counsel is an independent contractor with separate and distinct obligations to its client, the insured. As such, any alleged negligence by Bastien did not subject Utica Mutual to vicarious liability. We agree.

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stated that he had had a long conversation with John Sullivan at SRMG and that they appeared to be "in good shape." In the next entry on August 1, 1994, Crumrine stated that he had not received any reports from Bastien and that if he had not "talked at length [with insured, he would] be firing firm no [questions] asked." In subsequent entries dated September 27, 1994, Crumrine noted as follows: "[Counsel] makes no effort to pick sides or rule on outcome. This is really maddening. . . . [Counsel] advises that despite what's been produced that [insured] has failed to comply [with discovery] and intimates [insured] is faced [with] some sort of imminent sanctions. . . . Need to discuss any [number] of things [with] counsel. . . . But given [counsel's] abject failure to timely and adequately [report] it will be all the harder [to] manage, direct and control disposition of this case."

[12] It was not until March 6, 1995, in response to SRMG's repeated complaints that it was not receiving a competent defense, that Utica Mutual agreed to retain substitute counsel, under a continuing reservation of rights. Utica Mutual's recommendation for replacement counsel was accepted by SRMG. Bastien was instructed to work with replacement counsel for a thirty-day period to effectuate a smooth transition and to ensure that SRMG's defense was not compromised.

On receiving notification of the St. Mary's action, Utica Mutual informed SRMG that it would undertake SRMG's defense subject to a reservation of rights. It also advised SRMG that it might wish to discuss the matter with its own attorney, at its own expense. Such a reservation of rights letter has been approved by this court on several occasions. See *Three [**539] Sons, Inc. v. Phoenix Ins. Co., 357 Mass. 271, 276, 257 N.E.2d 774 (1970)*; *Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677, 682-683, 195 N.E.2d 514 (1964)*; *Salonen v. Paanenen, 320 Mass. 568, 572-573, 71 N.E.2d 227 (1947).* **[***37]** In *Salonen v. Paanenen, supra at 573-574*, we concluded that ***HN21*** an insurer's defense of its insured pursuant to reservation of rights did not estop the insurer from subsequently disclaiming liability because the insured had been put on notice of such possible disclaimer and could thus take necessary steps to protect its rights. At the same time, we also stated that the case should not be construed to mean that an insurer could reserve its rights to disclaim liability while also insisting on retaining control of the insured's defense. *Id. at 574*. When an insurer seeks to defend its insured **[*407]** under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs. See *Three Sons, Inc. v. Phoenix Ins. Co., supra at 276-277*. Cf. *Magoun v. Liberty Mut. Ins. Co., supra at 684-685*. That did not happen here.

Pursuant to Section II of the errors and omissions policy, Utica Mutual agreed to "defend any claim . . . seeking damages to which this insurance **[***38]** applies even if the allegations of the claim are groundless, false, or fraudulent." John Sullivan testified that when he received the reservation of rights letter from Utica Mutual, he contacted claims examiner James Lee Crumrine and expressed his desire to be represented by his own attorney in Boston. Sullivan was informed that the selection of counsel would be made by Utica Mutual. The policy language not only obligated Utica Mutual to defend SRMG, but also, by extension, gave it the right to choose defense counsel. There is no indication in the record that SRMG either insisted on having the reservation of rights removed or, in the alternative, insisted on assuming control of its own defense. [13] As such, we conclude that SRMG acquiesced in the legal representation provided by Utica Mutual. The issue then becomes whether and to what extent Utica Mutual was vicariously liable for the subsequent negligence of the attorney it hired to defend SRMG.

[*39]** ***HN22*** Generally speaking, the employer of an independent contractor is not liable for harm caused to another by the independent contractor's negligence, except where the employer retained some control over the manner in which the work was performed. See *Lyon v. Morphew, 424 Mass. 828, 834, 678 N.E.2d 1306 (1997)*. *Restatement (Second) of Torts § 414* [14] comment c (1965) **[*408]** illustrates the degree of control sufficient to impose liability for the negligence of an independent contractor:

> **[**540]** "In order for the rule stated in [§ 414] to apply, the employer must have retained at least some degree of control over the manner in which the work is done. **[***40]** It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress, or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

More specifically, we consider here whether an insurer who hires an attorney to defend its insured may be liable for any negligence by that attorney in the representation of the insured. ***HN23*** "Since an insurer is not permitted to practice law, it must rely on independent counsel for conduct of litigation, and in doing so it does not assume a nondelegable duty to present an adequate

[13] We note that in Section I of the errors and omissions policy, "claims expenses" were defined as "fees charged by any attorney hired by the insured with our written consent." Further, a "litigation expense" was defined as "fees and disbursements charged by any attorney retained by us, or hired by you with our written consent, to defend a suit against you." This language suggests that it was anticipated that an insured might demand to hire its own defense attorney and be compensated therefor. There is no evidence here that Utica Mutual ever gave written consent for SRMG to hire its own attorney.

[14] Restatement (Second) of Torts § 414 (1965) provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

defense. Since the conduct of the litigation is the responsibility of trial counsel, the insurer is not vicariously liable for the negligence of the attorneys who conduct the defense for the insured." 7C J.A. Appleman, Insurance Law and Practice § 4687, at **[***41]** 192-193 (rev. ed. 1979). Rule 5.4 (c) of the Massachusetts Rules of Professional Conduct, as appearing in 430 Mass. 1303 (1999), states: ***HN24*** "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." As such, ***HN25*** a lawyer hired by an insurer to represent an insured owes an unqualified duty of loyalty to the insured and must act at all times to protect the insured's interests. Cf. McCourt Co. v. FPC **[*409]** Props., Inc., 386 Mass. 145, 146, 434 N.E.2d 1234 (1982) (lawyer owes duty of undivided loyalty to client). It is the lawyer who controls the strategy, conduct, and daily details of the defense. To the extent that the lawyer is not permitted to act as he or she thinks best, the lawyer properly can withdraw from the case. See Restatement (Second) of Agency § 385 comment a, at 193 (1958). In these circumstances, an insurer cannot be vicariously liable for the lawyer's negligence. See Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co., 963 F. Supp. 452, 454-455 (M.D. Pa. 1997) ("The attorney's **[***42]** ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability"); Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 880, 110 Cal. Rptr. 511 (1973) ("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"); Marlin v. State Farm Mut. Auto. Ins. Co., 761 So. 2d 380, 381 (Fla. Dist. Ct. App. 2000) (insurer had no obligation or right to supervise or control professional conduct of attorney and, therefore, was not liable for litigation decisions of counsel); Feliberty v. Damon, 72 N.Y.2d 112, 120, 531 N.Y.S.2d 778, 527 N.E.2d 261 (1988) ("The insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client"); State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 626, 42 Tex. Sup. Ct. J. 284 (Tex. 1998) (insurer not vicariously liable for malpractice **[***43]** of independent attorney selected to defend insured). But see Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 697 (Tenn. 2002) ("the insurer can be **[**541]** held vicariously liable for the acts or omissions of an attorney hired to represent an insured when those acts or omissions were, at least in part, directed, commanded, or knowingly authorized by the insurer").

Here, Bastien was retained by Utica Mutual to defend SRMG in connection with all five counts of St. Mary's complaint, even though not all claims might be covered by the errors and omissions policy. Bastien proceeded to keep Utica Mutual apprised of the progress of the case through periodic status reports. During proceedings before the United States District Court for the **[*410]** Northern District of West Virginia, pertaining to the imposition of sanctions on SRMG for failure to comply with discovery, Bastien acknowledged that Utica Mutual had "indicated early on in the case [it] desired to not delay but to avoid expense if possible and to instead perhaps devote those dollars toward the possible resolution of the case." Further, in deposition testimony, Bastien stated that Crumrine wanted him "to hold off **[***44]** substantive discovery in the early days of the case until [he] could give [Crumrine] some analysis of the case and [they] could make a determination as to whether the case might be settlable." Nonetheless, at trial, Bastien unequivocally testified that Utica Mutual did not do anything to interfere with his ability to provide a complete defense to SRMG in the St. Mary's action. His moral, legal, and ethical obligations were to SRMG, notwithstanding the fact that he had been retained by Utica Mutual. While Utica Mutual paid for that representation, Bastien was subject to a professional duty to attend to the interests of his client, SRMG, and not to allow Utica Mutual's financial underwriting of the expenses to infringe on his duty of competent representation. SRMG may be able to seek redress in a malpractice action against Bastien. However, we conclude that Utica Mutual was not vicariously liable for Bastien's negligence.

(c) *Damages*. Utica Mutual asserts that SRMG failed to demonstrate that any breach of Utica Mutual's duty of care to SRMG caused it damages. SRMG had alleged that, because of Utica Mutual's negligent conduct, it was entitled to recoup the legal fees that it **[***45]** had to pay for its defense in the St. Mary's action, as well as its lost profits. The jury awarded SRMG $ 607,000 for out-of-pocket expenses, including legal fees, and $ 500,000 for lost profits. These amounts were reduced by forty-two per cent, the degree to which the jury found that SRMG was comparatively negligent.

Considering first the issue of legal fees, Utica Mutual argues that SRMG did not present evidence that it

incurred legal fees in defense of the St. Mary's action because of the specific conduct of Utica Mutual. Rather, Utica Mutual asserts that SRMG only incurred legal fees because St. Mary's amended its complaint, thus eliminating Utica Mutual's duty to defend SRMG and requiring SRMG to pay for its own defense of [*411] claims not covered by the errors and omissions policy. As such, SRMG's legal fees were incurred in the ordinary course of defending a lawsuit and not because of any alleged negligence by Utica Mutual. Although we agree with Utica Mutual that it was not required to pay for SRMG's legal fees in defense of the St. Mary's action *after* it had properly withdrawn, we conclude that Utica Mutual was responsible for those legal fees, to the extent that there were [***46] any, resulting from Utica Mutual's negligent handling of the St. Mary's action, but only the amount of such fees as were incurred by SRMG *prior* to Utica Mutual's withdrawal.

HN26 [**542] "A cause of action based on negligence requires that both negligence and harm be shown, with a causal connection between these two elements." Cannon v. Sears, Roebuck & Co., 374 Mass. 739, 742, 374 N.E.2d 582 (1978). The requirement that a plaintiff sustain actual loss, or appreciable harm, will be met where the plaintiff incurs additional fees and expenses necessary to ameliorate the harm that would not have occurred but for the defendant's negligence. See Cantu v. St. Paul Cos., 401 Mass. 53, 57-58, 514 N.E.2d 666 (1987) (subsequent need to hire lawyer to address issues mishandled by previous lawyer constitutes appreciable harm); Pelletier v. Chouinard, 27 Mass. App. Ct. 92, 95, 534 N.E.2d 813 (1989) (legal malpractice claim barred by statute of limitations where cause of action accrued when client suffered appreciable harm by expending additional attorney's fees and expenses to resolve attorney's error). See also Levin v. Berley, 728 F.2d 551, 554 (1st Cir. 1984) [***47] (retention of another attorney is harm in form of additional legal fees).

We have already concluded that Utica Mutual was negligent with respect to its own conduct in monitoring SRMG's defense in the St. Mary's action prior to its withdrawal. In its amended complaint, SRMG alleged that it had to hire counsel, at its own expense, to assist Bastien in the removal of sanctions imposed for failure to provide discovery materials to St. Mary's in a timely manner. SRMG further alleged that it had incurred substantial damages in an effort to remediate Utica Mutual's negligence and to defend the St. Mary's action. At trial, John Sullivan testified that SRMG had incurred legal fees and expenses of $ 610,000 in the St. Mary's action, and the itemized [*412] bills were admitted in evidence. It is clear that SRMG incurred some legal fees and expenses to ameliorate the harm to its defense that would not have occurred but for the negligence of Utica Mutual. However, SRMG is not entitled to the legal fees and expenses it incurred after August 4, 1995, when Utica Mutual properly withdrew because none of the claims asserted in St. Mary's amended complaint was covered by the errors and omissions policy. Such [***48] fees and expenses were the responsibility of SRMG, incurred in the ordinary course of defending a lawsuit for noncovered claims. Because the jury's award for this component of damages was nearly the entire amount sought, it is obvious that a substantial portion of the award was unrelated to any negligence of Utica Mutual. This portion of the case must be remanded to the Superior Court for a determination of those legal fees incurred by SRMG between January, 1995, and August 4, 1995 (the date of Utica Mutual's withdrawal of defense), caused by Utica Mutual's negligence, less any amount paid by Utica Mutual in this regard. [15]

Considering next the issue of lost profits, Utica Mutual contends that SRMG failed to demonstrate that any conduct by Utica Mutual resulted in lost profits to SRMG. [16] It points out that no testimony [**543] was presented from customers who had stopped doing business with SRMG regarding [***49] their reasons for changing insurance providers. Furthermore, Utica Mutual asserts [*413] that the sum of $ 500,000 that was awarded by the jury was purely speculative. We disagree.

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[15] Debra Cabral testified that she paid the lawyer hired by SRMG, Thomas Sullivan, for his work on the case.

[16] In connection with this argument, Utica Mutual also asserts that the Superior Court judge abused his discretion in denying Utica Mutual's motion in limine on the issue of lost profits. On April 6, 2000, Utica Mutual filed a motion, pursuant to Mass. R. Civ. P. 37, as amended, 423 Mass. 1406 (1996), for sanctions to preclude SRMG from offering any evidence relating to its claim for lost profits. The basis for the motion was that SRMG had failed to provide Utica Mutual with essential discovery necessary to its defense of such claim. The Superior Court judge admitted the evidence as to lost profits on a de bene basis, subject to an ultimate ruling after the jury's verdict. On May 15, 2000, Utica Mutual filed an emergency motion in limine to preclude all evidence relating to lost profits on the ground that SRMG still had failed to produce all documents relating to such claim and would not make John Sullivan available for deposition. When ruling on posttrial motions, the Superior Court judge concluded

[***50] We first note what Utica Mutual does not argue. It has made no assertion that SRMG is not entitled to recover lost profits because SRMG did not sustain any personal injury or property damage as a result of Utica Mutual's negligence. ***HN27*** The long-standing rule in this Commonwealth, in accordance with the majority of jurisdictions that have considered this issue, is that "purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage." FMR Corp. v. Boston Edison Co., 415 Mass. 393, 395, 613 N.E.2d 902 (1993). See Garweth Corp. v. Boston Edison Co., 415 Mass. 303, 305, 613 N.E.2d 92 (1993) ("The traditional economic loss rule provides that, when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the person or property of the plaintiff, the plaintiff may not recover for purely economic losses"); Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 107, 533 N.E.2d 1350 (1989). ***HN28*** Because Utica Mutual has not made this argument, it has been waived.

HN29 "Prospective profits may be [***51] recovered in an appropriate action when the loss of them appears to have been the direct result of the wrong complained of and when they are capable of proof to a reasonable degree of certainty." Lowrie v. Castle, 225 Mass. 37, 51, 113 N.E. 206 (1916). Lost profits are notoriously difficult to prove with precision. See Arch Med. Assocs., Inc. v. Bartlett Health Enters., Inc., 32 Mass. App. Ct. 404, 407, 589 N.E.2d 1251 (1992). "The plaintiff [is] not required to prove its lost profits with mathematical precision. Under our cases, an element of uncertainty is permitted in calculating damages and an award of damages can stand on less than substantial evidence. This is particularly the case in business torts, where the critical focus is on the wrongfulness of the defendant's conduct." Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc., 14 Mass. App. Ct. 396, 426, 440 N.E.2d 29 (1982). See Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 777, 489 N.E.2d 185 (1986); National Merchandising Corp. v. Leyden, 370 Mass. 425, 430, 348 N.E.2d 771 (1976).

SRMG asserts that [***52] it lost business as a direct result of Utica Mutual's negligence in overseeing its defense in the St. Mary's [*414] action. John Sullivan testified that he was the key relationship person at SRMG responsible for meeting with customers and handling their insurance policy requests and renewals. Sullivan stated that virtually all his time from January, 1995, until the conclusion of the trial in June, 1996, was consumed with the St. Mary's action, particularly in preparing voluminous discovery materials and seeking removal of the sanctions against SRMG. [17] As [**544] a consequence, he lost ten customers during this time period due to his inability to service properly their insurance needs.

SRMG also presented the testimony of Thomas Blake, a certified public accountant hired by SRMG to assess the damages associated with its loss of certain [***53] customers. Blake analyzed, inter alia, the fees and commissions that SRMG had received from particular customers in the past and SRMG's history of customer retention. He then projected revenues for five years after customers were lost, taking into consideration revenue growth, interest rates, inflation, stock market activity, small business risks, and risks particularly attributable to SRMG as a specialized insurance business. Based on his analysis, Blake opined that SRMG had lost profits in the amount of $ 1,739,000. Taking into consideration all the evidence presented at trial, the jury then concluded that SRMG was entitled to $ 500,000 in lost profits.

HN30 It is the function of the jury to assess and weigh the soundness and credibility of an expert opinion. See Leibovich v. Antonellis, 410 Mass. 568, 573, 574 N.E.2d 978 (1991). Here, viewing the evidence, as we must, in the light most favorable to SRMG, a jury could reasonably infer that SRMG lost customers as a consequence of Utica Mutual's negligence in overseeing the St. Mary's action. Moreover, the jury's award was supported by the evidence. Accordingly, we conclude that, as this case was presented, SRMG was entitled [***54] to the award of lost profits.

8. *Conclusion*. The judgment is affirmed in all respects except as pertains to the legal fees component of SRMG's damages. [*415] We remand that matter to the Superior Court for further proceedings in accordance with this opinion.

So ordered.

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that the evidence of SRMG's lost profits, admitted de bene, should not be struck. The judge was not convinced that Utica Mutual was "hamstrung by the rush to discovery" in advance of trial or that SRMG's counsel "hid the ball" as to discovery of lost profits.

[17] We note that Utica Mutual has not argued that John Sullivan would have had to spend time preparing discovery materials irrespective of any negligence in the defense of the St. Mary's action.

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Warner v. Wingfield, W.Va., November 3, 2009

211 W.Va. 264
Supreme Court of Appeals of West Virginia.

Marybeth DAVIS, an incarcerated person by her next friend and her power of attorney, Gary DAVIS, Plaintiff Below, Appellant, Paul S. Detch, Attorney, Appellant,
v.
Gregory WALLACE; Irvin Sopher; Elizabeth Scharman; Anne Hooper; Basil Zitelli; and Dorothy Becker, Defendants Below, Appellees, State of West Virginia, Intervenor Below, Appellee.

No. 29966.
|
Submitted Jan. 9, 2002.
|
Decided April 26, 2002.
|
Dissenting Opinion by Chief Justice Davis May 8, 2002.
|
Concurring Opinion of Justice Starcher July 3, 2002.

Convicted defendant by her next friend brought action against state's expert witnesses to recover for negligence in performing tests, preparing for testimony, and testifying. The Circuit Court, Greenbrier County, Frank E. Jolliffe, J., ordered her, next friend, and her attorney to pay Rule 11 sanctions. They appealed. The Supreme Court of Appeals held that the lawsuit was not frivolous.

Reversed and remanded.

Davis, C.J., dissented and filed opinion joined by Maynard, J.

Starcher, J., concurred and filed opinion.

West Headnotes (8)

[1] **Trial**
Discretion
Trial
Admission of evidence in general

Rules of Evidence and Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings.

Cases that cite this headnote

[2] **Pretrial Procedure**
Failure to Disclose; Sanctions
Trial
Admission of evidence in general

Rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court.

Cases that cite this headnote

[3] **Appeal and Error**
Allowance of remedy and matters of procedure in general
Appeal and Error
Rulings on admissibility of evidence in general

Absent a few exceptions, the Supreme Court of Appeals will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

1 Cases that cite this headnote

[4] **Appeal and Error**
Abuse of discretion

A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law.

Cases that cite this headnote

[5] **Attorney and Client**
Liability for costs; sanctions

A court may order an attorney to pay to a prevailing party reasonable attorney fees and costs incurred as the result of a vexatious, wanton, or oppressive assertion of a claim or

defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law. Rules Civ.Proc., Rule 11.

