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Insurance—Conflict of Interests—Bad Faith of Insurer

Myron J. Carlson

license suspended?", "Did you know that *D* spent twelve days in jail and was fined twenty-five dollars for drunkenness on January 10, 1949?" and "Did you know *D* was given twenty days for vagrancy in the city jail of Walla Walla?" *Held*: The form of the questions was proper as long as it was not for the purpose of discerditing the person on trial. *State v. Cyr*, 40 Wn. 2d 840, 246 P.2d 480 (1952).

The holding in the instant case puts Washington among the small minority of states which allow the prosecution to ask, on cross-examination of defendant's character witness, whether such witness has any personal knowledge of specific acts of misconduct committed by the defendant. *State v. Jacobs*, 195 La. 281, 196 So. 347 (1940). The Washington cases which support the minority rule and upon which the court relied in the instant case are *State v. Austin*, 83 Wash. 444, 145 Pac. 451 (1915) and *State v. Stilts*, 181 Wash. 305, 42 P. 2d 779 (1935). In these cases the court held that questions asked of character witnesses as to their knowledge of specific acts of the accused were within the bounds of legitimate cross-examination as long as the purpose was only to discredit the testimony of the witness. See also *State v. McMullen*, 142 Wash. 7, 252 Pac. 108 (1927); *State v. Bozovich*, 145 Wash. 227, 259 Pac. 395 (1927); *cf. State v. Coates*, 22 Wash. 601, 61 Pac. 726 (1900) (testimony as to general reputation alone allowed).

The majority rule allows the prosecution to cross-examine defendant's character witnesses only as to rumors or reports of particular acts of misconduct committed by the defendant. *Stewart v. United States*, 104 F.2d 234 (App. *D.C.* 1939); *Michelson v. United States*, 335 U.S. 469 (1948); *State v. Miller*, 60 Ida. 79, 88 P. 2d 526 (1939); 3 WIGMORE, EVIDENCE § 988 (3rd ed. 1940). In the *Michelson* case, the basis for the majority rule was concisely explained by Mr. Justice Jackson: "Since the whole inquiry, . . . is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry 'Have you heard?' has general approval, and 'Do you know' is not allowed . . it is not the man that he is, but the name that he has which is put in issue."

The form of inquiry, "Do you know?" indicates to the jury that the prosecutor has definite information that the defendant has been guilty of a series of offenses by not in any way distinguishing between rumor and fact of such offenses. This results in prejudicing the accused in the mind of the jury. It is suggested that the form of question allowed by the majority, "Have you heard?," keeps the prosecution within the stated purpose of cross-examination of character witnesses and lessens the chance of prejudicing the defendant in the mind of the jury by minimizing references to the fact that the defendant has been guilty of prior acts of misconduct.

MICHAEL MINES

Insurance—Conflict of Interests—Bad Faith of Insurer. *P*, the insured under a public liability insurance policy with *D*, had been sued by an injured party; one of the grounds alleged for recovery was expressly excepted by the terms of the policy. *D* insisted on its policy right to control the defense and also to withdraw and disclaim all liability if at the trial the loss was found to be outside the policy coverage. *P* objected to the reservation of rights by *D*, pointing out that it would be to *D's* interest at the trial to allow proof of the loss on grounds outside the policy coverage and thus escape all liability. *D* then offered to allow *P's* counsel to assist in the defense and P accepted. *P*, subject to potential liability in excess of the policy's limits, negotiated a settlement within the policy's limits, to which *D* refused to contribute. *P* paid the settlement and

and seeks to recover from *D*, alleging breach of contract in insisting upon a conditional defense, and bad faith in not cooperating in settlement. As an affirmative defense *D* pleaded the policy clause that "no action" shall be maintained against the insurer until the amount of loss was determined by judgment against the insured or by written consent of insurer, insured, and claimant. Trial court found *D* guilty of breach of contract and bad faith as alleged and gave *P* judgment for the amount of the settlement plus attorney's fees. Appeal. *Held*. Affirmed. When an insurer has been guilty of bad faith in failing to cooperate toward a settlement, the insured may make a fair settlement and recover the same within the policy limits, from the insurer. Further, since the bad faith of the insurer in not performing his contract obligations sounds in tort, the "no action" contract clause is inapplicable as a defense. *Evans v. Continental Casualty Co.*, 40 Wn. 2d 614, 245 P. 2d 470 (1952).

This is the first appellate case in Washington in which an insurer has been called upon to defend an insured against a suit alleging grounds within and without policy. A definite "conflict of interests" results from such a suit. If the insurer defends with a reservation of rights it will be to the insurer's advantage to allow the complainant to recover judgment on grounds outside the coverage of the policy and thereby avoid liability. If the insurer accepts an unconditional defense he is generally held to have waived his immunity from losses outside the coverage of the policy. This may be inferred from the cases which hold that notice of reservation of right is necessary to prevent waiver. *Eakle v. Hayes*, 185 Wash. 520, 55 P.2d 1072 (1936). Foreign courts, in dealing with this problem, have held that if the insurer allows the insured to participate in the defense, and reserves his right to withdraw and disclaim liability under the policy, the rights of both parties are properly protected. *Fidelity and Casualty Co. v. Stewart Drygoods Co.*, 208 Ky. 429, 271 S.W 444 (1925) ;*Compton Heights Laundry Co. v. General Accident, Fire, and Life Assurance Corporation*, 195 Mo. App. 313, 190 S.W 382 (1917). In the face of this authority it is understandable that the court avoided a discussion of the breach of contract finding of the trial court, which was assigned as error, and chose to base its opinion entirely upon the bad faith finding.