1 Cases that cite this headnote

[6] **Costs**
Nature and Grounds of Right
In formulating the appropriate Rule 11 sanction, a court shall be guided by equitable principles, must identify the alleged wrongful conduct and determine if it warrants a sanction, must explain its reasons clearly on the record if it decides a sanction is appropriate, and may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and the nature of the conduct as an isolated occurrence or as a pattern of wrongdoing throughout the case. Rules Civ.Proc., Rule 11.

1 Cases that cite this headnote

[7] **Costs**
Nature and Grounds of Right
Lawsuit that was filed by convicted defendant alleging negligence of prosecutor's expert witnesses in performing tests, preparing for testimony, and testifying was not frivolous and, therefore, did not warrant Rule 11 sanctions in light of sparse state law on expert witness immunity, the rulings of other jurisdictions on liability of expert witnesses in some circumstances for their negligent preparation of evidence or opinions offered in court, and various scholarly works on the subject of witness immunity; the defendant and her attorney could make a good faith argument for the extension of the law of witness immunity. Rules Civ.Proc., Rule 11.

4 Cases that cite this headnote

[8] **Costs**
Nature and Grounds of Right
Bad faith supporting Rule 11 sanctions requires the assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law. Rules Civ.Proc., Rule 11.

2 Cases that cite this headnote

****387 *265** *Syllabus by the Court*

1. "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syllabus Point. 1, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995).

2. "A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syllabus, *Daily Gazette Co., Inc. v. Canady,* 175 W.Va. 249, 332 S.E.2d 262 (1985).

3. "In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case." Syllabus Point 2, *Bartles v. Hinkle,* 196 W.Va. 381, 472 S.E.2d 827 (1996).

Attorneys and Law Firms

Paul S. Detch, Esq., Lewisburg, for Appellants.

Eric A. Collins, Esq., Pullin, Knopf, Fowler & Flanagan, Beckley, for Irwin Sopher and Anne Hooper.

Stephen M. Houghton, Esq., Dickie, McCamey & Chilcote, Wheeling, for Basi Zitelli and Dorothy Becker.

Charles R. Bailey, Esq., John T. Molleur, Esq., Bailey & Wyant, Charleston, for Gregory Wallace.

George A. Daugherty, Esq., Elkview, for Elizabeth Scharman.

Robert Kevin Hanson, Prosecuting Attorney, Greenbrier County, Lewisburg, for Appellee State of West Virginia.

Opinion

PER CURIAM.

The appellant, Marybeth Davis, who is currently incarcerated, appeals from an order of the Circuit Court of Greenbrier County awarding sanctions in the amount of $8,500.00 against the appellant Marybeth Davis, her next friend Gary Davis, and their attorney, Paul S. Detch.

I.

On September 15, 1999, the appellant by her next friend, Gary Davis, sued the appellees, Drs. Gregory Wallace, Irvin Sopher, Elizabeth Scharman, Anne Hooper, Basi Zitelli, and Dorothy Becker, for their conduct in connection with the appellant's criminal ****388 *266** trial. [1] Specifically, she alleged that the doctors, as expert witnesses for the State, had negligently performed tests, negligently prepared for testimony, negligently testified, and otherwise failed to meet the "standards of science and medicine as it existed at that time."

In response to the lawsuit, the appellees filed motions to dismiss for failure to state a claim upon which relief could be granted pursuant to *West Virginia Rules of Civil Procedure,* Rule 12(b)(6) [1998]. The Circuit Court of Greenbrier County granted the appellees' motions to dismiss, finding that none of the causes of action stated against the appellees were viable under existing state law.

The appellees thereafter filed motions for sanctions against the appellants and their counsel. The circuit court granted the appellees' motions for sanctions, finding as a matter of law that the claims and other legal contentions made by the appellants were not warranted by existing law, nor did they constitute a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law pursuant to Rule 11(b) of the *West Virginia Rules of Civil Procedure* [1998].

The circuit court further held that the claims and other legal contentions made in the appellant's complaint were frivolous in nature, and that the allegations and other factual contentions made in the complaint did not have any evidentiary support, nor were they likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Finally, the circuit court found that the appellants filed the lawsuit with a vexatious, wanton, or oppressive intent to intimidate the appellees regarding their testimony at any post-trial hearing in the criminal case, or to seek to punish them for their testimony at the criminal trial.

The circuit court awarded attorneys' fees and related expenses against the appellants, Marybeth Davis and Gary Davis, and their attorney, Paul S. Detch, jointly and severally, in the amount of $8,500.00 as sanctions for their conduct. The trial court had previously dismissed the appellants' lawsuit against the appellees.

The appellants and their attorney now appeal the circuit court's order.

II.

[1] [2] [3] [4] This Court reviews a trial court's assessment of sanctions under an abuse of discretion standard. "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syllabus Point 1, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995). "A trial court abuses its discretion if its ruling is based on an erroneous assessment of the evidence or the law." *Bartles v. Hinkle,* 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996) (discussing the trial court's imposing a $10,000.00 sanction against a party who repeatedly failed to comply with the trial court's discovery orders).

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Rule 11(b) of the *West Virginia Rules of Civil Procedure* provides that:

> By presenting to the court ... a pleading, written motion, or other paper, an attorney ... is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument ****389** ***267** for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, [if] specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

West Virginia Rules of Civil Procedure, Rule 11(b) [1998].

An important purpose of Rule 11 of the *West Virginia Rules of Civil Procedure* is to prevent frivolous lawsuits or lawsuits filed for an improper purpose. "The purpose of Rule 11 and Rule 37 of the West Virginia Rules of Civil Procedure is to allow trial courts to sanction parties who do not meet minimum standards of conduct in a variety of circumstances." *Bartles v. Hinkle,* 196 W.Va. at 389, 472 S.E.2d at 835. Rule 11 with its possible sanctions "deters much frivolous litigation (thereby conserving judicial resources), compensates the victims of vexatious litigation, and educates the bar about appropriate standards of conduct." Alan E. Untereiner, Note, *A Uniform Approach to Rule 11 Sanctions,* 97 Yale Law Journal 901, 902 (1988) (footnotes omitted).

[5] **[6]** West Virginia trial courts have the authority to sanction parties that file frivolous lawsuits. "A court may order payment by an attorney to a prevailing party reasonable attorney fees and costs incurred as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syllabus, *Daily Gazette Co., Inc. v. Canady,* 175 W.Va. 249, 332 S.E.2d 262 (1985). However, there are some limitations on a trial court's ability to levy sanctions:

> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Syllabus Point 2, *Bartles v. Hinkle, supra.*

[7] At the heart of this case is the issue of whether the appellants filed a "frivolous" lawsuit that was neither grounded in existing state law nor was "a good faith argument for the application, extension, modification, or reversal of existing law."

The appellants took the novel approach of suing the opposing party's expert witnesses for negligence and malpractice. The appellants claimed that the expert witnesses (among other alleged acts of misconduct) mishandled tissue samples, mislabeled and misread tissue samples, and concealed evidence that would have been useful in the defense of appellant Marybeth Davis in the underlying criminal action. The appellants argued that expert witnesses who commit negligence in pre-trial preparation of reports and on the witness stand should be held liable for their mistakes.

The law regarding witness immunity is sparse in West Virginia, and the issue of expert witness immunity has not been addressed by this Court. Historically, in West Virginia and in other jurisdictions, witnesses have been regarded as having an absolute immunity regarding their testimony given during a trial. This immunity encourages witnesses "to speak freely without the specter of subsequent retaliatory litigation for their good faith testimony. The immunity was created at common law to shield the percipient [fact] witness who was called into court to testify as to what he saw, heard, or did that was relevant to an issue in the case." Christopher M. McDowell, Note, *Authorizing the Expert Witness to*

Assassinate Character for Profit: A Reexamination of the Testimonial Immunity of the Expert Witness, 28 U. Mem L.Rev. 239, 275 (1997).

****390** ***268** However, an emerging body of case law[2] and scholarly work[3] questions the granting of absolute immunity to expert witnesses for in-court testimony or out-of-court preparations for trial including compiling data and generating reports.

Courts that have contemplated allowing expert witnesses to be held liable for their negligent behavior find that the typical policy concerns that promote absolute immunity for fact witnesses do not apply to expert witnesses. Fact witnesses are often bystanders and are assumed to be unbiased. Expert witnesses, however, are generally "procured by parties to testify because the testimony is expected to benefit the party procuring the expert." Christopher M. McDowell, *supra,* 28 U. Mem. L.Rev. at 261. Discussing the policy concerns underlying witness immunity, the Pennsylvania Supreme Court noted that: "[t]he goal of ensuring that the path to truth is unobstructed ... is not advanced by immunizing an expert witness from his or her negligence in formulating that opinion." *LLMD of Michigan, Inc. v. Jackson-Cross Co.,* 559 Pa. 297, 306, 740 A.2d 186, 191 (1999).

In *LLMD of Michigan, Inc. v. Jackson-Cross Co.,* 559 Pa. 297, 740 A.2d 186 (Pa.1999), the Supreme Court of Pennsylvania expanded the liability of expert witnesses to include negligence in the preparation of testimony. The Pennsylvania Supreme Court found that witness immunity did not bar professional malpractice suits when the allegations of negligence were not premised on the substance of the expert's testimony but were premised on the expert's negligent preparation in reaching conclusions offered at trial, or on the expert's use of a faulty methodology. In considering the policy concerns underlying expert witness immunity, the Pennsylvania court found that witness immunity should not protect expert witnesses who do not "render services to the degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession." *Id.,* 559 Pa. at 306-307, 740 A.2d at 191.

A Louisiana court, also considering the different policy interests underlying witness immunity, noted:

> With no sanction for incompetent preparation, however, an expert witness is free to prepare and testify without regard to the accuracy of his data or opinion. We do not see how the freedom to testify negligently will result in more truthful expert testimony. Without some overarching purpose, it would be illogical, if not unconscionable, to shield a professional, who is otherwise held to the standards and duties of his or her profession, from liability for his or her malpractice simply because a party to a judicial proceeding has engaged that professional to provide services in relation to ****391** ***269** the judicial proceeding and that professional testifies by affidavit or deposition.

Marrogi v. Howard, 805 So.2d 1118, 1133 (La.2002) (holding that witness immunity does not bar a claim against a retained expert witness for negligence performance of his duty).

Many courts, of course, have been understandably unwilling to allow a party to sue the opposing party's expert witness for malpractice or negligence, in part because there is no reliance between the expert witness and the opposing party and because of the fear of retaliatory lawsuits. *See, e.g.,* Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls, and Proposed Responses,* 18 Yale J. on Reg. 253 (2001); Douglas R. Pahl, Casenote, *Absolute Immunity for the Negligent Expert Witness: Bruce v. Byrne-Stevens,* 26 Willamette L.Rev. 1051 (1990). However, at least one law review article argues that "[i]t should not be unreasonable, however, for a litigant to expect an adverse expert witness to observe the same standard of care applicable outside the context of litigation services." W. Raley Alford, III, Comment, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change,* 61 La. L.Rev. 181 (2000).

The rulings of other jurisdictions holding that expert witnesses may be held liable in some circumstances for their negligent preparation of evidence or opinions offered in court and various scholarly works on the subject of witness immunity demonstrate a good faith argument for extension of the law of witness immunity in West Virginia.

West Virginia law is not settled in the area of expert witness immunity and, at this time, we are not addressing the issue of

witness immunity. We are simply addressing whether a trial judge, who correctly identified the current state of law in West Virginia, abused his discretion by sanctioning a litigant and her attorney for expounding a novel cause of action that is not currently recognized in West Virginia.

[8] Among jurisdictions that have addressed the issue of expert witness malpractice, there is a plurality of opinions. Therefore, the appellants cannot be found to have made their claim in bad faith because bad faith requires "the assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." *See Newcome v. Turner,* 179 W.Va. 309, 367 S.E.2d 778 (1988) (*per curiam*) (holding that the plaintiffs could not be accused of bad faith when asserting a claim in an unsettled area of West Virginia law).

III.

We therefore find that the trial court abused its discretion in sanctioning the appellants. We reverse the trial court's levying of sanctions in the form of attorneys' fees and related expenses, and remand this case for the entry of an order in accordance with this opinion.

Reversed and Remanded.

DAVIS, Chief Justice, dissenting.

(Filed May 8, 2002)

This Court serves as a lighthouse whose beacon guides the bench and bar by clarifying the proper procedures to follow in civil proceedings prosecuted in the courts of this State. Rather than shining brightly and providing clear guidance on the Rule 11 issue presented by this appeal, however, the majority of my colleagues have allowed this flame to flicker. In the water's murky darkness, schools of attorneys and litigants may now prey on unsuspecting experts, while parties who rely on expert testimony watch helplessly from the shore. Although the Court attempts to conceal the impact of its decision by rendering it as a per curiam opinion,[1] the majority's decision nevertheless ****392 *270** will have future consequences so far-reaching as to virtually eradicate the term "frivolous lawsuit" from this State's legal vocabulary while effectively precluding the pursuit of lawsuits designed to redress real and compensable injuries. The immediate impact of the majority's decision, though, is just as grave. By rendering its ruling, the majority has not only missed the boat by failing to appreciate the frivolity of the appellant's lawsuit; it simultaneously has stirred up a frightful storm at sea by allowing a criminal defendant to sue the State's expert witnesses. For the reasons set forth below, I dissent.

I. Rule 11 Sanctions Frivolous Lawsuits

"The purpose of Rule 11 ... of the West Virginia Rules of Civil Procedure is to allow trial courts to sanction parties who do not meet minimum standards of conduct[.]" *Bartles v. Hinkle,* 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citation omitted). In this regard, Rule 11 succinctly states, in pertinent part, that

> [b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an[ ] attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,
>
> ....
>
> the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]

W. Va. R. Civ. P. 11(b)(2). Failure to follow these directives could, subject to the presiding court's discretion, result in the imposition of sanctions: "If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may ... impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." W. Va. R. Civ. P. 11(c). In other words, if a filing (1) is not warranted by existing law or (2) does not present a meritorious argument to extend, modify, or reverse existing law or to create new law, the court in which such filing has been made may assess sanctions against the individual(s) responsible for such frivolous filing. Sanctionable conduct includes the "vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syl., in part, *Daily Gazette Co., Inc. v. Canady,* 175 W.Va. 249, 332 S.E.2d 262 (1985).

" 'Because of their very potency, ... [sanction] powers must be exercised with restraint and discretion. A primary aspect of ... [a circuit court's] discretion is the ability to fashion an *appropriate* sanction for conduct which abuses the judicial process.' " *Cox v. State,* 194 W.Va. 210, 218, 460 S.E.2d 25, 33 (1995) (per curiam) (Cleckley, J., concurring) (quoting *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44-45, 111 S.Ct. 2123, 2132-33, 115 L.Ed.2d 27, 45 (1991) (citation omitted; emphasis added)). To guide circuit courts' exercise of such discretion, this Court has established guidelines to be followed when frivolous filings suggest that the imposition of sanctions may be warranted.

> Although Rule[ ] 11 ... of the West Virginia Rules of Civil Procedure do [es] not formally require any particular procedure, before issuing a sanction, a court must ensure it has an adequate foundation either pursuant to the rules or by virtue of its inherent powers to exercise its authority. The Due Process Clause of Section 10 of Article III of the West Virginia Constitution requires that there exist a relationship ****393 *271** between the sanctioned party's misconduct and the matters in controversy such that the transgression threatens to interfere with the rightful decision of the case. Thus, a court must ensure any sanction imposed is fashioned to address the identified harm caused by the party's misconduct.

Syl. pt. 1, *Bartles v. Hinkle,* 196 W.Va. 381, 472 S.E.2d 827.

> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

Syl. pt. 2, *id.*

Applying the above-cited authorities, my colleagues have determined that Ms. Davis' lawsuit was not frivolous, and, accordingly, that sanctions were not warranted. Based upon the analysis which follows, however, I disagree with the majority's conclusion that the appellant advanced a nonfrivolous argument for the extension and/or modification of existing law. Instead, I agree with the circuit court's ruling that Ms. Davis' lawsuit was totally devoid of merit and concur with the sanctions imposed by that court.

II. Ms. Davis' Lawsuit against the State's Expert Witnesses is Frivolous

Rule 11(b)(2) of the West Virginia Rules of Civil Procedure precludes lawsuits, filings, and legal claims that are not warranted by existing law or that constitute a frivolous "argument for the extension, modification, or reversal of existing law or the establishment of new law." The majority's decision in the case *sub judice* found that Ms. Davis' lawsuit against the State's experts did not violate Rule 11(b)(2)'s directives, and thus was not sanctionable. A review of the applicable law, however, requires a contrary conclusion.

A. No Meritorious Argument Can Be Made to Permit a Criminal Defendant to Sue a State's Expert

If one simply reads the majority opinion, without more, it seems that other jurisdictions have approved the type of lawsuit filed in this case. Consequently, it superficially seems that the majority opinion was correct in determining that a good faith basis existed for the filing of the lawsuit against the experts. Unfortunately, the majority opinion distorts the cases upon which it relies. In not one case cited by the majority opinion did a court permit a convicted criminal defendant to file a civil lawsuit against experts which testified on behalf of the prosecutor. In fact, none of the cases cited even addressed the issue.

1. *James v. Brown.* The majority opinion first cites *James v. Brown,* 637 S.W.2d 914 (Tex.1982) (per curiam). *James* involved a lawsuit filed by a plaintiff alleging, among other

things, malpractice against three psychiatrists who generated a report that diagnosed the plaintiff as mentally ill. The report was used by the plaintiff's children at a mental health proceeding in their unsuccessful effort to have the plaintiff involuntarily committed to a mental health facility. The trial court dismissed the plaintiff's lawsuit, but the Supreme Court of Texas reversed. Upholding the lawsuit, the Texas Supreme Court held that the plaintiff was "not prevented from recovering from the doctors for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the due course of judicial proceedings." *James,* 637 S.W.2d at 918. In addition, the *James* opinion referred to a statute that permitted the plaintiff's lawsuit, holding that "[t]he plain implication of [the statute] is that persons acting in bad faith, unreasonably, and negligently in connection with mental health proceedings are not free from liability." *Id.*

The majority opinion cites to *James* as supporting the proposition that a convicted criminal defendant can bring a civil lawsuit against experts testifying for the prosecutor. However, it is crystal clear that *James* never ****394 *272** came close to the exact issue before this Court. Rather, *James* related to a plaintiff's right to file a lawsuit against psychiatrists who misdiagnosed the plaintiff's mental health.

2. *Levine v. Wiss & Co.* Next, the majority cites *Levine v. Wiss & Co.,* 97 N.J. 242, 478 A.2d 397 (1984), which addressed

> whether an accountant, selected by the litigants in a contested matrimonial case and appointed by the court to act as an "impartial expert" in rendering a binding valuation of a business asset for purposes of equitable distribution, should be held liable for negligence in deviating from accepted standards applicable to the accounting profession.

Levine, 97 N.J. at 244, 478 A.2d at 398. The defendants in *Levine* argued that because they had been appointed by the trial court and the litigants had agreed to be bound by their report, these factors "elevated them beyond the status of accountants to the quasi-judicial role of 'arbitrators,' who would generally be shielded from private actions for damages brought by the parties to a given dispute." *Levine,* 97 N.J. at 247, 478 A.2d at 399. Nevertheless, the *Levine* court rejected the defendants' contention and held that the defendants "did not remotely resemble arbitrators when they performed their assigned function, and, accordingly, they are not entitled to immunity from legal responsibility for any malfeasance." *Levine,* 97 N.J. at 251, 478 A.2d at 402 (citations omitted). The court in *Levine* found that the "[d]efendants simply rendered a singular determination-a finding of fact by which the parties had agreed to be bound." *Id.*

The majority opinion in *Davis* cites to *Levine* as supporting the proposition that a convicted criminal defendant can file a civil lawsuit against experts who testify for the prosecutor. However, it is clear that *Levine* never addressed that exact issue. *Levine* was concerned with whether or not accountants could use the immunity granted to arbitrators, in an effort to escape liability for their negligence in valuing property on behalf of both parties in a divorce proceeding.

3. *Mattco Forge, Inc. v. Arthur Young & Co.* The third case to which the majority opinion cites is *Mattco Forge, Inc. v. Arthur Young & Co.,* 6 Cal.Rptr.2d 781, 5 Cal.App.4th 392 (1992). In *Mattco,* the plaintiff brought a lawsuit against accountants that the plaintiff had hired as experts in a prior civil lawsuit, alleging that they had performed negligently. The trial court dismissed the action, but the appellate court reversed and reinstated the plaintiff's case. In doing so, the appellate court held that expert witness immunity "does not exist to protect one's own expert witnesses, but [is designed] to protect adverse witnesses from suit by opposing parties after the lawsuit ends." *Mattco,* 6 Cal.Rptr.2d at 789, 5 Cal.App.4th at 405.

Erroneously, the majority opinion cites *Mattco* as supporting the proposition that a convicted criminal defendant can bring a civil lawsuit against experts testifying for the prosecution. However, this issue was not before the appellate court in *Mattco.* More importantly, *Mattco* referenced with approval a prior decision of that court which expressly *prohibited* a criminal defendant from filing a civil lawsuit against an expert who erroneously testified to facts for the prosecutor. *See Block v. Sacramento Clinical Labs, Inc.,* 182 Cal.Rptr. 438, 131 Cal.App.3d 386 (1982).

4. *Murphy v. A.A. Mathews.* The majority opinion also cites *Murphy v. A.A. Mathews,* 841 S.W.2d 671 (Mo.1992) (en banc). *Murphy* involved a lawsuit brought by the plaintiff against an engineering expert, who had earlier been retained by the plaintiff for an arbitration proceeding. In the lawsuit, the plaintiff contended that the engineering expert had negligently performed work in the earlier proceeding. The trial court dismissed the case, but the Supreme Court of

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Missouri reversed. In doing so, the *Murphy* court held that "we do not believe that [expert witness] immunity was meant to or should apply to bar a suit against a privately retained professional who negligently provides litigation support services." *Murphy,* 841 S.W.2d at 680 (footnote omitted).

The majority opinion cites to *Murphy* as supporting the proposition that a convicted criminal defendant can bring a civil lawsuit against experts testifying for the prosecution. ****395 *273** However, it is clear that *Murphy* never addressed that exact issue. On the contrary, *Murphy* was concerned with whether a plaintiff could sue an expert retained by the plaintiff for litigation purposes.

5. *LLMD of Michigan, Inc. v. Jackson-Cross Co.* The majority opinion additionally relies upon the decision in *LLMD of Michigan, Inc. v. Jackson-Cross Co.,* 559 Pa. 297, 740 A.2d 186 (1999). LLMD brought a professional malpractice action against a company it hired to provide expert services in a federal lawsuit regarding lost profits. The trial court dismissed the case, but the Supreme Court of Pennsylvania reversed. By so ruling, the Pennsylvania court held that witness immunity did not preclude a party who retained an expert from suing that expert "when the allegations of negligence are not premised on the substance of the expert's opinion ... [but on] negligen [ce] in performing the mathematical calculations required to determine lost profits." *LLMD,* 559 Pa. at 306, 740 A.2d at 191.

The majority opinion cites to *LLMD* as supporting the proposition that a convicted criminal defendant can bring a civil lawsuit against experts testifying for the prosecution. It is clear, however, that *LLMD* never addressed that exact issue. *LLMD* was limited to the issue of whether or not a plaintiff could sue its own expert retained for litigation purposes.

6. *Marrogi v. Howard.* Lastly, the majority opinion cites to the decision in *Marrogi v. Howard,* 805 So.2d 1118 (La.2002). *Marrogi* involved a plaintiff who sued a medical billing analyst. In that case, the plaintiff alleged that the analyst breached its contract to provide medical billing, coding analysis and expert testimony in connection with the plaintiff's prior litigation. The trial court dismissed the action, but the Supreme Court of Louisiana reversed. *Marrogi* accurately recognized that courts around the country have held that "an adverse expert witness [is] immune from a retaliation suit filed by the losing party in the earlier litigation." *Marrogi,* 805 So.2d at 1126. However, in reversing the trial court, *Marrogi* held that "no overarching public purpose is served by applying witness immunity to shield a retained expert witness from a claim subsequently asserted by the party who hired him when the claim alleges deficient performance of his professional and contractual duties to provide litigation support services." *Marrogi,* 805 So.2d at 1129.

Erroneously, the majority opinion cites *Marrogi* as supporting the proposition that a convicted criminal defendant could bring a civil lawsuit against experts testifying for the prosecution. Clearly, *Marrogi* never addressed that exact issue. *Marrogi* was limited to the issue of whether or not a plaintiff could sue its own expert witness that had been retained for litigation purposes.

In summary, the majority opinion cites six cases allegedly supporting the proposition that a convicted criminal defendant can bring a civil lawsuit against experts testifying for the prosecutor. Yet, *not one* of these cited cases addresses the issue of a litigant bringing a negligence lawsuit against an expert retained by the opposing party in a prior case. With the exception of one case, *James v. Brown,* all of the other cases relied upon by the majority opinion involved lawsuits by plaintiffs who were suing *their own* experts retained in prior litigation.[2] Thus, the majority opinion has failed to cite *any* judicial decision in the country that would allow a convicted criminal defendant to bring a civil lawsuit against experts testifying for the prosecution. Given this lack of authority, I find it impossible to accept the majority's conclusion that Ms. Davis has asserted a nonfrivolous argument to establish a new cause of action in this State.

Aside from the six cases cited by the majority to justify its decision, it is readily apparent that no authority whatsoever, either judicial or statutory, supports Ms. Davis' claims. As is evident from the decision in *Briscoe v. LaHue,* 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), the law in this country is well-settled and quite clear: a convicted criminal defendant cannot bring a ****396 *274** civil lawsuit against witnesses testifying for the prosecutor on a theory of negligent testimony. The decision in *Briscoe* involved a federal Civil Rights Act lawsuit that was filed by convicted state defendants against state and local police officers, seeking damages based on alleged giving of perjured testimony at the defendants' criminal trials. The lower courts dismissed the action, and the United States Supreme Court affirmed. In doing so, the Court said that the doctrine of witness immunity was derived from the common law and

is based on the idea that "the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Briscoe,* 460 U.S. at 333, 103 S.Ct. at 1114, 75 L.Ed.2d at 106 (internal citation and quotations omitted). *Briscoe* followed the law in the nation and held that because the statements were made in the courtroom, the witnesses would receive absolute immunity for all statements that were " relevant to the judicial proceeding." *Briscoe,* 460 U.S. at 331, 103 S.Ct. at 1113, 75 L.Ed.2d at 105 (footnote omitted).

In addition to the common law protection afforded all of the expert witnesses who testified for the State in prosecuting Ms. Davis, those witnesses who testified as to the victim's cause of death in the criminal case were protected from civil litigation by W. Va.Code § 16-10-3 (1989) (Repl.Vol.2001), which provides:

> A physician or any other person authorized by law to determine death who makes such determination in accordance with section one [§ 16-10-1] of this article is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination. Any person who acts in good faith in reliance on a determination of death is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for such act.

It is patently obvious, then, that there is no authority to support the majority's conclusion that Ms. Davis' lawsuit constituted a good faith argument to extend the law.

B. No Existing Law Supports Ms. Davis' Lawsuit

Just as the cases relied upon by the majority fail to present a good faith, meritorious argument to extend existing law or to create a new cause of action, so, too, do the circumstances surrounding Ms. Davis' lawsuit preclude a finding that such claims are supported by existing law. During its consideration of Ms. Davis' suit against the State's expert witnesses, whose testimony contributed to her criminal conviction, [3] the circuit court examined no less than seven legal theories and principles of law, all of which bar her cause of action.

First, the circuit court determined that the experts retained by the State were protected by principles of witness immunity. *See Briscoe v. LaHue,* 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Higgins v. Williams Pocahontas Coal Co.,* 103 W.Va. 504, 138 S.E. 112 (1927). Next, the court ruled that Ms. Davis' action was barred by the statute of limitations set forth in W. Va.Code § 55-2-12 (1959) (Repl.Vol.2000). The third ground relied upon by the circuit court to dismiss Ms. Davis' complaint was its filing after the expiration of the one year statute of limitations for libel or slander. *See* W. Va.Code § 55-7-8a (1959) (Repl.Vol.2000); *Rodgers v. Corporation of Harpers Ferry,* 179 W.Va. 637, 640, 371 S.E.2d 358, 361 (1988). Additionally, the circuit court determined that Ms. Davis' lawsuit was barred by collateral estoppel due to the final resolution of her criminal conviction, upon which her civil lawsuit was based. *See State v. Davis,* 205 W.Va. 569, 519 S.E.2d 852 (1999); *Baber v. Fortner by Poe,* 186 W.Va. 413, 421, 412 S.E.2d 814, 822 (1991). The circuit court also found that dismissal was appropriate because "there is no cause of action for deviation [from] the standard of care under the Medical Professional Liability Act ... while testifying in a criminal case." *See* W. Va.Code § 55-7B-4 (1986) (Repl.Vol.2000). A sixth basis for halting Ms. Davis' prosecution of her claims addressed by the circuit court was its lack of personal jurisdiction over defendant doctors Zitelli and Becker. *See* W. Va.Code § 56-3-33 (1997) (Supp.2001). ****397 *275** Finally, the court deemed Ms. Davis' lawsuit to be improper based upon her failure to appeal the court's earlier ruling dismissing her claims against the defendants and the tolling of the applicable appeals period.

Although Judge Jolliffe's well-reasoned order most certainly satisfies the due process consideration with which Justice Cleckley was concerned in *Bartles,* [4] the majority of the Court completely ignores this thorough analysis. Rather than dismissing the lower court's ruling, this Court should, at the very least, have heeded its own prior holding, which it quoted at length in its majority opinion, and accorded some modicum of discretion to the circuit court's decision to proclaim frivolous Ms. Davis' suit and impose appropriate sanctions. *See* Syl. pt. 1, in part, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995) ("[T]he West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making ... procedural rulings.... Absent a few exceptions, this Court will review ... procedural rulings of the circuit court under an abuse of discretion standard.").

C. Ms. Davis' Lawsuit is Frivolous and Should Have Been Sanctioned Under Rule 11

Because of the absolute clarity of the law on this issue, I believe that the impact of the majority decision strips circuit courts of the authority to impose sanctions against parties filing frivolous lawsuits. I do not take this position lightly. Prior to this decision, our law was clear. Sanctions may be imposed against a party "as the result of his or her vexatious, wanton, or oppressive assertion of a claim or defense that cannot be supported by a good faith argument for the application, extension, modification, or reversal of existing law." Syl., in part, *Daily Gazette Co., Inc. v. Canady,* 175 W.Va. 249, 332 S.E.2d 262 (1985). *See, e.g., Pritt v. Suzuki Motor Co., Ltd.,* 204 W.Va. 388, 513 S.E.2d 161 (1998) (per curiam) (affirming sanctions against plaintiff for filing a baseless lawsuit); Syl. pt. 4, in part, *State ex rel. Roy Allen S. v. Stone,* 196 W.Va. 624, 474 S.E.2d 554 (1996) (holding that a "circuit court has discretion [under Rule 11] to impose attorney's fees on litigants who bring vexatious and groundless lawsuits"). Additionally, this Court has held that "[t]he filing of frivolous and harassing litigation can lead to disciplinary sanctions including disbarment[.]" Syl. pt. 4, in part, *Committee on Legal Ethics of the West Virginia State Bar v. Douglas,* 179 W.Va. 490, 370 S.E.2d 325 (1988). *See also* W. Va. Rules of Professional Conduct Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law[.]").

The lawsuit filed by Ms. Davis is a textbook example of a frivolous lawsuit. By prohibiting the circuit court in this case from imposing sanctions for the filing of such a meritless pleading, the majority opinion has left no room for trial courts to ever again impose Rule 11 sanctions. Attorneys who file frivolous lawsuits in the future can evade sanctions and disciplinary charges merely by citing to the majority's decision. Worse yet, the majority decision has no judicial support to challenge a universally accepted common law principle, which categorically *precludes* a negligence action by a convicted criminal defendant against expert witnesses who are testifying on behalf of the prosecution. [5] The ****398 *276** ultimate result of the majority's decision will almost certainly be the death knell for causes of action requiring the services of an expert witness, from medical malpractice and personal injury cases to abuse and neglect proceedings and criminal prosecutions.

III. On the Horizon: Rough Waters Ahead

" 'A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.' " *Hunt v. Tucker,* 875 F.Supp. 1487, 1539 (N.D.Ala.1995) (Maddox, J., dissenting) (quoting *Auto-Owners Ins. Co. v. Hudson,* 547 So.2d 467, 469 (Ala.1989) (Maddox J., dissenting) (quoting United States Supreme Court Chief Justice Charles Evans Hughes in William O. Douglas, *The Dissent: A Safeguard of Democracy,* 32 J. Am. Judicature Soc'y 104, 106 (1948))) (footnote omitted), *aff'd,* 93 F.3d 735 (11th Cir.1996). It goes without saying that the effect of the majority's decision in this case will be sweeping and profound. By giving criminal defendants carte blanche authority to sue the State's experts without impunity, the Court precariously navigates in heretofore uncharted waters, leaving countless expert witnesses to be tossed in the rough waters of their wake. I only hope that the Court has an opportunity to revisit this issue so that testifying experts can be spared from further peril. Realistically, however, I fear it will be some time before this State's litigants can once again enjoy smooth sailing.

For the foregoing reasons, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.

STARCHER, Justice, concurring.

(Filed July 3, 2002)

I believe the majority opinion is correct in this case. Though artfully pled, it seems to me that the dissenting opinion is the one that has "missed the boat" on the underlying case. The unnecessarily harsh dissent is but a lengthy essay on the issue of whether there exists in West Virginia a cause of action for negligence or malpractice against forensic experts. The majority opinion clearly acknowledges that there is *not* a cause of action for suing an opposing party's expert witness in West Virginia, and there is absolutely no language in the majority opinion that advocates for the creation of such a claim.

At issue is whether the trial court abused his discretion by assessing $8,500.00 in sanctions against the appellant

parties for promoting what the appellants perceived to be an advancement in our current law. The trial court properly determined that the theory of law propounded by the appellants does not support a cause of action in our State. However, the trial court also determined that the appellants were in violation of *West Virginia Rules of Civil Procedure,* Rule 11 [1998], and had a "vexatious, wanton, or oppressive intent to intimidate the appellees."

The majority merely acknowledges that there is an emerging body of case law and scholarly work that have begun to question the granting of absolute immunity to expert witnesses, often known in legal circles as "hired guns," for their in-court testimony and out-of-court preparations. Several law review articles and courts have begun to argue that it is not unreasonable to expect that ****399 *277** expert witnesses should be held to standards of their profession both in and outside of the courtroom, and several jurisdictions have permitted such law suits. Considering the developing trend, the appellants' suit against the State's expert witnesses should not be seen as frivolous. Thus, this Court was within its authority to find that the trial court erred in levying sanctions.

West Virginia Rules of Civil Procedure, Rule 11(b) [1998], clearly permits a lawyer to urge "the extension, modification, or reversal of existing law or the establishment of a new law[.]" Lawyers should be praised for their innovations, even if their innovations run a little far afield. The law is an evolving entity-not a museum piece to be studied under glass. And, on occasion, what may be seen by some as a frivolous argument may become tomorrow's cutting-edge legal theory.

For all of the hand-wringing and complaints of the sky falling, what the dissenting opinion portends as "rough seas ahead" is actually a self-imposed, artificially-created tempest in a teapot.

All Citations

211 W.Va. 264, 565 S.E.2d 386

Footnotes

1 On September 15, 1997, Marybeth Davis was convicted of the attempted poisoning by insulin of her son and the murder of her daughter by caffeine. *See State v. Davis,* 205 W.Va. 569, 519 S.E.2d 852 (1999).

2 *See, e.g., James v. Brown,* 637 S.W.2d 914 (Tex.1982) (finding that the adverse expert-witness psychiatrist owed a statutory duty of care to the plaintiff); *Levine v. Wiss & Co.,* 97 N.J. 242, 478 A.2d 397 (1984) (holding that immunity would not protect an expert witness-accountant from a claim of negligent compilation of an appraisal for a judicial proceeding); *Mattco Forge, Inc. v. Arthur Young & Co.,* 5 Cal.App.4th 392, 6 Cal.Rptr.2d 781 (Ct.App.1992) (holding that witness immunity would not shield an expert witness-accounting firm from otherwise actionable professional malpractice); *Murphy v. A.A. Mathews,* a Div. of CRS Group Engineers, Inc., 841 S.W.2d 671 (Mo.1992) (*en banc*) (finding that an expert who provided negligent litigation support was not protected by witness immunity); *but see Bruce v. Byrne-Stevens & Associates Engineers, Inc.,* 113 Wash.2d 123, 776 P.2d 666 (1989) (holding the expert witnesses were protected by witness immunity to ensure expert objectivity).

3 Mary Virginia Moore, Gary G. Johnson and Deborah F. Beard, *Liability in Litigation Support and Courtroom Testimony: Is it Time To Rethink the Risks?,* 9 J. Legal Econ. 53 (Fall 1999); Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Professionals Hired as Expert?,* 17 Rev. Litig. 393 (1998); Douglas R. Richmond, *The Emerging Theory of Expert Witness Malpractice,* 22 Cap. U.L.Rev. 693, 694 (1993); W. Raley Alford, III, Comment, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change,* 61 La. L.Rev. 181 (2000); Eric G. Jensen, Comment, *When "Hired Guns" Backfire: The Witness Immunity Doctrine and the Negligent Expert Witness,* 62 UMKC L.Rev. 185 (1993); Randall K. Hanson, *Witness Immunity Under Attack: Disarming "Hired Guns,"* 31 Wake Forest L.Rev. 497 (1996); *but see* Adam J. Myers III, *Misapplication of the Attorney Malpractice Paradigm to Litigation Services: "Suit within a Suit" Shortcomings Compel Witness Immunity for Experts,* 25 Pepperdine L.Rev. 1 (1997).

1 Such an attempt to lessen the precedential weight of a decision by rendering it per curiam, however, cannot be successful in light of the Court's recent revision of its treatment of such opinions. *Compare* Syl. pts. 3-4, *Walker v. Doe,* 210 W.Va. 490, 558 S.E.2d 290 (2001) (Syl. pt. 3: "Per curiam opinions have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a per curiam opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases."; Syl. pt. 4: "A per curiam opinion may be cited as support for a legal argument.") *with Lieving v. Hadley,* 188 W.Va. 197, 201 n. 4, 423 S.E.2d 600, 604 n. 4 (1992) ("*Per curiam* opinions ... are used to decide only the specific case before the Court; everything in a *per curiam* opinion beyond the

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syllabus point is merely *obiter dicta*. A *per curiam* opinion that appears to deviate from generally accepted rules of law is not binding on the circuit courts, and should be relied upon only with great caution.... [I]f rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a *per curiam* opinion.").

2 The decision in *James v. Brown* involved an action for misdiagnosis, by the plaintiff's own psychiatrists during a mental health proceeding, that was permitted by statute. *See James v. Brown,* 637 S.W.2d 914, 918 (Tex.1982) (per curiam).

3 Ms. Davis was convicted of the murder of her daughter and the attempted poisoning of her son. *See State v. Davis,* 205 W.Va. 569, 519 S.E.2d 852 (1999) (affirming convictions and sentences).

4 *See* Syl. pt. 1, *Bartles v. Hinkle,* 196 W.Va. 381, 472 S.E.2d 827 (1996).

5 Criminal defendants who are wrongfully prosecuted are not without remedy. A civil action lies for malicious prosecution. *See* Syl. pt. 3, in part, *McCammon v. Oldaker,* 205 W.Va. 24, 516 S.E.2d 38 (1999) ("To maintain an action for malicious prosecution it is essential to prove: (1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff." (internal quotations and citation omitted)). Additionally, a criminal action lies for perjury or subornation of perjury under W. Va.Code § 61-5-1 (1996) (Repl.Vol.2000), which states:

> (a) Any person who is under an oath or affirmation which has been lawfully administered and who willfully testifies falsely regarding a material matter in a trial of any person, corporation or other legal entity for a felony, or before any grand jury which is considering a felony indictment, shall be guilty of the felony offense of perjury.
>
> (b) Any person who induces or procures another person to testify falsely regarding a material matter in a trial of any person, corporation or other legal entity for a felony, or before any grand jury which is considering a felony indictment, shall be guilty of the felony offense of subornation of perjury.