This decision extends considerably the scope of liability of public liability insurers, who now, if found guilty of bad faith, may be subject to liability for the amount of extrajudicial agreement to which they are not parties and concerning which they had no opportunity to protect their own interests. There is authority for allowing recovery of a settlement amount from an insurer who has flatly denied liability and refused to defend. *L. J. Dowell, Inc. v. United Pacific Casualty Ins. Co.*, 191 Wash. 666, 72 P.2d 296 (1937). Recovery of a *judgment* rendered against the insured, from an insurer who has been guilty of bad faith has been allowed. *Burnham v. Commercial Casualty Ins. Co.*, 10 Wn.2d 624, 117 P.2d 644 (1941). But there appears to be no previous authority for recovery of a settlement amount from an insurer on grounds of bad faith.

Apparently because of the lack of direct authority, the court, reasoning by analogy, said, "The situation presented here [insurer's non-cooperation in settlement] does not differ in principal from that in which insurer denies its liability and refuses to defend." Ths rather strained analogy enables the court to rest its decision on the authority of cases supporting the proposition to which the analogy is drawn. *Traders and General Ins. Co. v. Rudco Oil and Gas Co.*, 129 F.2d 621 (C.A. 10th 1942). This case, principally relied upon by the court, may be distinguished, however, in that, in the instant case, the insurer did not deny liability and refuse to defend, but rather refused to cooperate in settlement negotiations, a notable difference.

The court disposes of the defense of the "no action" clause by holding that this action, based on the bad faith of the insurer in failing to perform a contract obligation,

sounds in tort, and therefore the contract defense is inapplicable. A finding of bad faith may follow from a neglect or refusal to fulfill some contract obligation, *Bundy v. Commercial Credit Co.,* 202 N.C. 604, 163 S.E. 676 (1932), and an action based thereon sounds in tort, *Johnson v. Hardware Mutual Casulty Co.,* 108 Vt. 269, 187 A. 788 (1936). The court does not state what contract obligation was unfulfilled. There is no contractual obligation of the insurer to settle or compromise suits against the insured. The court must have been referring to the implied obligation of the insurer to use good faith because of a fiduciary relationship arising from the insured's having surrendered all right to defend suits or effect compromises. *American Fidelity and Casualty Co. v. All American Bus Lines,* 179 F.2d 7 (C.A. 10th 1949).

It is unfortunate that the trial court never determined whether the loss was within the policy coverage. Similar litigation might be avoided by several courses of action. (1) Force the insurer to elect to defend unconditionally or surrender the defense to the insured. Then if the damage suit reveals loss within the policy coverage, the insured may recover from the insurer in a separate suit if necessary, although payment by the insurer would be almost certain in view of the evidence indicating that the loss was within the policy coverage; (2) Allow counsel of the insurer and the insured to participate in the defense, thus giving protection to the interests of both. This is the method suggested by the *Fidelity* and *Compton cases, supra;* (3) Either of the foregoing solutions could be carried out by a provision in our Insurance Code directing the course of action to be pursued when similar "conflicts of interest" arise.

MYRON J. CARLSON

Practice and Procedure—Rule 16—Grounds for Granting New Trial. *P* sued *D* for malpractice. After a verdict for *P,* the trial court granted *D's* motion for new trial, citing Rule 16, sub. 9 of the General Rules of the Superior Court, 34A Wn.2d 117, i.e., "substantial justice has not been done." The court listed in the order granting the new trial the following reasons: insufficient evidence of negligence, prejudice of a juror, statements of *P's* counsel tending to prejudice the jury against *D,* speed of the verdict, consideration of the entire record and proceedings, and appearance and demeanor of witnesses. P appealed. *Held*: reversed and judgment for *P* according to the verdict. Rule 16 requires that in all cases where a trial court grants a motion for new trial it shall in the order of granting the motion give definite reasons of law and facts for so doing. The reasons based on the record are insufficient to warrant a new trial and the reasons based upon the trial court's consideration of the proceedings and demeanor of witnesses do not show in what way *D* was prejudiced thereby. *Mulka v. Keyes,* 41 Wn. 2d 427, 249 P.2d 972 (1952).

The Supreme Court for many years has been committed to the proposition that the trial court may in its discretion, grant a new trial on the ground that substantial justice has not been done. See Green, *Procedural Progress in Washington,* 26 WASH L. REV. 87, 109 (1951). The requirement that the trial court list reasons for such a conclusion was added to the Rules in 1951, as a result of a discussion in *Coppo v. Van Weeringen,* 36 Wn.2d 120, 217 P.2d 294 (1950). In the *Coppo* case, Justice Hill indicated that the Supreme Court would be able to perform the appellate function more effectively if the trial court were required to state reasons of law and fact for the granting of the new trial order.

Washington, in allowing an appeal from an order granting a new trial is in a minority position. Most jurisdictions deny such appeal upon the ground of lack of finality