See also State v. Justice, 130 W.Va. 662, 44 S.E.2d 859 (1947) (reviewing subornation of perjury conviction); Syl., in part, *State v. Lake,* 107 W.Va. 124, 147 S.E. 473 (1929) ("It is vital in a trial of an indictment for perjury that the evidence given ... in a former judicial proceeding and alleged to have been willfully false, should show that such evidence so given ... was material to the issue involved in the trial."). Finally, a criminal action for false swearing is available under W. Va.Code § 61-5-2 (1923) (Repl.Vol.2000), which provides:

> To wilfully swear falsely, under oath or affirmation lawfully administered, in a trial of the witness or any other person for a felony, concerning a matter or thing not material, and on any occasion other than a trial for a felony, concerning any matter or thing material or not material, or to procure another person to do so, is false swearing and is a misdemeanor.

See also State v. Wade, 174 W.Va. 381, 327 S.E.2d 142 (1985) (affirming false swearing conviction).

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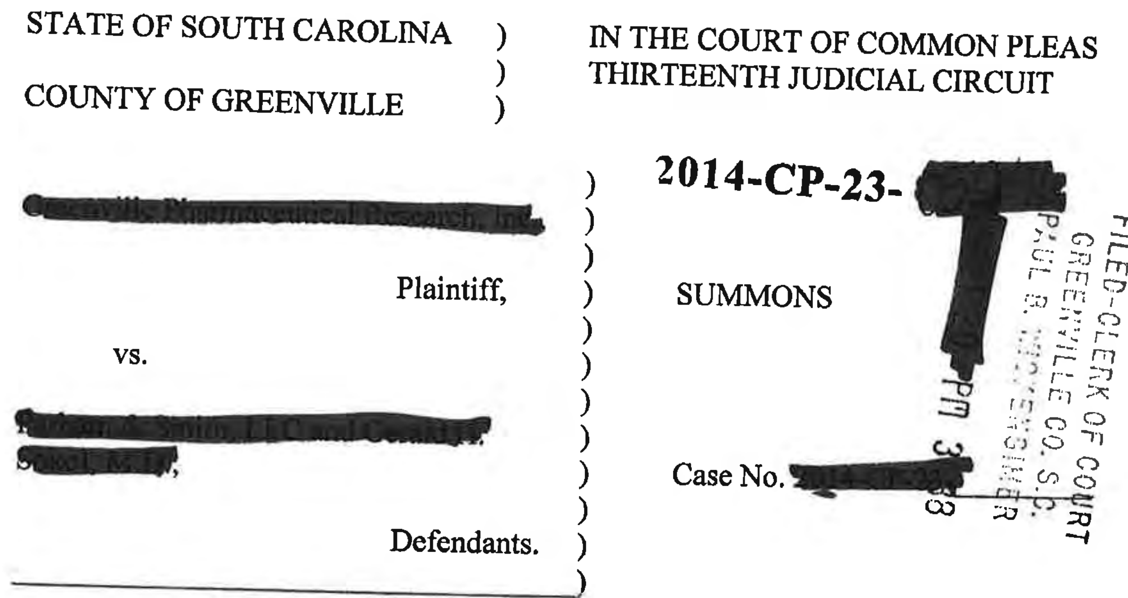


STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2014-CP-23-

Plaintiff,

vs.

Defendants.

SUMMONS

Case No.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
PM 3:58

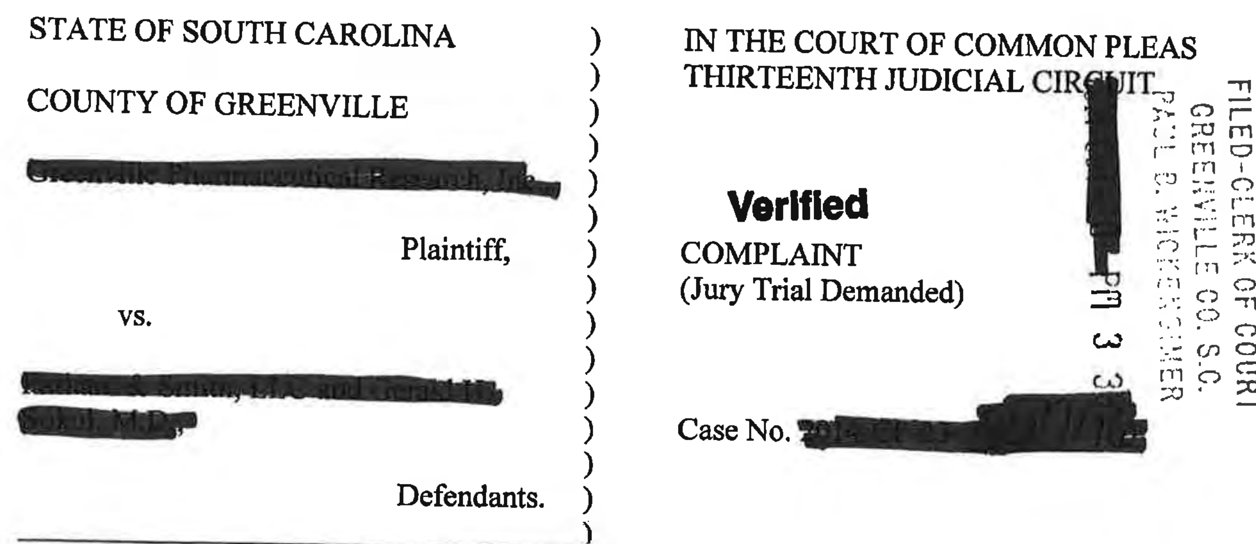
TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the COMPLAINT herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days (or thirty-five (35) days if service is by certified mail) after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

BY:

October 20, 2014

SCANNED



STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

[redacted],

Plaintiff,

vs.

[redacted],

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Verified
COMPLAINT
(Jury Trial Demanded)

Case No. [redacted]

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PM 3 3

Now comes the Plaintiff complaining of the Defendants and allege:

<u>Venue and Jurisdictional Allegations</u>

1. The Plaintiff, [redacted] is a corporation in good standing, formed within the State of South Carolina with its principal place of business in Greenville County.
2. Upon information and belief, [redacted] is a corporation in good standing, formed within the State of South Carolina with its principal place of business in Greenville County.
3. Upon information and belief, [redacted] is a resident of the State of [redacted] with substantial ties to South Carolina through his paid-for witness services and therefore this court has personal jurisdiction over him.
4. Venue and jurisdiction are vested in the Circuit Court of the Thirteenth Judicial Circuit in and for Greenville County, South Carolina.

General Factual Allegations

5. This action arises out of alleged conduct by [redacted] Esquire, [redacted] as an attorney with [redacted] Plaintiff's counsel and [redacted] as a paid-for witness in a prior lawsuit captioned [redacted] v. [redacted], ("underlying action" or "[redacted]itigation") filed on October 20, 2011 in the Court of Common Pleas for Greenville County, Thirteenth Judicial Circuit, case number [redacted]

6. According to the [redacted]igation court records, [redacted] served Plaintiff with the Notice of Intent to File Suit on or about July 13, 2011, which is required pursuant to §15-79-125 South Carolina Code of Laws in order to bring a medical malpractice claim within South Carolina.

7. [redacted] affidavit was offered in compliance with §15-7-125 South Carolina Codes of Law, a copy of which is attached herewith and incorporated herein as Exhibit A.

8. In the [redacted]itigation, [redacted] and [redacted] ("Bruces"), through their attorney, [redacted] alleged that [redacted] Inc. ([redacted]) and [redacted], failed "to possess the degree of care, competence and skill ordinarily and customarily possessed by similar healthcare providers in similar circumstances or failing to exercise that degree of care, competence and skill ordinarily and customarily exercised by similar health-care providers under similar circumstances and in deviating from ordinary and customary standards of medical care", and acted in a fashion of "negligence, carelessness,

recklessness, willfulness and wantonness", which caused the Plaintiffs to suffer real and immediate injury.

FIRST CAUSE OF ACTION
(Fraud as to [redacted])

9. Plaintiff realleges all of the above paragraphs, to the extent not inconsistent herewith, as if each is set forth *in toto* hereunder.
10. [redacted] is a licensed physician and a member of the American Medical Association, who is engaging in the service of providing paid-for testimony and affidavits in many states, including the State of South Carolina, and has testified in several hundred medical negligence cases.
11. There is a high probability that [redacted] will continue selling his testimony and affidavits in South Carolina in the future.
12. South Carolina Code of Laws §15-79-125 is meant to protect the public and to discourage or eliminate the filing of the lawsuits without credible expert support in the form of a pre-suit affidavit, or a certificate of merit from a physician.
13. If physicians deliver dishonest or fraudulent medical testimony and affidavits, they discredit physicians as a group, unjustly cause meritless litigation and endanger the public's trust in physicians, as well as the legal system.
14. South Carolina requires an individual bringing a medical malpractice claim to file an expert affidavit in a proceeding called the Pre-Suit Notice of Intent, §15-79-125 South Carolina Code of Laws.
15. In South Carolina, the expert witness is required to specify at least one negligent act or omission claimed to exist, by an Affidavit, before a Notice of Intent may be filed §15-36-100, South Carolina Code of Laws.

16. [redacted] was recruited to provide a deviation of the standard of care affidavit pursuant to §15-79-125, South Carolina Code of Laws, regarding [redacted] for [redacted].

17. [redacted] knew very well about this South Carolina requirement respecting affidavit by virtue of his years at selling his testimony and affidavits.

18. [redacted] prepared and presented the affidavit attached as Exhibit A to [redacted] who signed it without modification or sufficient information to form good faith opinions.

19. During his recruitment, [redacted] received a letter from [redacted] by way of his handler, [redacted], RN, in which he advised Sokol that a pre-suit affidavit was required for Parham to bring suit.

20. [redacted] letter stated that the medical records provided were incomplete.

21. [redacted] never requested any additional medical records.

22. The standard of the profession for providing expert testimony in medical negligence liability cases requires that they be willing to evaluate cases objectively and derive an independent opinion, not simply sell their credentials.

23. The South Carolina requirement of a sworn statement is meant to prevent frivolous claims before they make it into the court system.

24. In his affidavit, [redacted] fraudulently claimed that he had based his opinion as to liability upon his review of medical records.

25. [redacted] received limited medical records and no records indicating medical care allegedly given by [redacted].

26. [redacted] thereby made false and material misrepresentations, which he knew to be false or had a reckless disregard for its truth or falsity, which he intended said representations to be acted upon, by the hearer's ignorance of its falsity, hearer's

reliance on its truth, hearer's right to reply, and consequence and proximate injury by signing [redacted] Affidavit.

27. During [redacted] deposition, he was clearly unfamiliar with the facts of the case, and spoke only in generalities.
28. [redacted] candidly admitted he only testifies for Plaintiffs' counsel.
29. [redacted] refused to answer questions about his prior work as a paid-for witness during his deposition.
30. Ultimately, [redacted] left his deposition before its conclusion, thereby necessitating it being reconvened at a later time.
31. Upon reconvening [redacted] deposition, he admitted he had insufficient evidence and would not opine as to any <u>standard of care</u> that may have applied to [redacted].
32. [redacted] actions clearly established he sold his signature fraudulently to [redacted]
33. [redacted] intentionally marketed and sold his medical license by executing a fraudulent Affidavit merely for the purpose of circumventing the pre-suit requirements of §15-79-125 South Carolina Code of Laws.
34. [redacted] clearly intended to appease his handler, [redacted] RN, as it was in his best economic interest to continue a positive and prosperous business relationship in order to obtain future Plaintiff's cases.
35. At all times material, [redacted] was willing to state anything requested by Parham, regardless of its truth, veracity and medical accuracy.
36. [redacted] provided no medical literature to support his opinion.

37. Plaintiff has suffered damages, loss and harm, including but not limited to their reputations, money, emotional tranquility, and privacy.

38. That said damages, loss and harm was the proximate and legal result of the aforementioned fraud.

SECOND CAUSE OF ACTION
(Defamation Per Se as to [redacted] LLC)

39. Plaintiff realleges all of the above paragraphs, to the extent not inconsistent herewith, as if each is set forth *in toto* hereunder.

40. [redacted] took the deposition of [redacted] M.D. ("[redacted]"), on March 12, 2012.

41. [redacted] produced numerous pieces of medical literature at said deposition.

42. [redacted]'s medical literature was the only medical literature produced in the underlying lawsuit.

43. [redacted] did not provide any medical literature to refute or counter that of [redacted]

44. Based upon [redacted]'s deposition testimony, admissions that he was not prepared to offer testimony against the Plaintiff respecting liability as to standard of care, and lack of supportive medical literature, it was unreasonable for Parham to rely on Sokol.

45. However, subsequent to the depositions of [redacted] and [redacted]n, [redacted] sent a letter to the Institutional Review Board ("IRB") dated June 4, 2012, a copy of which is attached hereto and incorporated herein as Exhibit B.

46. The IRB is a third-party regulatory body that oversees pharmaceutical studies, which is the primary function of [redacted]

47. The IRB ensures that FDA protocols are followed by the sponsor and pharmaceutical research entity, including that non-eligible participants are not permitted to participate in a study.

48. In the letter to the IRB, [redacted] stated that Mr. [redacted] suffered from Stage IV Lung Cancer and his "involvement in a [redacted] study has caused this."

49. Further, [redacted] wrote that [redacted] did not follow the protocols.

50. [redacted] alleges in his letter to the IRB that Mr. [redacted] inoperable cancer and death was caused by [redacted], which is manifestly against the information that he had, and therefore reckless and/or untruthful.

51. The IRB and medical community takes very seriously the allegations that a pharmaceutical research entity caused the death of any person.

52. [redacted] was fully aware of the seriousness of his allegations made in the IRB letter against Plaintiff.

53. [redacted] knew the importance of the IRB to clinical research entities such as GPR based upon the sworn testimony in several prior depositions.

54. [redacted] crafted the letter to the IRB after [redacted] had been discredited, and [redacted] had provided undisputed medical literature, in a reckless and intentional effort to force a settlement with [redacted].

55. [redacted] knew of the untruthfulness or he had a reckless disregard as to the truthfulness of the IRB letter at the time the letter was sent.

56. [redacted] sent the IRB letter with the full knowledge that [redacted] was never accepted as a volunteer for a [redacted] research study; that [redacted] "screen failed" and

thus never participated in the [redacted] study at issue, never had any procedures performed at [redacted] and never took the [redacted] study medicine.

57. [redacted] made false and defamatory statements in the IRB letter against Plaintiff, to third parties, through the fault of Defendant [redacted] LLC which caused harm to Plaintiff by harming its reputation, by lowering it in the estimation of the community, and/or deterring third persons from associating or dealing with it.

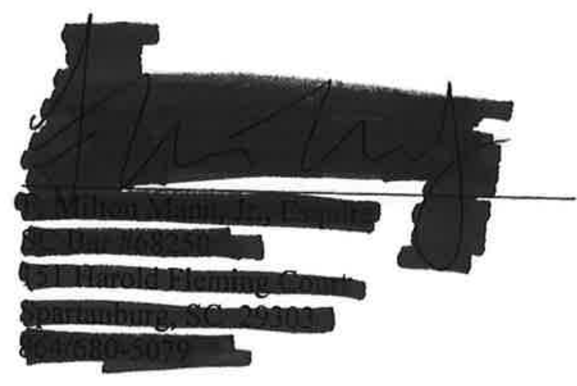
58. Plaintiff has suffered damages, loss and harm, including but not limited to their reputations, money, emotional tranquility, and privacy.

59. That said damages, loss and harm was the proximate and legal result of the defamation per se aforementioned.

WHEREFORE, having fully set forth its Complaint above, the Plaintiff prays:

a. For a jury trial to be conducted in this matter;
b. For actual and compensatory damages in an amount to be determined by the jury;
c. For punitive damages in an amount to be determined by the jury; and
d. For the cost of this action, including reasonable attorney's fees and for other such relief as appears just and equitable in the premises.

Dated: 10/20/14



Attorney for Plaintiff

JURY REQUEST

The Plaintiff hereby respectfully requests a trial by jury.

Dated: 10/20/14

____

Esquire

EXHIBIT "B"

AFFIDAVIT OF [redacted] MD

1. I am over eighteen (18) years of age and legally competent to make this Affidavit based upon my background, education, training and experience, as well as a review of the medical records from [redacted] a part of [redacted] C. regarding [redacted]. My qualifications and background are listed in my attached *Curriculum Vitae.*

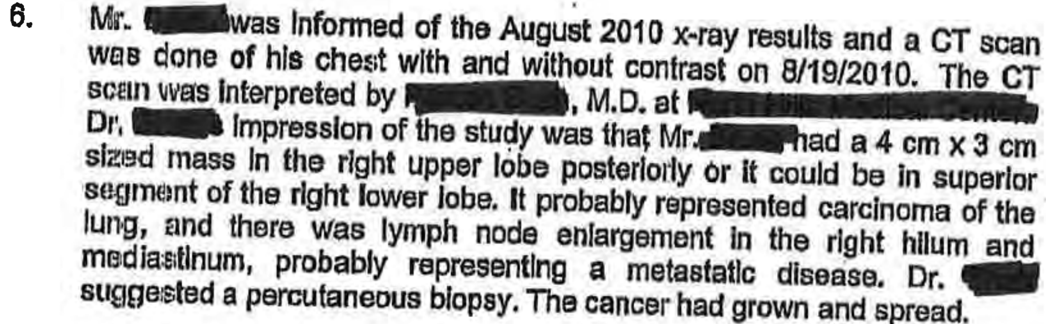
2. In this case, based upon my review of the medical records as stated, specifically the radiology report of [redacted] MD on [redacted] chest film of January 26, 2010, there is at least one negligent deviation from the standard of care on behalf of [redacted] M.D., [redacted] and [redacted] in the care given to [redacted].

3. According to the Medical Records, [redacted] began participating in a research study for COPD with [redacted] in 2006. This study required [redacted] to have a chest x-ray on January 26th, 2010. [redacted] of [redacted] read [redacted] chest x-ray on January 28th, 2010. [redacted] conclusion was that there was a suggestion of a small soft tissue density measuring 1.8 cm in size in the right upper lung field medially at about T5 level. He recommended a CAT scan with and without contrast for further evaluation.

4. [redacted] never received the information found in the January 26th 2010 x-ray. He was never informed that he had a 1.8 cm density in his upper right lung, nor was he told that he should have a CAT scan for further evaluation.

5. The [redacted] study required Mr. [redacted] to have another chest x-ray in August of 2010. Dr. [redacted] generated the x-ray report on August 3, 2010 and his conclusion that of an abnormal density seen in the right upper lung field medially and posteriorly. Dr. [redacted] stated that the density had increased in size in comparison to the 1/26/2010 x-ray, and the density currently measured 3.05 cm in size. Dr. [redacted] strongly recommended a CT scan, and concluded that the rest of the chest was within normal limits.

COMPLAINT EXHIBIT "A"



6. Mr. [redacted] was informed of the August 2010 x-ray results and a CT scan was done of his chest with and without contrast on 8/19/2010. The CT scan was interpreted by [redacted], M.D. at [redacted]. Dr. [redacted] impression of the study was that Mr. [redacted] had a 4 cm x 3 cm sized mass in the right upper lobe posteriorly or it could be in superior segment of the right lower lobe. It probably represented carcinoma of the lung, and there was lymph node enlargement in the right hilum and mediastinum, probably representing a metastatic disease. Dr. [redacted] suggested a percutaneous biopsy. The cancer had grown and spread.

7. Mr. [redacted] underwent a needle biopsy on 8/26/2010 which revealed T2 N3 squamous cell carcinoma of the lung. It was determined that Mr. [redacted] large cell carcinoma had metastasized and was non-operable. He began radiation and chemotherapy treatments.

8. Mr. [redacted] prognosis at stage 3(B) squamous cell carcinoma is grim to incurable.

9. In my opinion, more probably than not to a reasonable degree of medical certainty, had the results of Mr. [redacted] January 26th, 2010 chest x-ray been reported to his treating physicians and had those physicians acted appropriately upon that information, Mr. [redacted] would have undergone a CAT scan with and without contrast and a needle biopsy which would have revealed that the 1.8 cm density in his lung was stage one squamous cell carcinoma and that his tumor was operable.

10. It is further my opinion that had Mr. [redacted] tumor been diagnosed and treated at the time of the January 26th, 2010 x-ray, he more probably than not to a reasonable degree of medical certainty would have had a prognosis of greater than fifty percent for survival.

11. There may be other deviations from the standard of care and there may be additional bases for the opinions expressed herein that may be discussed or discovered at a later time. As a result, I reserve the right to modify, change and/or supplement these opinions in the future.

Dated this 26 day of May, 2011.

Subscribed and sworn to before me this
26 day of May, 2011.

Notary Public
In and For the State of Florida
My Commission Expires: June 7, 2014

Superior Court of Connecticut, Judicial District of Litchfield at Litchfield

July 1, 2013, Decided; July 1, 2013, Filed

LLICV126006448S

Reporter
2013 Conn. Super. LEXIS 1492 | 2013 WL 3871341

O&G Industries, Inc. v. Litchfield Insurance Group, Inc. et al.

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Core Terms

coverage, apportionment, procure, motion to strike, judicial district, alleges, internal quotation marks, parties, insurance coverage, policies, declaratory judgment, service agreement, argues, counts, revised, insurance agent, Services, umbrella, recommend, insurance broker, umbrella policy, broker, minority view, fiduciary, asserts, liability insurance, liability coverage, contends, damages, advise

Case Summary

Overview

HOLDINGS: [1]-As an insured's claim against an insurance agent was based upon an alleged breach of the parties' service agreement, there was no need for the court to declare the rights of the parties pursuant to Conn. Gen. Stat. § 52-29 and Conn. Gen. Prac. Book, R. Super. Ct. § 17-55 because the agreement would be interpreted under the breach of contract claim; [2]-A breach of contract claim survived challenge by a motion to strike, as it alleged that the agent did not procure the required insurance, as contracted by the parties; [3]-The insured sufficiently alleged claims of negligence and professional malpractice against the agent, based on the parties' relationship and the agent's duty to procure the proper insurance; [4]-The fact that the agent was already a party to the action did not warrant striking the insurer's apportionment complaint under Conn. Gen. Stat. § 52-102b.

Outcome

Motion to strike denied as to insurer's apportionment complaint; granted as to insured's declaratory judgment claim and denied as to other challenged claims.

LexisNexis® Headnotes

Insurance Law > ... > Commercial General Liability Insurance > Coverage > General Overview

HN1 A contractor controlled insurance program is a program that "wrap-up" various individual policies related to a common project or location into master policies. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2 The purpose of a motion to strike is to contest the legal sufficiency of the allegations of any complaint to state a claim upon which relief can be granted. A court takes the facts to be those alleged in the complaint that has been stricken and it construes the complaint in the manner most favorable to sustaining its legal sufficiency. Thus, if facts provable in the complaint would support a cause of action, the motion to strike must be denied. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3 For purposes of a motion to strike, what is necessarily implied in an allegation need not be expressly alleged. It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN4 Whether a court can properly grant declaratory relief is a distinct question, which is properly raised by a motion to strike. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN5 Declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. The purpose of a declaratory judgment action, as authorized by Conn. Gen. Stat. § 52-29 and Conn. Gen. Prac. Book, R. Super. Ct. § 17-55, is to secure an adjudication of rights when there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties. The declaratory judgment statute provides a valuable tool by which litigants may resolve uncertainty of legal obligations. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief
Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN6 Connecticut's declaratory judgment statute is unusually liberal. Although the declaratory judgment procedure may not be utilized merely to secure advice on the law, it may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof. Implicit in Conn. Gen. Stat. § 52-29 and Conn. Gen. Prac. Book, R. Super. Ct. § 17-55 is the notion that a declaratory judgment must rest on some cause of action that would be cognizable in a nondeclaratory suit. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Pleadings > Complaints > Topic Summary ReportRequirements for Complaint
Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

HN7 A declaratory judgment complaint must state facts sufficient to set forth a cause of action entitling a plaintiff to a declaratory judgment. To state a cause of action for such relief, facts showing the existence of a substantial controversy or uncertainty of legal relations which requires settlement between the parties must be alleged. Ordinarily, there should be an assertion in the pleadings by one party of a legal relation or status or right in which he has a definite interest, together with an assertion of the denial of it by the other party, thus setting forth a substantial dispute. Fully to carry out the purposes intended to be served by declaratory judgments, it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening. Even if the right claimed is a contingent one,

its present determination may well serve a very real practical need of the parties for guidance in their future conduct. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN8 See Conn. Gen. Prac. Book, R. Super. Ct. § 17-54. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Discretionary Jurisdiction
Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN9 Accepting as true the allegations in a complaint and all facts provable thereunder, in deciding whether a declaratory judgment action in a given case is appropriate, courts allow a trial court wide discretion to render a declaratory judgment unless another form of action clearly affords a speedy remedy as effective, convenient, appropriate, and complete. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN10 While a trial court is afforded wide discretion to render a declaratory judgment, a court should not entertain an action for a declaratory judgment when an ordinary action affords a remedy as effective, convenient, and complete. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN11 It is well established that a motion to strike must be considered within the confines of the pleadings and not external documents. Courts are limited to a consideration of the facts alleged in the complaint. Where the legal grounds for a motion to strike are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Pleadings > Complaints > Topic Summary ReportRequirements for Complaint
Contracts Law > Breach > Breach of Contract Actions > Elements of Contract Claims

Insurance Law > ... > Company Representatives > Agents > General Overview
Torts > Malpractice & Professional Liability > Topic Summary ReportProfessional Services

HN12 Connecticut recognizes a cause of action against an insurance agent for failure to obtain insurance under a theory of either professional malpractice or breach of contract. When bringing a claim against an insurance agent for failure to obtain insurance under a breach of contract theory, a plaintiff must allege that he contracted with the insurance agent to obtain a particular result. If the allegations are couched in terms of the defendant having committed professional negligence in the procuring of the insurance policy, instead of allegations that the defendant promised the plaintiff a specific result in obtaining the insurance, the claim for breach of contract should be stricken. Shepardize - Narrow by this Headnote

Torts > ... > Elements > Duty > General Overview
Torts > ... > Elements > Duty > Foreseeability of Harm

HN13 The existence of a duty is a question of law. First, it is necessary to determine the existence of a duty, and second, if one is found, it is necessary to evaluate the scope of that duty. A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act. The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. By that it is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? Shepardize - Narrow by this Headnote

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Agents
Insurance Law > ... > Company Representatives > Agents > General Overview
Torts > ... > Elements > Duty > General Overview

HN14 The Supreme Court of Connecticut has stated that an insurance broker is an agent of an insured in negotiating for the policy and, as such, he owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance, and any negligence or other breach of duty on his part which defeats the insurance which he undertakes to secure will render him liable to his principal for the resulting loss. Where he undertakes to procure a policy affording protection against a designated risk, the law imposes upon him an obligation to perform with reasonable care the duty he has assumed, and he may be held liable for loss properly attributable to his default. Shepardize - Narrow by this Headnote

Insurance Law > ... > Company Representatives > Agents > General Overview
Torts > ... > Duty > Affirmative Duty to Act > General Overview

HN15 The reasonable skill, care and diligence required of an insurance broker includes a duty to at least see that his client has proper coverage. The Connecticut Appellate Court has approved a trial court instruction correctly explaining a broker's duty of care: Selling insurance is a specialized field with specialized knowledge and experience, and an agent has the duties to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client. A client ordinarily looks to his agent and relies on the agent's expertise in placing his insurance problems in the agent's hands. If the agent performs these duties negligently, he is liable therefor, just as other professionals are. Shepardize - Narrow by this Headnote

Insurance Law > ... > Company Representatives > Agents > General Overview

HN16 Absent a fiduciary relationship, insurance brokers have no duty to advise as to adequate insurance. Shepardize - Narrow by this Headnote

Business & Corporate Law > Agency Relationships > Fiduciaries > Formation
Insurance Law > ... > Company Representatives > Agents > General Overview

HN17 With respect to the relationship between an insurance agent and a client, at least one Superior Court judge has held that because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between the insurance agent and his client is often a fiduciary one. The insurance agent-client relationships which give rise to a fiduciary duty and those which are merely professional in nature are distinguished by the conduct of the parties. Where the agent holds himself out as a consultant and counselor and is acting as a specialist, and where the client trusts and relies on the agent as a specialist, a fiduciary duty is present. Shepardize - Narrow by this Headnote

Business & Corporate Law > Agency Relationships > Fiduciaries > Definitions
Business & Corporate Law > Agency Relationships > Fiduciaries > Formation
Insurance Law > ... > Company Representatives > Agents > General Overview

HN18 Although it is inadvisable to create a situation where an incentive exists for an insured to claim successfully after the fact they would have purchased more insurance, Connecticut law does recognize an agency relationship between insurance agent and insured at the time insurance is contracted and some duties flow from that relationship. A fiduciary relationship is one characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interest of the other. At the very least the agent has a duty to put into effect the type and amount of coverage requested. It also does not seem too much to ask that an agent, with his or her expertise and knowledge of the insurance business, review existing and available coverages, at that time. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

HN19 In ruling on a motion to strike, a trial court is limited to considering the grounds specified in the motion. Shepardize - Narrow by this Headnote

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN20 See Conn. Gen. Stat. § 52-102b. Shepardize - Narrow by this Headnote

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN21 Connecticut appellate authority has not yet determined whether a defendant may bring an apportionment claim or counterclaim against a current party to an action. There is a split of authority at the Superior Court level on the issue. One line of cases, which has been referred to as the "majority view," interprets the plain language of Conn. Gen. Stat. § 52-102b and certain of its legislative history to preclude the filing of an apportionment claim against one who is already a party to the underlying action. The contrary view, often characterized as the "minority view," concludes that the purpose of § 52-102b is not to bar the filing of apportionment complaints against existing parties, but to provide a statutory means by which defendants may add and seek apportionment from non-parties. These "minority view" opinions have determined that because § 52-102b is irrelevant to persons that are already parties to a suit, the law does not preclude the filing of an apportionment action against existing parties. A review of the most recent case law suggests that the division among the superior court judges is approaching an even split. Indeed, given the clear trend toward the adoption of the "minority view" in recent cases, it may well be that the so-called "minority view" now reflects the opinion of the majority of the judges who have had occasion to rule upon this particular question. Shepardize - Narrow by this Headnote

Governments > Legislation > Interpretation

HN22 When two constructions are possible, courts will adopt the one which makes a statute effective and workable, and not one which leads to difficult and possibly bizarre results. In construing a statute, common sense must be used, and courts will assume that the legislature intended to accomplish a reasonable and rational result. Shepardize - Narrow by this Headnote

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN23 The purpose of Conn. Gen. Stat. § 52-102b is to effectuate a sharing of the responsibility between potential tortfeasors, as set forth in the legislative directive and the public policy of Conn. Gen. Stat. § 52-572h(c). Under the "minority view," § 52-102b does not say, and was not intended to say, that a defendant is barred from filing an apportionment complaint against an existing party. Rather than serving to restrict a defendant's right to seek apportionment, the statute's purpose is to broaden that right by authorizing apportionment to be sought against non-parties as well. There are numerous Superior Court decisions on the subject of whether a co-defendant can assert a cross claim for apportionment against another co-defendant. There is no appellate authority in Connecticut on the issue. The Superior Court of Connecticut, Judicial District of Litchfield, is persuaded that by adopting the "minority view," the purpose of § 52-102b is effectuated and a reasonable result is reached. Shepardize - Narrow by this Headnote

Torts > Negligence > Types of Negligence Actions > General Overview
Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN24 Conn. Gen. Stat. § 52-102b(a) grants the right to file an apportionment complaint to a defendant in any civil action to which Conn. Gen. Stat. § 52-572h applies. The Supreme Court has stated that a civil action to which § 52-572h applies within the meaning of § 52-102b means a civil action based on negligence. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim
Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN25 On a motion to strike, a court is limited to the facts alleged in the challenged complaint. It is inappropriate to look beyond a challenged apportionment complaint to the allegations contained in the original complaint. Shepardize - Narrow by this Headnote

Torts > ... > Elements > Duty > General Overview
Torts > Procedural Matters > Multiple Defendants > Distinct & Divisible Harms

HN26 The existence of a duty of care is an essential element of negligence. There is no question that a duty of care may arise out of a contract. No court has held that apportionment claims must be based on allegations of negligent breaches of identical or similar duties as those alleged in the plaintiff's complaint. Moreover, Conn. Gen. Stat. § 52-572h does not require that the apportionment defendant owe a duty to the apportionment plaintiff, but merely that the apportionment defendant is partially liable for the plaintiff's damages, or rather had a duty to the plaintiff. Shepardize - Narrow by this Headnote

Judges: [1] John W. Pickard, J.

Opinion by: John W. Pickard

Opinion

MEMORANDUM OF DECISION

Before the court are Aon Risk Services Northeast, Inc.'s (1) motion to strike (#116) counts two, four, six and eight of the plaintiff's revised complaint (#111); and (2) motion to strike (#127) Litchfield Insurance Group Inc.'s apportionment complaint (#124). For the reasons that follow, Aon's motion to strike the plaintiff's revised complaint will be granted as to count two, but denied as to counts four, six and eight. Also, Aon's motion to strike Litchfield Insurance Group Inc.'s apportionment complaint will be denied.

I

FACTS

Following a catastrophic explosion resulting in multiple deaths and injuries, as well as millions of dollars in property damage, the plaintiff, O&G Industries, Inc., filed a revised complaint, on June 27, 2012, against the defendants, Litchfield Insurance Group Inc. ("LIG") and Aon Risk Services Northeast, Inc. ("Aon"), asserting that the plaintiff had inadequate insurance coverage for a construction projection with Kleen Energy Systems, Inc. ("Kleen"). The revised complaint alleges the following relevant facts.

On November 30, 2007, the plaintiff and Kleen entered into an "Engineering, Procurement and Construction [2] Agreement" ("EPC Agreement"), in connection with Kleen's development of a power generation facility. Pursuant to the EPC Agreement, the plaintiff was required to maintain $100 million in liability insurance coverage, in the form of commercial general liability ("CGL") insurance and umbrella liability insurance. Under the EPC Agreement, some or all of the required insurance coverage could be provided under a Contractor Controlled Insurance Program ("CCIP").1Link to the text of the note The plaintiff decided to place the first $50 million of that coverage into a CCIP and to put the remaining $50 million into an umbrella coverage program.

The plaintiff entered into a service agreement with Aon to procure the CCIP ("Aon Service Agreement"). Under the Aon Service Agreement, the CCIP was to include CGL and excess liability coverages. The plaintiff also entered into a service agreement with LIG to procure umbrella and excess lines of insurance, including [3] the umbrella insurance which was to be excess of the CCIP ("LIG Service Agreement").

Aon procured the CCIP, which was composed of one CGL policy and three excess liability policies with limits totaling one-half of the liability coverage required under the EPC Agreement. The primary layer of the plaintiff's own liability program was issued by Travelers Property Casualty Company of America and provided for $2 million in coverage in excess of the CCIP ("Travelers policy"). LIG procured an umbrella policy issued by Commerce & Industry Insurance ("AIG policy") which provided coverage in excess of the Travelers policy, but not for the Kleen project. LIG also procured an excess liability policy issued by Westchester Fire Insurance Company ("ACE policy") and additional excess liability policies that provided coverage over the AIG policy (collectively, the "Excess policies") and were "follow form" to the AIG policy. However, LIG failed to ensure that the AIG policy had the proper policy endorsement necessary to provide umbrella insurance in excess of the CCIP. As follow form policies, the Excess policies were also deficient in this regard. As a result, the policies procured by LIG did not provide [4] liability coverage in excess of the CCIP for the Kleen project.2Link to the text of the note

On February 7, 2010, an explosion occurred at the Kleen project site, causing multiple deaths and injuries, as well as millions of dollars in property damage and project delays (the "Incident"). In addition to wrongful death and bodily injury lawsuits against the plaintiff and other CCIP participants, some of which have been settled, the plaintiff was forced to pay liquidated delay damages to Kleen in the amount of $44.6 million resulting from the extensive project delays. Additionally, Kleen has made a demand on the plaintiff for substantial amounts that Kleen allegedly incurred because of the property damage at the project site. Finally, one of the plaintiff's subcontractors also has sued the plaintiff to recover for alleged substantial property damage losses. After the Incident, AIG, ACE [5] and the other carriers issuing the Excess policies declined coverage for any claims arising out of the Incident. Subsequently, the plaintiff learned that the AIG policy and the Excess policies did not include the endorsement necessary to provide umbrella liability insurance coverage in excess of the CCIP.

In order to mitigate the gap in coverage caused by LIG and Aon, the plaintiff was forced to purchase retroactive liability insurance coverage at a cost of $3.85 million. That coverage is subject to a deductible of $7 million.

The [6] plaintiff alleges that, pursuant to the LIG Service Agreement, and as the plaintiff's agent and broker, LIG had the obligation to ensure that the insurance coverage it placed for the plaintiff satisfied the EPC Agreement's umbrella liability insurance requirements and the plaintiff's requests for coverage. LIG has denied responsibility for the shortfall in coverage and has blamed Aon for failing to comply with a purported requirement that all of the insurance limits required by the EPC Agreement be provided in a CCIP, and for failing to recognize that the CCIP and the plaintiff's own umbrella/excess policies failed to provide the full limit of required coverage.

The plaintiff also alleges that, pursuant to the Aon Service Agreement, and as the plaintiff's agent and broker, Aon had the obligation to ensure that the CCIP coverage it placed for the plaintiff, along with the plaintiff's own umbrella/excess liability policies satisfied the EPC Agreement's umbrella liability insurance requirements and the plaintiff's requests for coverage.

The plaintiff asserts that, under the EPC Agreement, the required liability coverage could be provided, in part, by the CCIP and, in part, by other policies. [7] However, the plaintiff alleges, if LIG is correct in its assertion that the EPC Agreement required that the entire limits of liability coverage be provided through a CCIP, then Aon failed to fulfill its obligation to procure that amount of coverage under the CCIP.

According to the plaintiff, had LIG and Aon secured all of the insurance coverage requested by the plaintiff, the delay damages would have been covered and the plaintiff would be fully covered for any liabilities it has already incurred and/or may incur in the future.

The present action is one for breach of contract, negligence, professional malpractice and misrepresentation against LIG, based on its acts and omissions in advising the plaintiff with respect to insurance coverage. The action is also one for breach of contract, negligence and professional malpractice against Aon, based on its acts and omissions in its role as the plaintiff's broker with respect to the liability coverage procured for the plaintiff. Counts one and two seek a declaratory judgment; counts three and four are claims for breach of contract; counts five and six are claims for negligence; counts seven and eight are claims for professional malpractice; [8] and counts nine and ten are claims for misrepresentation and violations of the Connecticut Unfair Trade Practices Act ("CUTPA") as to LIG, only.

On August 1, 2012, Aon filed the present motion to strike counts two, four, six and eight of the plaintiff's revised complaint. On September 5, 2012, LIG filed an apportionment complaint against Aon. On September 19, 2012, Aon filed the present motion to strike LIG's apportionment complaint. All parties filed a variety of responsive pleadings. Both matters were heard on the April 22, 2013 short calendar.

II

DISCUSSION

A

Motion to Strike Standard

HN2 "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "[The court takes] the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency . . . Thus [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied . . . HN3 Moreover . . . [9] [w]hat is necessarily implied [in an allegation] need not be expressly alleged . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted . . . Indeed, pleadings must be construed broadly and realistically, rather than narrowly and technically." (Internal quotation marks

omitted.) Connecticut Coalition for Justice in Education Funding, Inc. v. Rell, 295 Conn. 240, 252-53, 990 A.2d 206 (2010).

B

Analysis

1

Motion to Strike (#116)

Aon seeks to strike counts two, four, six and eight of the plaintiff's revised complaint, which seek a declaratory judgment and allege breach of contract, negligence and professional malpractice, respectively. According to Aon, the plaintiff bases its claims against Aon on two purported assertions by LIG: (1) that the EPC Agreement required that the entire limits of liability coverage be provided solely through the CCIP, rather than partly under the CCIP and partly under a separate insurance program placed by LIG, and (2) that Aon should have placed the entire $100 million in liability coverage under [10] the CCIP.

Aon notes that, in the revised complaint, the plaintiff expressly disagrees with LIG's interpretation of the EPC Agreement and avers that it was entitled to place only part of the coverage under the CCIP and the remainder under the program that LIG placed. However, the plaintiff also alleges that, if LIG's interpretation is accepted, then Aon failed to fulfill its obligation to procure that amount of coverage under the CCIP. According to Aon, the plaintiff thus alleges that, even though it hired LIG, not Aon, to place the separate program, Aon nonetheless should have reviewed the policies that LIG placed, realized that LIG had failed to include the necessary endorsements, and taken steps to correct LIG's errors. Aon asserts that it had no duty to do so.

(a)

Count Two: Declaratory Judgment

Count two alleges that the liability claims against the plaintiff arising from the Incident exceed the coverage provided for under the CCIP and the Travelers policy, and, if LIG was not responsible for securing the full amount of insurance coverage requested by the plaintiff, then Aon was responsible for doing so. Aon did not secure the full amount of coverage and, if Aon had done so, the plaintiff [11] would have had enough insurance to cover the full extent of its actual and potential liability arising out of the Incident. Count two further alleges that Aon has denied or will deny responsibility and, therefore, the plaintiff is entitled to a judgment declaring that Aon is liable to the plaintiff for its actual and potential liability.

Aon moves to strike count two, arguing that the plaintiff cannot obtain a declaratory judgment because it is not testing the parties' rights and responsibilities under an insurance policy or agreement, but rather is seeking money damages for Aon's alleged failure to procure certain insurance. Aon asserts that the plaintiff's declaratory judgment claim is based on LIG's purported

assertion that the EPC Agreement required that the entire limits of liability coverage be provided through the CCIP. Aon argues that, even if such an assertion were true, such an act or omission relating to the actual procurement of insurance does not call for the interpretation of an agreement or insurance provision that can be answered in a judicial declaration. Rather, it is simply a claim for damages. Moreover, Aon argues that the count should be stricken because the plaintiff [12] failed to append to its complaint the mandatory good faith certificate required by Practice Book §17-56(b).

In contrast, the plaintiff argues that it has met all three conditions for the maintenance of a declaratory judgment action. First, the plaintiff has alleged that it has an interest concerning its rights to reimbursement from Aon for Aon's acts and omissions which caused the plaintiff to incur existing and potential future losses. According to the plaintiff, this interest is uncertain or in danger of loss. Second, the plaintiff has alleged that Aon has or will deny its duty to reimburse the plaintiff and, therefore, a substantial dispute exists as to the plaintiff's rights to reimbursement that requires settlement by the court. Third, the plaintiff argues that its declaratory judgment claim is the only speedy and effective method available to adjudicate Aon's responsibility for the plaintiff's existing and potential future losses. The plaintiff contends that the extent of its losses is currently uncertain and, if the court does not issue a declaratory judgment, the parties might be forced to relitigate in the event that the plaintiff incurs additional expenses in the future. Finally, [13] the plaintiff argues that, while it did inadvertently fail to file the certificate of notice, it did comply with the substance of Practice Book §17-56(b) by joining all interested parties, and, in fact, it filed a certificate of notice on August 14, 2012, thereby removing any procedural barrier to its declaratory judgment claim.

HN4 "Whether the court . . . could properly grant declaratory relief . . . is a distinct question, which is properly raised by a motion to strike." (Internal quotation marks omitted.) Leoni v. Water Pollution Control Authority, 21 Conn.App. 77, 82, 571 A.2d 153 (1990).

HN5 "[D]eclaratory relief is a mere procedural device by which various types of substantive claims may be vindicated." (Internal quotation marks omitted.) Bysiewicz v. Dinardo, 298 Conn. 748, 756, 6 A.3d 726 (2010). "The purpose of a declaratory judgment action, as authorized by General Statutes §52-29 and Practice Book §[17-55], is to [14] secure an adjudication of rights [when] there is a substantial question in dispute or a substantial uncertainty of legal relations between the parties . . . [The] declaratory judgment statute provides a valuable tool by which litigants may resolve uncertainty of legal obligations." (Citation omitted; internal quotation marks omitted.) New London County Mutual Ins. Co. v. Nantes, 303 Conn. 737, 747-48, 36 A.3d 224 (2012). HN6 Connecticut's "declaratory judgment statute is unusually liberal . . . [Although] the declaratory judgment procedure may not be utilized merely to secure advice on the law . . . it may be employed in a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement, and where all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof." (Citations omitted; internal quotation marks omitted.) Id., 748. "Implicit in [§52-29 and Practice Book §17-55] is the notion that a declaratory judgment must rest on some cause of action that would be cognizable in a nondeclaratory [15] suit." (Internal quotation marks omitted.) Milford Power Co., LLC v. Alstom Power, Inc., 263 Conn. 616, 625, 822 A.2d 196 (2003).

HN7 "The complaint must state facts sufficient to set forth a cause of action entitling the plaintiff to a declaratory judgment . . . To state a cause of action for such relief, facts showing the existence of a substantial controversy or uncertainty of legal relations which requires settlement between the parties must be alleged. Ordinarily, there should be an assertion in the pleadings by one party of a legal relation or status or right in which he has a definite interest, together with an assertion of the denial of it by the other party, thus setting forth a substantial dispute."3Link to the text of the note (Citation omitted; internal quotation marks omitted.) Bombero v. Planning & Zoning Commission, 40 Conn.App. 75, 85, 669 A.2d 598 (1996). "Fully to carry out the purposes intended to be served by [declaratory] judgments, it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening. Even if the right claimed . . . is a contingent one, its present determination may well serve a very real practical need of the parties [16] for guidance in their future conduct." (Internal quotation marks omitted.) George v. Watertown, 85 Conn.App. 606, 613-14, 858 A.2d 800, cert. denied, 272 Conn. 911, 863 A.2d 702 (2004), quoting Sigal v. Wise, 114 Conn. 297, 301-02, 158 A. 891 (1932).

HN9 "Accepting as true the allegations in the complaint and all facts provable thereunder, in deciding whether a declaratory judgment action in a given case is appropriate, we allow the trial court wide discretion to render a declaratory judgment unless another form of action clearly affords a speedy remedy as effective, convenient, appropriate and complete." (Internal quotation marks omitted.) Pamela B. v. Ment, 244 Conn. 296, 308, 709 A.2d 1089 (1998).4Link to the text of the note

In the present case, the plaintiff, essentially, is seeking a declaratory judgment that, under the Aon Service Agreement, Aon was contractually obligated to procure insurance on the plaintiff's behalf, that Aon did not obtain proper insurance and that Aon is liable to the plaintiff for losses it has suffered and will suffer as a result. HN10 "[W]hile a trial court is afforded . . . wide discretion to render a declaratory judgment, a court should not entertain an action for a declaratory judgment when an ordinary action affords a remedy as effective, convenient and complete . . ." (Internal quotation marks omitted.) Wittmann Battenfeld, Inc. v. United Refrigeration, Inc., Superior Court, judicial district of Litchfield, Docket No. CV 10 6001611, 2010 Conn. Super. LEXIS 2426 (September 24, 2010, Pickard, J.). As the plaintiff's claim is based upon a breach of the Aon Service Agreement, there is no need for this court to declare the rights of the parties because the court's interpretation of the contract under the plaintiff's breach of contract claim will determine the parties' rights and, thus, the breach of [18] contract claim provides immediate and complete relief to the plaintiff. Therefore, a declaratory judgment is unnecessary and the motion to strike count two is granted.

(5)

Count Four: Breach of Contract
Aon moves to strike count four, arguing the plaintiff failed to allege a breach of any contractual promise or that Aon made a specific promise to secure the full amount of insurance coverage. According to Aon, the Aon Service Agreement does not even mention the EPC Agreement, or

any fixed amount of coverage to be acquired, let alone an explicit undertaking that such coverage will be placed. Absent an allegation that Aon specifically guaranteed a particular result and that such a result was not delivered, the plaintiff cannot maintain an action for breach of contract. Aon contends that the plaintiff's claim sounds in professional negligence rather than contract.

In contrast, the plaintiff first asserts that actions against insurance brokers for failure to obtain insurance may take the form of both negligence and contract claims, and arise out of the same set of facts. Next, the plaintiff argues that the complaint alleges that Aon had an obligation to understand the plaintiff's insurance [19] needs under the EPC Agreement, request and review documentation ensuring that the plaintiff's insurance needs had been met, and ensure that the CCIP coverage it placed for the plaintiff along with the plaintiff's own umbrella policies satisfied the plaintiff's requests for coverage. Finally, the plaintiff argues that Aon is inappropriately seeking to transform its motion to strike into a motion for summary judgment by introducing its interpretation of the EPC Agreement and the Aon Service Agreement.

In reply, Aon asserts that the specifically agreed-upon tasks set forth in the plaintiff's memorandum are not enumerated in the Aon Service Agreement and do not exist. This court notes, however, that neither the EPC Agreement nor the Aon Service Agreement are attached to the revised complaint and, therefore, are not incorporated therein. See Practice Book §10-29. HN11 "It is well established that a motion to strike must be considered within the confines of the pleadings and not external documents . . . We are limited . . . to a consideration of the facts alleged in the complaint." (Internal quotation marks omitted.) Zirinsky v. Zirinsky, 87 Conn.App. 257, 268-69 n.9, 865 A.2d 488, cert. denied, [20] 273 Conn. 916, 871 A.2d 372 (2005). "Where the legal grounds for . . . a motion [to strike] are dependent upon underlying facts not alleged in the plaintiff's pleadings, the defendant must await the evidence which may be adduced at trial, and the motion should be denied." (Internal quotation marks omitted.) Commissioner of Labor v. C.J.M. Services, Inc., 268 Conn. 283, 293, 842 A.2d 1124 (2004). Accordingly, the court is limited to the facts alleged in the plaintiff's revised complaint.

Count four contains the following allegations. Under the Aon Service Agreement, Aon promised to develop, recommend, negotiate and place insurance and/or risk financing programs for all CCIP coverages, as well as review the CCIP policies to ensure that they were accurate as to the insurance coverage terms and policy limits that the plaintiff was purchasing, and advise the plaintiff of any errors or required changes to such policies. Aon was obligated to advise the plaintiff as to how much of the liability limits required under the EPC Agreement should be provided through the CCIP and how much should be provided through other policies. Aon knew that the EPC Agreement required the plaintiff to secure a [21] minimum amount of umbrella/excess liability insurance and that the plaintiff wanted higher liability insurance limits than were required under the EPC Agreement. Aon was required to understand the EPC Agreement insurance requirements. When Aon placed the CCIP coverage for an amount which was less than the total coverage required by the EPC Agreement, it had a contractual and professional responsibility to request and review documentation confirming that the aggregate insurance from CCIP policies and other policies, which the plaintiff had in force, exceeded the EPC Agreement's insurance requirements. Aon did not request or review such documentation or otherwise satisfy itself that the insurance requirements of the EPC Agreement had been exceeded and met the plaintiff's requests for coverage.

Count four further alleges that the plaintiff believes that, under the EPC Agreement, the required liability coverage could be provided, in part, by a CCIP and, in part, by other policies. However, the plaintiff alleges, if LIG is correct in its assertion that the EPC Agreement required the entire limits of liability coverage be provided through a CCIP and, therefore, LIG was not responsible for [22] securing the full amount of insurance coverage, then Aon was responsible for securing the entire limits of liability coverage through a CCIP and breached the Aon Service Agreement by failing to do so. If Aon had not breached the contract, the plaintiff would have had the full amount of coverage necessary to cover the full extent of its actual and potential liabilities arising out of the Incident.

HN12 "Connecticut recognizes a cause of action against an insurance agent for failure to obtain insurance under a theory of either professional malpractice or breach of contract." Erikson Metals Corp. v. Erikson, Superior Court, judicial district of New Haven, Docket No. CV 07 5002467, 2008 Conn. Super. LEXIS 757 (March 27, 2008, Gilligan, J.), citing Ursini v. Goldman, 118 Conn. 554, 559-60, 173 A. 789 (1934). When bringing a claim against an insurance agent for failure to obtain insurance under a breach of contract theory, a plaintiff must allege that he contracted with the insurance agent to obtain a particular result. Allied Sprinkler & Mechanical Systems, Inc. v. Montpelier U.S. Ins. Co., Superior Court, judicial district of Litchfield, Docket No. CV 12 6006081 (July 19, 2012, Roche, J.) (54 Conn. L. Rptr. 392, 2012 Conn. Super. LEXIS 1850). If "the [23] allegations are couched in terms of the defendant having committed professional negligence in the procuring of the insurance policy," instead of allegations that "the defendant promised the plaintiff a specific result in obtaining the insurance," the claim for breach of contract should be stricken. Savoy Linen Services, Inc. v. USI Ins. Services of Connecticut, Superior Court, judicial district of Fairfield, Docket No. CV 01 5017161, 2010 Conn. Super. LEXIS 351 (February 9, 2010, Tyma, J.).

In support of its position, Aon relies on three Superior Court cases. The first case is Berlin Corp. v. Continental Casualty Co., Superior Court, judicial district of Hartford, Docket No. CV 06 4021653 (November 2, 2006, Wiese, J.) (42 Conn. L. Rptr. 358, 2006 Conn. Super. LEXIS 3305), in which the plaintiffs brought a multi-count complaint against an insurance company and an insurance broker, alleging various omissions concerning the plaintiffs' purchase of insurance. The plaintiffs, sellers of alcohol, claimed that the defendants procured an insurance policy that failed to provide liquor liability coverage. Id. The fifth count of the plaintiffs' complaint alleged that the insurance broker agreed "that it had the ability to recommend the necessary and appropriate [24] insurance coverage to the plaintiffs and that it breached [the] contract by failing to procure liquor liability insurance." Id., 360-61, 2006 Conn. Super. LEXIS 3305. The court granted the broker's motion to strike the fifth count, concluding that the allegations constituted a professional negligence claim, not breach of contract. Id., 361, 2006 Conn. Super. LEXIS 3305. The court explained that "[a] fair reading of the plaintiffs' amended complaint reveals that the plaintiffs' cause of action hinges not on whether the defendant executed specifically agreed-upon tasks required of it pursuant to a contract, but whether the defendant exercised ordinary care in effectuating the plaintiffs' purchase of insurance. The complaint states that the defendant contracted that it had the 'ability to recommend the necessary and appropriate insurance coverage' not that it contractually guaranteed, as part of the basis of the bargain, to effectuate the

purchase of a particular insurance product. The defendant's statement is merely a recitation that the defendant will exercise the skill and judgment common to practitioners of its trade." Id.

Next, Aon relies on DeCresenzo v. CPM Ins. Services, Inc., Superior Court, judicial district of New Haven, Docket No. CV 07 5010892 (December 19, 2007, Cosgrove, J.) [44 Conn. L. Rptr. 679, 2007 Conn. Super. LEXIS 3409], [25] in which the plaintiff, a restaurant owner, brought an action against the defendant, an insurance broker and agent, for failure to obtain liquor liability insurance. The complaint alleged that the defendant met with the plaintiff and "filled out applications for liquor liability insurance and general liability insurance for the business. [The plaintiff] informed [the defendant] of his anticipated insurance needs, including the need for liquor liability coverage, and [the defendant] agreed to initiate the process by which [the plaintiff] could apply for and obtain the desired insurance." Id. Thereafter, the plaintiff was sued and reported the potential claim to the defendant. Id. "[The plaintiff] then learned that [the defendant] had never obtained liquor liability coverage for the bar." Id. The court granted the defendant's motion to strike the breach of contract claim, reasoning that the allegations revealed only that the defendant "agreed to assist [the plaintiff] with the insurance application process; there is no allegation that [the defendant] guaranteed the provision of insurance or any other specific result." [26] Id. In reaching its conclusion, the court relied on Berlin Corp. v. Continental Casualty Co., supra, 42 Conn. L. Rptr. 358, 2006 Conn. Super. LEXIS 3305. DeCresenzo v. CPM Ins. Services, Inc., supra.

Finally, Aon cites to Savoy Linen Services, Inc. v. USI Ins. Services of Connecticut, supra, Superior Court, Docket No. CV 01 5017161, in which the plaintiffs brought a multi-count complaint against the defendant, an insurance agent, alleging that the defendant failed to procure an insurance policy naming the proper insured and having sufficient coverage and limits. Specifically, the plaintiffs alleged that the defendant agreed to procure appropriate insurance and that the defendant breached the agreement by failing to procure an insurance policy under which they would receive appropriate amounts to compensate them. Id. The court granted the defendant's motion to strike the breach of contract claim, reasoning that the allegations did not expressly allege, and could not be construed as alleging, that the defendant promised the plaintiff a specific result in obtaining the insurance. Id. In reaching its conclusion, the court relied on Berlin Corp. v. Continental Casualty Co., supra, 42 Conn. L. Rptr. 358, 2006 Conn. Super. LEXIS 3305, and DeCresenzo v. CPM Ins. Services, Inc., supra, 44 Conn. L. Rptr. 679, 2007 Conn. Super. LEXIS 3409. [27] Savoy Linen Services, Inc. v. USI Ins. Services of Connecticut, Inc., supra.

The present case, however, is more analogous to Erikson Metals Corp. v. McManus, supra, Superior Court, Docket No. CV 07 5002467, 2008 Conn. Super. LEXIS 757, and Allied Sprinkler & Mechanical Systems, Inc. v. Montpelier U.S. Ins. Co., supra, 54 Conn. L. Rptr. 392, 2012 Conn. Super. LEXIS 1850. In Erikson Metals, the plaintiff brought a multi-count complaint against the defendants who were the plaintiff's insurance agent, including two counts for breach of contract. Erikson Metals Corp. v. McManus, supra. The plaintiff alleged that it "retained the defendants as its insurance agent to procure insurance for its business. The plaintiff provided the defendants with copies of the insurance policies it had in effect immediately prior to retaining the defendants and requested the same insurance coverage." Id. Subsequently, the plaintiff submitted a claim to its insurer under the policy procured by the defendants but was informed that the

insurer would not pay on the claim because of an exclusion in the policy. Id. The defendants moved to strike the breach of contract claims because the plaintiff did not allege that the plaintiff "made a specific request for a particular [28] type of coverage and that [the] defendants promised a particular result." (Internal quotation marks omitted.) Id. The court disagreed with the defendants and denied the motion to strike, concluding that the plaintiff had alleged claims for breach of contract. Id. The court explained that the plaintiff alleged that "it retained the defendants to procure insurance that was the same as it had in force at the time that the defendants were engaged. That insurance would have included coverage with no pollution exclusion or co-insurance clause since the plaintiff alleges those limitations were not included in its prior policies. [The breach of contract counts] allege specific requests by the plaintiff for the defendants to obtain a particular result; namely, the procurement for the plaintiff of the same insurance coverages that it had immediately prior to retaining the defendants." Id.

The court in Allied Sprinkler & Mechanical Systems, Inc. v. Montpelier U.S. Ins. Co., supra, 54 Conn. L. Rptr. 392, 2012 Conn. Super. LEXIS 1850, relied on Erikson Metals in denying a motion to strike two breach of contract claims. In Allied Sprinkler, the plaintiffs filed a multi-count complaint against their insurance agent, Woodbury Insurance [29] Agency, Inc., based on Woodbury's failure to procure appropriate commercial liability insurance. Allied Sprinkler & Mechanical Systems, Inc. v. Montpelier U.S. Ins. Co., supra. 393, 2012 Conn. Super. LEXIS 1850. The plaintiffs alleged that the insurance policy procured by Woodbury contained an endorsement, purporting to exclude the requested coverage. Id. In denying the motion to strike, the court found that the plaintiffs alleged that they contracted with Woodbury to obtain a particular result—namely, the procurement of commercial liability insurance appropriate to protect the plaintiffs. Id., 394-95, 2012 Conn. Super. LEXIS 1850.

In the present case, the plaintiff's revised complaint alleges that it engaged Aon to act as its insurance broker in the procurement of a CCIP that met the liability insurance limits required under the EPC Agreement. Aon procured CCIP coverage for an amount which was less than the total coverage required by the EPC Agreement. Construing these allegations in the light most favorable to the plaintiff, an action for breach of contract is sufficiently alleged. Count four alleges a specific request by the plaintiff for Aon to obtain a particular result—namely, the procurement of a CCIP that complied with the insurance [30] limits required by the EPC Agreement. Accordingly, the motion to strike count four is denied.

(c)

Counts Six and Eight: Negligence and Professional Malpractice

Count six, sounding in negligence, alleges that Aon owed the plaintiff a duty to exercise reasonable skill, care and diligence (1) to advise the plaintiff in the purchase of its insurance coverage required under the EPC Agreement, including additional umbrella/excess liability coverage in excess of the CCIP; (2) to procure a CCIP in the full amount of CGL and umbrella/excess insurance liability coverage required under the EPC Agreement; and (3) to determine whether the insurance required under the EPC Agreement, which was not provided by the CCIP, had been procured and to advise the plaintiff accordingly. Aon breached its duties by

failing to advise the plaintiff that all of the requested and required coverage had not been procured.

Count eight, sounding in professional malpractice, alleges that Aon owed a duty to the plaintiff to perform as the plaintiff's insurance agent and broker, and to professionally provide those services with the degree of skill, care and diligence generally expected of reasonably skilled members of the [31] profession. Count eight further alleges that the plaintiff relied upon Aon to ensure that the plaintiff did not have any deficiency in insurance coverage as required by the EPC Agreement and that Aon departed from the standard of care in its procurement and review of the plaintiff's insurance coverages.

Aon moves to strike counts six and eight, arguing that both counts fail to allege the breach of any common law duty or professional duty. According to Aon, the common law does not impose a duty on insurance brokers, such as Aon, to do more than place the coverage requested, which the plaintiff concedes Aon did. Additionally, Aon contends, the plaintiff did not allege that Aon undertook a professional duty to oversee placement of all insurance or supervise LIG.

In contrast, the plaintiff enumerates the allegations which, it contends, set forth Aon's legal and professional duties as the plaintiff's insurance broker. The plaintiff argues that Aon's interpretation of the law is constrained and, moreover, whether a fiduciary duty is owed is a question of fact not suitable for a motion to strike.

In reply, Aon contends that the plaintiff's sole theory of liability against it is that if the plaintiff's [32] own understanding of the EPC Agreement was incorrect and the EPC Agreement actually required the entire $100 million in coverage to be placed under the CCIP, then Aon should have corrected the plaintiff's legal error and, contrary to the plaintiff's instructions, placed the entire coverage under the CCIP. Aon asserts that it does not have a duty at common law to render legal advice.

Aon also argues that the cases cited by the plaintiff stand for the proposition that brokers may be liable for failing to recommend the correct type or amount of coverage but, in the present case, there is no dispute that all of the parties identified the appropriate amount and type of insurance to acquire and understood that the plaintiff charged Aon with acquiring only a part of the whole.

Moreover, Aon contends that the plaintiff did not allege a fiduciary duty in the complaint and cannot argue that Aon was acting as a fiduciary because the plaintiff specifically hired LIG to procure the umbrella policies and, therefore, chose not to rely on Aon's advice with respect to those policies. According to Aon, an insurance broker's duty does not extend to providing advice on coverage not procured by it. Aon was [33] hired to procure only part of the total insurance coverage required, i.e., the CCIP, while LIG was retained to procure the umbrella policies. The failure to include the Kleen project as part of the umbrella policies was due to LIG's oversight. Aon was not retained or paid to supervise LIG or take any affirmative steps to amend the CCIP to account for the umbrella policies. Therefore, Aon argues, the plaintiff has no common law claim against it for failure to supervise.

LIG also submitted a memorandum of law in opposition to Aon's motion to strike counts six and eight, contending that, when the complaint is read in its entirety, the plaintiff has stated claims for negligence and professional malpractice against Aon. According to LIG, under our appellate precedents, Ursini v. Goldman, 118 Conn. 554, 173 A. 789 (1934), and Dimeo v. Burns, Brooks & McNeil, 6 Conn.App. 241, 504 A.2d 557, cert. denied, 199 Conn. 805, 508 A.2d 31 (1986), the plaintiff need only allege that Aon breached its duty by failing to recommend, as the Aon Service Agreement required, that the plaintiff purchase sufficient limits, i.e., $100 million, under the CCIP to satisfy the EPC Agreement, or that the plaintiff [34] take all necessary steps to make sure it filled any gaps in that coverage by purchasing the insurance elsewhere. LIG contends that the plaintiff has satisfied this pleading standard.

LIG also argues that, beyond the common-law duties set forth in Ursini and Dimeo, Aon may be liable to the plaintiff for negligence based on its breach of duty arising out of the Aon Service Agreement. Aon specifically agreed, by contract, to recommend appropriate insurance specific to the Kleen project and is alleged to have negligently failed to do. The common-law and contractual duties imposed on Aon meant that Aon could not turn a blind-eye to any coverage deficiencies that might result from the plaintiff's requests. LIG argues that Aon had a duty to explain the consequences of purchasing a CCIP that did not meet the EPC Agreement's insurance requirements, to make recommendations about how to meet those requirements, to recommend the proper amount and to attempt to procure sufficient coverage. According to LIG, the plaintiff has alleged facts supporting its claim that Aon failed to meet the standard of exercising reasonable skill, care and diligence in effecting the insurance for the Kleen project.

In [35] reply to LIG, Aon reiterates that its duties to the plaintiff were limited to the CCIP, as it was not retained to place additional coverage or review the umbrella policies to ensure that the terms and conditions of the coverage placed by LIG met the plaintiff's requirements. Aon also disputes LIG's interpretation of Ursini v. Goldman, supra, 118 Conn. 554, and Dimeo v. Burns, Brooks & McNeil, supra, 6 Conn.App. 241.

HN13 "The existence of a duty is a question of law . . ." (Internal quotation marks omitted.) Precision Mechanical Services, Inc. v. T.J. Pfund Associates, Inc., 109 Conn.App. 560, 564, 952 A.2d 818, cert. denied, 289 Conn. 940, 959 A.2d 1007 (2008). "First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty . . . A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." (Citation omitted; internal quotation marks omitted.) D'Angelo Development & Construction Corp. v. Cordovano, 121 Conn.App. 165, 184, 995 A.2d 79, [36] cert. denied, 297 Conn. 923, 998 A.2d 167 (2010). "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised . . . By that it is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" (Citation omitted.) Orlo v. Connecticut Co., 128 Conn. 231, 237, 21 A.2d 402 (1941).

In Ursini v. Goldman, supra, 118 Conn. 559, HN14 our Supreme Court stated that an insurance broker is an agent of the insured in negotiating for the policy and, "[a]s such he owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance, and any negligence or other breach of duty on his part which defeats the insurance which he undertakes to secure will render him liable to his principal for the resulting loss . . . Where he undertakes to procure a policy affording protection against a designated risk, the [37] law imposes upon him an obligation to perform with reasonable care the duty he has assumed, and he may be held liable for loss properly attributable to his default." (Citations omitted.) See Todd v. Malafronte, 3 Conn.App. 16, 22, 484 A.2d 463 (1984) (Ursini standard applies to insurance agents as well as brokers).

HN15 The "reasonable skill, care and diligence required of a broker includes a duty to at least see that his client has proper coverage." (Internal quotation marks omitted.) OCI Chemical Corp. v. AON Corp., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 05 4003935, 2008 Conn. Super. LEXIS 2086 (August 14, 2008, Downey, J.), citing Dimeo v. Burns, Brooks & McNeil, supra, 6 Conn.App. 244. In Dimeo v. Burns, Brooks & McNeil, supra, 244-45, our Appellate Court approved a trial court instruction correctly explaining a broker's duty of care: "[S]elling insurance is a specialized field with specialized knowledge and experience, and . . . an agent has the duties to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client . . . [A] client ordinarily looks to his agent and relies on the agent's expertise in placing his insurance [38] problems in the agent's hands . . . [I]f the agent performs these duties negligently, he is liable therefor, just as other professionals are." The Dimeo court "instructed the jury, on the basis of the expert testimony produced in the case . . . that an agent has the duty to explain uninsured motorist coverage, to explain the consequences of not having a sufficient amount of such coverage, to recommend the proper amount, and to attempt to procure that amount and offer it to the client." Id., 245.

In support of its argument that it lacked a duty to the plaintiff with regard to any coverage beyond the CCIP, Aon relies on Grossenbacher v. Ericson Agency, Superior Court, judicial district of Litchfield, Docket No. CV 97 0073518, 2000 Conn. Super. LEXIS 942 (April 10, 2000, DiPentima, J.), for the proposition that an insurance broker's duties do not extend to providing advice on coverage procured by another insurance broker. Aon's characterization of Grossenbacher, however, is misleading. The Grossenbacher court actually held that HN16 absent a fiduciary relationship, insurance brokers had no duty to advise as to adequate insurance.5Link to the text of the note Id.

HN17 "With respect to the relationship between an insurance agent and a client, at least one Superior Court judge [40] has held that because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between the insurance agent and his client is often a fiduciary one." (Internal quotation marks omitted.) Seven Bridges Foundation v. Wilson Agency, Inc., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 11 6009707 (March 2, 2012, Tobin, J.) (53 Conn. L. Rptr. 584, 586, 2012 Conn. Super. LEXIS 564), quoting Putnam Resources v. Frenkel & Co., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 92 0123838 (July 20, 1993, Lewis, J.) (9 Conn. L. Rptr. 420, 1993 Conn. Super.

LEXIS 1851). "The insurance agent-client relationships which give rise to a fiduciary duty and those which are merely professional in nature are distinguished by the conduct of the parties." Seven Bridges Foundation v. Wilson Agency, Inc., supra. "[W]here the agent holds himself out as a consultant and counselor . . . and is acting as a specialist, and where the client trusts and relies on the agent as a specialist, a fiduciary duty is present." (Internal quotation marks omitted.) Id.

In Kohn v. John M. Glover Agency, Inc., Superior Court, judicial district of Danbury, Docket No. CV 000339053 (April 24, 2001, Adams, J.) (29 Conn. L. Rptr. 377, 2001 Conn. Super. LEXIS 1183) [41] , the court denied a motion to strike a negligence claim against an insurance agent, finding that the plaintiffs sufficiently alleged a fiduciary or special relationship with the agent based on their allegations that they relied on the agent's expertise to obtain appropriate insurance. In that case, the plaintiffs alleged that the agent had a duty to review their coverage, its adequacy and explain what coverage was available. Id., 377-78, 2001 Conn. Super. LEXIS 1183. The court explained that HN18 although "[i]t is . . . inadvisable to create a situation where an incentive exists for an insured to claim successfully after the fact they would have purchased more insurance . . . Connecticut law does recognize an agency relationship between insurance agent and insured at the time insurance is contracted and some duties flow from that relationship . . . [A] fiduciary relationship [is] one characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interest of the other." (Internal quotation marks omitted.) Id., 378, 2001 Conn. Super. LEXIS 1183. In [42] denying the motion to strike, the court noted that "[a]t the very least the agent has a duty to put into effect the type and amount of coverage requested. It also does not seem too much to ask that an agent, with his or her expertise and knowledge of the insurance business, review existing and available coverages, at that time." Id. As the existence of a fiduciary or special relationship is a question of fact, the court found that the plaintiffs alleged a relationship with the agent from which "a duty to advise of available insurance coverage and coverage adequacy may arise." Id., 378-79, 2001 Conn. Super. LEXIS 1183.

In the present case, the plaintiff has alleged a relationship with Aon, acting as its insurance agent and broker with respect to insurance required under the EPC Agreement, from which a duty to advise the plaintiff and recommend that the plaintiff purchase sufficient limits under the CCIP to satisfy the EPC Agreement may arise. Furthermore, the plaintiff sufficiently has alleged that Aon had a contractual duty to advise the plaintiff in the purchase of coverage required under the EPC Agreement, including the need for additional liability coverage in excess of the CCIP. Specifically, the complaint alleges [43] that Aon knew that the EPC Agreement required the plaintiff to secure a minimum amount of umbrella/excess liability coverage in connection with the project and Aon was required to understand the EPC Agreement's insurance requirements. The complaint further alleges that Aon had a professional responsibility to request and review documentation to ensure that the CCIP coverage it placed for the plaintiff, along with the plaintiff's excess policies, satisfied the EPC Agreement's insurance requirements.

The plaintiff has sufficiently alleged that Aon owed a duty to the plaintiff beyond placement of the CCIP. For the foregoing reasons, the motion to strike counts six and eight is denied.

Motion to Strike Apportionment Complaint (#127)
Aon moves to strike the entire apportionment complaint filed by LIG on the ground that the complaint is legally insufficient because (a) Aon is already a party to the action and (5) Aon had no relationship with LIG and owed no duty to LIG. According to Aon, there is no basis in the common law or in the parties' contracts for LIG's claims that Aon had a duty to mitigate LIG's failure to properly endorse the umbrella policies by supervising LIG in its placement [44] of the policies or by acquiring an additional $50 million in coverage.

In contrast, LIG argues that, although Connecticut's appellate courts have yet to consider the issue, there is a clear trend among Superior Court judges to allow apportionment complaints to be filed against an existing party to an action. LIG also argues that it has alleged additional facts, not contained in the plaintiff's revised complaint, which, if credited as they must be on a motion to strike, clearly establish that Aon's negligence caused the plaintiff's alleged damages.

In reply, Aon asserts that LIG's argument primarily relies on dicta from inapposite cases adopting a minority view. Additionally, Aon contends that LIG's argument that the apportionment complaint alleges additional facts is irrelevant as it does not add any basis for liability not already before the court. According to Aon, "an apportionment complaint is not a vehicle for a defendant to amend [a] plaintiff's complaint because it disagrees with [a] plaintiff's characterization of the facts." Aon contends that an apportionment complaint is unnecessary because its proportionate share of liability for the plaintiff's purported damages is necessarily [45] an issue already before the court.

LIG filed a supplemental memorandum in opposition to Aon's motion to strike, in which LIG asks that this court take judicial notice of Aon's amended third-party complaint against LIG in a federal court action between and among the parties to the present action.6Link to the text of the note According to LIG, in the third-party complaint, Aon takes a position contradictory to the position it takes in the present case, as Aon alleges that LIG had a duty to supervise Aon's work and should have noticed Aon's error in its placement of policies for the plaintiff. Essentially, according to LIG, Aon is requesting that a federal court hold that an apportionment right exists for Aon's benefit, while asking this court to hold that such a right does not exist for LIG.

In its reply to LIG's supplemental memorandum, Aon asserts that the federal action has no bearing on this court's analysis, and that the third-party complaint does not contradict the position that Aon is taking in the [46] present case. According to Aon, the third-party complaint does not seek apportionment, but rather contains causes of action for common-law indemnity and contribution. Moreover, in the federal action, Aon's claims against LIG are not based on some generalized duty to oversee, but rather based on Aon's theory that the plaintiff relied upon LIG, not Aon, to ensure that the terms of the insurance complied with the requirements under the EPC Agreement.7Link to the text of the note

(a)

General Statutes §52-102b

General Statutes §52-102b(a) provides in relevant part: HN20 "A defendant in any civil action to which section 52-572h applies may serve a writ, summons and complaint upon a person not a party to the action who is or may be liable pursuant to said section for a proportionate share of the plaintiff's damages in which case the demand for relief shall seek an apportionment of liability." (Emphasis added.)

HN21 "Connecticut appellate authority has not yet determined whether a defendant may bring an apportionment claim or counterclaim against a current party to an action. There is a split of authority at the Superior Court level on the issue. One line of cases, which has been referred to as the 'majority view,' interprets the plain language of §52-102b and certain of its legislative history to preclude the filing of an apportionment claim against one who is already a party to the underlying action . . . The contrary view, which is often characterized as the 'minority view,' concludes that the purpose of §52-102b is not to bar the filing of apportionment complaints against existing parties, but rather to provide a statutory means [48] by which defendants may add and seek apportionment from non-parties . . . These 'minority view' opinions have determined that because §52-102b is irrelevant to persons that are already parties to a suit . . . the law does not preclude the filing of an apportionment action against existing parties." (Citations omitted; internal quotation marks omitted.) Benway v. Belmont, Superior Court, judicial district of Waterbury, Docket No. CV 12 6016131 (March 28, 2013, Roche, J.) [55 Conn. L. Rptr. 824, 2013 Conn. Super. LEXIS 711].

As one court has noted, "[a] review of the most recent case law suggests that the division among the superior court judges is approaching an even split." Benway v. Belmont, Superior Court, judicial district of Waterbury, Docket No. CV 12 6016131, 2013 Conn. Super. LEXIS 711 (March 28, 2013, Roche, J.), supra, quoting Hilarion v. Yank, Superior Court, judicial district of Fairfield, Docket No. CV 10 6006792 (September 9, 2011, Dooley, J.) (52 Conn. L. Rptr. 574, 576 n.1, 2011 Conn. Super. LEXIS 2380). "Indeed, given the clear trend toward the adoption of the 'minority view' in recent cases, it may well be that the so-called 'minority view' now reflects the opinion of the majority of the judges who have had occasion to rule upon this particular question." [49] Prete v. Borrelli, Superior Court, judicial district of New Haven, Docket No. CV 11 6022696 (May 22, 2012, Gold, J.) (54 Conn. L. Rptr. 88, 90 n.1, 2012 Conn. Super. LEXIS 1325).

In Hilarion v. Yank, supra, 52 Conn. L. Rptr. 576, 2011 Conn. Super. LEXIS 2380, Judge Dooley adopted the "minority view," explaining that, HN22 "[w]hen two constructions are possible, courts will adopt the one which makes the statute effective and workable, and not one which leads to difficult and possibly bizarre results . . . In construing a statute, common sense must be used, and courts will assume that the legislature intended to accomplish a reasonable and rational result." (Internal quotation marks omitted.) HN23 "The purpose of §52-102b is to effectuate a sharing of the responsibility between potential tortfeasors, as set forth in the legislative directive and the public policy of General Statutes 52-572h(c)." Id. Similarly, in Prete v. Borrelli, supra, 54 Conn. L. Rptr. 89, 2012 Conn. Super. LEXIS 1325, Judge Gold adopted the "minority view," noting that, after "[undertaking] its own assessment of the respective merit of the majority and minority positions, this court concludes that the so-called 'minority view' is not only better reasoned and more practical, it seems to reflect the more modern approach. [50] As

this court sees it, §52-102b does not say, and was not intended to say, that a defendant is barred from filing an apportionment complaint against an existing party. Rather than serving to restrict a defendant's right to seek apportionment, the statute's purpose is to broaden that right by authorizing apportionment to be sought against non-parties as well."

As Judge Genuario recently stated, "[t]here are numerous Superior Court decisions on the subject of whether a co-defendant . . . can assert a cross claim for apportionment against another co-defendant. There is no appellate authority in our state on the issue. The court has reviewed all of the many Superior Court cases cited by the parties and finds itself in agreement with the line of cases that is referred to generally as the 'minority view.' Quite frankly this court cannot improve upon the logic or reasoning contained in . . . [those] cases . . ." (Citations omitted.) Stahl v. Gelco Corp., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 12 6012926, 2012 Conn. Super. LEXIS 3021 (December 17, 2012, Genuario, J.), citing Baez v. Toledo, Superior Court, judicial district of New Haven, Docket No. CV 12 6004897 (August 16, 2012, Markle, J.) (54 Conn. L. Rptr. 533, 2012 Conn. Super. LEXIS 2087); [51] Prete v. Borrelli, supra, 54 Conn. L. Rptr. 88, 2012 Conn. Super. LEXIS 1325; Blazer v. Gil, Superior Court, judicial district of Fairfield, Docket No. CV 07 5003123 (June 15, 2007, Tobin, J.) (43 Conn. L. Rptr. 619, 2007 Conn. Super. LEXIS 1520); Sharif v. Peck, Superior Court, judicial district of New Haven, Docket No. CV 04 29034 (March 27, 2001, Blue, J.) (29 Conn. L. Rptr. 311, 2001 Conn. Super. LEXIS 888); Torres v. Begic, Superior Court, judicial district of New Haven, Docket No. CV 00 0423742 (June 13, 2000, Levin, J.) (27 Conn. L. Rptr. 403, 2000 Conn. Super. LEXIS 1552); Farmer v. Christianson, Superior Court, judicial district of Rockville, Docket No. CV 00 71954 (May 4, 2000, Sullivan, J.) (27 Conn. L. Rptr. 196, 2000 Conn. Super. LEXIS 1202).

Likewise, this court also cannot improve on the logic or reasoning contained in the cases adopting the "minority view." This court is persuaded that, by adopting the "minority view," the purpose of General Statutes §52-102b is effectuated and a reasonable result is reached. As such, Aon's motion to strike the apportionment complaint on the ground that Aon is already a party to the action is denied.

(5)

Duty of Care

HN24 General Statutes §52-102b(a) "grants the right to file an apportionment complaint to a defendant in any civil action to which Section 52-572h applies . . . The Supreme [52] Court has stated that a civil action to which Section 52-572h applies within the meaning of 52-102b, means a civil action based on negligence." (Internal quotation marks omitted.) Bernard v. Baitch, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV 09 5013017 (January 13, 2012, Tobin, J.) (53 Conn. L. Rptr. 402, 404, 2012 Conn. Super. LEXIS 148), citing Allard v. Liberty Oil Equipment Co., 253 Conn. 787, 793-95, 756 A.2d 237 (2000).

Aon moves to strike the apportionment complaint on the ground that, as a matter of law, Aon did not owe a duty of care to LIG because there is no basis in common law or the parties' contracts for such a claim.8Link to the text of the note Aon argues that its duties to the plaintiff are defined

by the Aon Service Agreement and such duties did not extend to a duty to monitor LIG, mitigate LIG's failure to procure the proper coverage, or otherwise take affirmative steps to obtain the remaining coverage elsewhere. Aon also argues that LIG is not permitted to allege additional facts or facts inconsistent with the plaintiff's complaint.

As an initial matter, Aon does not provide any support for the proposition that LIG is not permitted to allege additional facts, relevant to its apportionment claim, which were not alleged in the plaintiff's complaint. Nonetheless, such an argument fails because, HN25 on a motion to strike, the court is limited to the facts alleged in the challenged complaint. It is inappropriate to look beyond the challenged apportionment complaint to the allegations contained in the original complaint. See Callis v. Cumberland Farms, Inc., Superior Court, judicial district of Waterbury, Docket No. CV 07 5009596, 2009 Conn. Super. LEXIS 744 (March 20, 2009, Brunetti, J.) (only look to facts alleged in apportionment complaint on a motion to strike apportionment complaint); Jones v. Greater Waterbury YMCA, Superior Court, judicial district of Waterbury, Docket No. CV 07 5004504 (January 16, 2008, Roche, J.) (44 Conn. L. Rptr. 625, 2008 Conn. Super. LEXIS 200); Rosario v. Orlando Annulli & Sons, Inc., Superior Court, judicial district of Hartford, Docket No. CV 07 5007896 (August 9, 2007, Wagner, J.T.R.) (44 Conn. L. Rptr. 9, 2007 Conn. Super. LEXIS 2180) [54] ; Cintron v. Meriden Square #3, Superior Court, judicial district of New Haven, Docket No. CV 05 5000244, 2007 Conn. Super. LEXIS 199(January 23, 2007, Taylor, J.); Saucier v. Wolcott, Superior Court, judicial district of Waterbury, Docket No. CV 03 0177767 (December 5, 2003, Matasavage, J.) (36 Conn. L. Rptr. 110, 2003 Conn. Super. LEXIS 3390). Moreover, LIG did not incorporate by reference or append the plaintiff's complaint to its apportionment complaint and, therefore, LIG did not expressly condition its claim of apportionment on the plaintiff's ability to prove at trial the Aon was negligent in the manner pleaded by the plaintiff. Compare, e.g., Huertas v. Hartford Housing Authority, Superior Court, judicial district of Hartford, Docket No. CV 09 5031540 (October 20, 2010, Sheldon, J.) (50 Conn. L. Rptr. 806, 2010 Conn. Super. LEXIS 2590) (apportionment plaintiff appended underlying complaint to apportionment complaint and, therefore, on motion to strike, court reviewed underlying complaint in determining the sufficiency of the apportionment complaint).

HN26 "[T]he existence of a duty of care is an essential element of negligence . . . There is no question [55] that a duty of care may arise out of a contract . . ." (Citation omitted; internal quotation marks omitted.) Sturm v. Harb Development, LLC, 298 Conn. 124, 139-40, 2 A.3d 859 (2010). "[N]o court has held that apportionment claims must be based on allegations of negligent breaches of identical or similar duties as those alleged in the plaintiff's complaint." Shay v. Norwalk, Taxi, Inc., Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket Nos. CV 12 6012737, CV 12 6013544 (March 7, 2013, Tobin, J.T.R.) [55 Conn. L. Rptr. 755, 2013 Conn. Super. LEXIS 527]. Moreover, General Statutes §52-572h "does not require that the apportionment defendant owe a duty to the apportionment plaintiff, but merely that the apportionment defendant is partially liable for the plaintiff's damages, or rather had a duty to the plaintiff." (Internal quotation marks omitted.) Sobieski v. Extreme Maintenance, LLC, Superior Court, judicial district of New Haven, Docket No. CV 09 6003762, 2010 Conn. Super. LEXIS 543 (March 5, 2010, Wilson, J.); Billings v. Cretella Builders, LLC, Superior Court, judicial district of New Haven, Docket No. CV 07 5012830, 2009 Conn. Super. LEXIS 2116 (July 30, 2009, Holden, J.).

In the present case, LIG's apportionment complaint alleges the following [56] relevant facts. When work on the Kleen project began, the plaintiff was insured by umbrella policies which had been placed by LIG. These umbrella policies provided the plaintiff with a total of $100 million in excess liability insurance and fully satisfied the contractual requirements in the EPC Agreement. The umbrella policies contained wrap-up insurance exclusions that excluded coverage for any project that was subject to a CCIP. Partway through the Kleen project, Aon recommended and convinced the plaintiff to purchase a CCIP providing only $50 million of excess insurance, notwithstanding Aon's knowledge that the EPC Agreement required $100 million in coverage. Aon held itself out as an expert on CCIP policies and contractually agreed with the plaintiff to develop, recommend, negotiate and place insurance for the Kleen project. Aon knew or should have known that the umbrella policies in place would exclude the Kleen project if and when the CCIP became effective. Aon failed to inform the plaintiff of that fact and, therefore, failed to make a proper recommendation to the plaintiff consistent with its contractual and common law duty of care.

Taking these allegations in a light most [57] favorable to sustaining the complaint's legal sufficiency, LIG has alleged that Aon owed a duty to the plaintiff and negligently performed that duty, causing the plaintiff's alleged damages. As such, Aon's motion to strike the apportionment complaint is denied.

III

CONCLUSION

Aon's motion to strike the plaintiff's revised complaint (#116) is granted as to count two, but the motion is denied as to counts four, six and eight. Also, Aon's motion to strike LIG's apportionment complaint (#127) is denied.

BY THE COURT,

John W. Pickard

Footnotes

1Link to the location of the note in the document

HN1 "CCIP is a program that 'wrap-up' various individual policies related to a common project or location into master policies." Travelers Indemnity Co. v. C.R. Klewin, Inc., Superior Court, judicial district of Hartford, Docket No. CV 05 4019921, 2008 Conn. Super. LEXIS 262 (February 5, 2008, Dubay, J.).

2Link to the location of the note in the document

LIG also failed to realize and/or failed to advise the plaintiff that the Travelers policy was not properly endorsed as excess insurance over the CCIP. However, Travelers retroactively issued

such an endorsement based on a Travelers "Sold Proposal" procured by LIG indicating that the Travelers policy would apply in excess of the CCIP.

3Link to the location of the note in the document

The rules of practice define the scope of declaratory judgment actions as follows: HN8 "The judicial authority will, in cases not herein excepted, render declaratory judgments as to the existence or nonexistence (1) of any right, power, privilege or immunity; or (2) of any fact upon which the existence or nonexistence of such right, power, privilege or immunity does or may depend, whether such right, power, privilege or immunity now exists or will arise in the future." Practice Book §17-54.

4Link to the location of the note in the document

Abrogation [17] on other grounds is recognized by Markley v. Dept. of Public Utility Control, 301 Conn. 56, 23 A.3d 668 (2011).

5Link to the location of the note in the document

In Grossenbacher, the plaintiffs alleged that their insurance agent was negligent in [39] failing to advise them of the inadequacy of their coverage. Id. However, the coverage that was allegedly inadequate was an automobile policy, not procured through the agent. Id. Rather, the agent had procured a homeowner's insurance policy for the plaintiffs, which was not the subject of the complaint. Id. The issue of whether the agent owed a duty to advise was presented on a motion for summary judgment, not a motion to strike. Id. Although the court noted that "[u]nder the established Connecticut law . . . insurance brokers do not automatically have a duty to advise the plaintiffs as to adequate coverage," it also stated that a fiduciary relationship between the parties may give rise to such a duty and a determination of such relationship is a question of fact. Id. The court found that there were no facts to support a finding that a "unique degree of trust and confidence existed between the parties" and the duty that the insurance broker did have with the plaintiff did not extend to providing unsolicited advice on coverage with regard to policies not procured through them." Id.

6Link to the location of the note in the document

LIG states that it was unable to bring Aon's third-party complaint to the court's attention in its original opposition to Aon's motion to strike because the third-party complaint had not been filed at that time.

7Link to the location of the note in the document

Aon also adds an additional argument in support of its motion to strike, asserting that there is no apportionment right with respect to purely economic or commercial losses. In a supplemental memorandum in reply to Aon's reply, LIG objects to this new ground and argues that, under Connecticut common law, apportionment is permitted for economic damages. The court need not reach this issue because, HN19 "[i]n ruling on a motion to strike the trial court is limited to

considering the grounds specified in the motion." Meredith v. Police Commission, 182 Conn. 138, 140, 438 A.2d 27 (1980). Aon's motion to strike specifies only two grounds: (1) that Aon is already a party and (2) Aon does not owe a duty to LIG. As such, this court will not consider [47] Aon's newly presented additional argument.

8Link to the location of the note in the document

Aon also argues that LIG's apportionment complaint is dependent on the plaintiff's revised complaint and, therefore, if the revised complaint is stricken then the [53] court must strike the apportionment complaint because the apportionment complaint merely restates the same bases for liability set forth in the revised complaint. As the motion to strike the revised complaint was denied, the court need not address this argument.

GUST K. NEWBERG CONSTR. CO. v. E. H. CRUMP & CO., 1986 U.S. Dist. LEXIS 27549
United States District Court for the Northern District of Illinois Eastern Division
March 27, 1986
No. 84 C 3257

Reporter
1986 U.S. Dist. LEXIS 27549 | 1986 WL 4152

GUST K. NEWBERG CONSTRUCTION COMPANY, an Illinois corporation, Plaintiff, v. E. H. CRUMP & COMPANY, a Tennessee corporation, Defendant

Core Terms

coverage, procure, perils, insured, bid, insurance company, advice, insurance policy, specifications, insurance agent, parties, sub-surface, broker, insurance broker, damages, appellate court, insurance coverage, consumer, advise, limits, summary judgment, inventory, warehouse, policies, services, desired, seawall, oral contract, construction project, clarifier

Case Summary

Procedural Posture
Plaintiff insured sought recovery of losses in a negligent procurement of insurance claim against defendant insurance broker.

Overview
The insured sought recovery of losses sustained when the builder's risk insurance coverage procured by the insurance broker excluded subsurface water perils. The insured alleged the broker negligently secured a policy which excluded coverage for damages caused by below surface water pressure, and failed to inform it about the lack of such coverage. The court entered judgment in favor of the broker, concluding the circumstances under which a broker could be held liable for a negligent failure to procure coverage did not exist in the present case. The court explained that the insured's request for a quote on builder's risk insurance did not mention sub-surface water or the need for dewatering in the partial specifications provided to the broker. The court further noted the broker was also not asked to examine the perils of the project for insurance purposes. The court noted the broker did not receive additional compensation for undertaking any additional responsibility for analyzing necessary coverage beyond the needs indicated in the specifications. The court found the broker did not undertake any duty to give comprehensive advice that the insured could have reasonably relied upon.

Outcome

The court entered judgment in favor of the insurance broker in the insured's suit for negligent procurement of insurance.

▼LexisNexis® Headnotes

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview
HN1 When the court's jurisdiction is founded on diversity, it is required to apply the choice of law rules of the state in which the court sits. Shepardize - Narrow by this Headnote

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview
Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships
Torts > Procedural Matters > Conflict of Law > General Overview
Torts > Procedural Matters > Conflict of Law > Significant Relationships
HN2 With respect to tort law claims, Illinois courts have adopted the "most significant contacts" test. Four factors must be considered under this test: (a) the place of injury; (b) the place where the conduct causing the injury occurred; (c) the domicil or place of business of the parties; and (d) the place where the relationship between the parties is centered. The place of injury, however, is given presumptive importance only to be supplanted when another state has a more significant interest in the outcome of the lawsuit. Shepardize - Narrow by this Headnote

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Agents & Brokers
Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview
Insurance Law > ... > Insurance Company Operations > Company Representatives > Brokers
Real Property Law > Common Interest Communities > Condominiums > Condominium Associations
HN3 A broker who agrees to provide insurance can be held liable under certain circumstances for the negligent failure to provide coverage and can be held liable under certain circumstances for the failure to accurately advise an insurance consumer of the coverage available. Shepardize - Narrow by this Headnote

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
HN4 Florida recognizes an insurance agent's liability for failure to procure coverage as agreed. Shepardize - Narrow by this Headnote

Contracts Law > Types of Contracts > Oral Agreements
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > Contract Formation > Oral Contracts
HN5 Florida recognizes both oral contracts to procure insurance and oral contracts of insurance. Shepardize - Narrow by this Headnote

Contracts Law > Procedural Matters > Statute of Frauds > General Overview
Contracts Law > ... > Statute of Frauds > Requirements > General Overview
Contracts Law > ... > Statute of Frauds > Requirements > Performance
Contracts Law > Types of Contracts > Oral Agreements
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > Contract Formation > Oral Contracts
HN6 The Statute of Frauds does not apply to oral agreements to procure insurance if the alleged oral contract was intended to be performed within one year. Shepardize - Narrow by this Headnote

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > Liability & Performance Standards > Good Faith & Fair Dealing > Agents & Brokers
Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview
Insurance Law > ... > Company Representatives > Agents > General Overview
HN7 An agent who agrees to obtain insurance, and, through his own fault, or neglect, fails to do no, may be liable in damages, but if, after diligent effort, the agent is unable to procure the requested coverage, his only duty is to inform the party of his inability within a reasonable time. Shepardize - Narrow by this Headnote

Contracts Law > Types of Contracts > Oral Agreements
Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > General Overview
Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Agent & Broker Representations

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Policy Coverage Issues

HN8 Failure of an insured to take appropriate action when he becomes aware that the coverage he thought he had was not obtained by the agent constitutes both a waiver of his right to performance under an alleged oral contract and an estoppel against his right to assert the claim under the alleged oral agreement. Shepardize - Narrow by this Headnote

Contracts Law > Formation of Contracts > Consideration > Detrimental Reliance
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Policy Coverage Issues

HN9 While estoppel cannot be invoked to create coverage clearly excluded by a written contract of insurance, the concept may be utilized against an insurer when its conduct has been such as to induce action in reliance on it. Shepardize - Narrow by this Headnote

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > ... > Policy Interpretation > Reasonable Expectations > General Overview
Insurance Law > ... > Insurance Company Operations > Company Representatives > Brokers

HN10 One who holds himself out to the public as an insurance broker is required to have a degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principle seeks to be protected. If he neglects to procure the insurance, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill of diligence, he becomes liable to his principal for the loss sustained thereby. Shepardize - Narrow by this Headnote

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
Torts > ... > Standards of Care > Special Care > Highly Skilled Professionals

HN11 Whether or not an additional duty is assumed by an insurance broker will depend upon the particular relationship between the parties. Each case must be decided on its own peculiar facts. Shepardize - Narrow by this Headnote

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview
Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview
Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
HN12 The ordinary insurance solicitor only assumes those duties normally found in any agency relationship. In general this includes the obligation to deal with his principal in good faith and to carry out his instructions. No affirmative duty to advise is assumed by the mere creation of an agency relationship. Shepardize - Narrow by this Headnote

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview
HN13 In the absence of separate consideration apart from the premium, the failure to advise rationale should be limited to cases involving a long-established relationship of entrustment between insurance counselor or agent and client from which it clearly appears that the insurance counselor appreciated that there was a duty to take the initiative in giving comprehensive advice to his client on insurance matters. Shepardize - Narrow by this Headnote

Torts > Malpractice & Professional Liability > Attorneys
Torts > Procedural Matters > Attorney-Client Relationships
HN14 An attorney cannot be held liable for failing to ascertain and deal with the legal needs of a client who does not inform the lawyers of those needs, for example, a client who comes to the lawyer for the drafting of a will, but fails to mention a potential personal injury claim the client may have. Shepardize - Narrow by this Headnote

Insurance Law > ... > Policy Interpretation > Reasonable Expectations > General Overview
Insurance Law > ... > Insurance Company Operations > Company Representatives > General Overview
Insurance Law > ... > Insurance Company Operations > Company Representatives > Brokers
HN15 At a minimum to hold an insurance broker liable, the plaintiff insurance consumer must have informed the broker of the coverage desired and the broker agreed to provide that coverage either explicitly or implicitly because of the relationship of the parties. If proof of agreement is based upon their relationship, that relationship must be such that it clearly appears that the broker appreciated its duty and the fact that its expertise is being relied upon by the insurance consumer to ascertain the needed insurance coverage. Shepardize - Narrow by this Headnote

Opinion by: [1] HOLDERMAN

Opinion
JAMES F. HOLDERMAN, District Judge:

MEMORANDUM OPINION AND ORDER

Plaintiff Gust K. Newberg Construction Company ("Newberg"), a construction general contractor, claims that defendant E. H. Crump & Company ("Crump"), an insurance broker, was negligent in connection with the procurement of insurance for Newberg. In 1979, Newberg bid to perform certain construction work for Miami-Dade Water & Sewer Authority. The construction project consisted of a small building and 4 large underground concrete tanks known as final clarifiers. Crump, at Newberg's request, obtained quotes for builders' risk insurance on the project and submitted a bid to Newberg. When Newberg was awarded the contract by Miami-Dade, Crump procured a builders' risk insurance policy for Newberg issued by National Union Fire Insurance, which had supplied an earlier quotation to Crump. That insurance policy was delivered by Crump to Newberg in April 1980. Newberg commenced construction and in August 1981, one of the tanks under construction was damaged by sub-surface water. The insurance policy delivered by Crump contained an exclusion for the peril of sub-surface. The insurer, National Union Fire Insurance, [2] obtained a declaratory judgment of non-liability under the policy for the loss incurred by Newberg.

I. The Pleadings

In its complaint, Newberg alleged that it suffered damages totalling $577,315.41 and alleged that Crump was negligent in the following specific respects:

a) Crump negligently secured a builders risk insurance policy for Newberg in connection with said construction job which excluded coverage for damages caused due to water pressure below the surface of the ground.

b) Crump negligently failed to secure for Newberg a builders risk insurance policy in connection with said construction job which insured against damages caused due to water pressure below the surface of the ground.

c) Crump negligently failed to inform Newberg that the builders risk insurance policy procured in connection with said construction job did not cover damages caused due to water pressure below the surface of the ground.

Crump denied any negligence on its part and alleged in its amended answer the affirmative defenses that:

1. Whatever damages were sustained by Plaintiff were caused by reason of the negligence of Plaintiff.

2. Plaintiff accepted the subject insurance [3] policy and is therefore estopped to claim that it is defective.

The plaintiff and the defendant are citizens of different states and the parties do not contest that the Court has jurisdiction pursuant to 28 U.S.C. § 1332(a). The amount in controversy exceeds $10,000 exclusive of interest and costs.

The issues of liability and damages were bifurcated for trial. A bench trial on liability has been held and this opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.