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RECENT COURT DECISIONS

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Sexual Harassment—Insurer Not Liable for Willful Acts of Insured and Has No Duty to Defend

Coit Drapery Cleaners v. Sequoia Insurance 18 Cal. Rptr. 2d 692 (Cal. App. 1 Dist. 1993)

A job applicant was interviewed by Coit's president who was also a major stockholder, chairman of the board, and founder of the company. The president allegedly asked questions of a sexual nature during the interview, and, after being hired, the plaintiff testified that the president made numerous unwelcome advances and propositions to her during the two months she worked for the corporation. She testified she was terminated for rejecting his advances.

The plaintiff filed suit against the corporation, the president, and another employee who the plaintiff testified acted as the president's "procuress." The suit alleged theories of sexual harassment, invasion of privacy, wrongful termination, breach of public policy, infliction of emotional stress, fraud, and battery.

Several months after the lawsuit was initiated, the defendant Coit tendered defense of the lawsuit to Sequoia Insurance Company which had a general liability policy in effect. Sequoia declined to accept the defense indicating that the wrongful termination of the plaintiff did not constitute an "occurrence" since the events were expected or intended by the insured.

Subsequently, the defendants and plaintiffs settled the case for more than $1,000,000. The settlement agreement was designed to provide that the insurer pay the bulk of the settlement (approximately $705,000 of the $1,055,000 settlement).

The trial court found that the acts of sexual harassment and unlawful termination claimed were intentional acts for which coverage was excluded by the language of the insurance policy and also by the California Insurance Code Section 533. That section provides that insurers are not liable for loss caused by the willful act of the insured; however, an insurer is not exonerated by the negligence of the insured or of the insured's agents or others.

The appellate court affirmed the finding that the allegations by the plaintiff and the evidence presented at the trial show that there was "no credible argument that this alleged wrongful conduct could be anything other than intentional and willful." The court wrote that, quite apart from the plain meaning of the statute, "public and statutory policy of this state against sexual harassment of employees will not be well served by a ruling which would exonerate a perpetrator from payment of damages for his own willful act of sexual gratification, by shifting such liability to an insurer."

The court also found that the employer (Coit) had ratified the president of the corporation's conduct. The court held there was no duty to defend the employer despite the fact that there were claims of potential coverage for possible defamation and negligent supervision.

Liability to Trespassers—U.S. Supreme Court Recently Refused to Review a Decision of the Illinois Supreme Court

Lee v. Chicago Transit Authority 605 N.E. 2d 493 (Ill. 1992)

The case involved a 46-year-old Korean immigrant, with a blood alcohol level of 0.341, who walked off a sidewalk and up the railroad tracks of the Chicago Transit Authority. He was electrocuted by the third rail which supplies power to the electric trains. The deceased entered the tracks at a location where there were signs that said "danger," "keep out," and "electric current." The signs were printed in English.

In addition to the signs, there were also sharp boards in the shape of triangles which had been installed between the sidewalk and the third rail to make it difficult to walk up the tracks. The decedent walked approximately six and one-half feet up the tracks, apparently to urinate, and was then electrocuted.

The Illinois Supreme Court wrote that the rule in Illinois is that a land owner generally owes a trespasser only the duty to refrain from willfully or wantonly injuring him. However, the rule has certain exceptions. The court wrote that a land owner must use ordinary care to avoid injury to a trespasser who has been discovered in a place of danger on the premises. Additionally, the land owner owes a duty of ordinary care to those who are frequent trespassers in a limited area where a land owner knows, or should know, of their constant intrusion. Illinois courts had also recognized an exception where small children foreseeably intrude on the premises and are incapable of appreciating the risk involved.

In this case, the Illinois Supreme Court adopted Section 337 of the Restatement (Second) of Torts which provides that "if a land owner knows of or reasonably anticipates the presence of a trespasser in a place of danger, the land owner should be held to a duty of ordinary care to protect and/or warn the trespasser." Justice Moran dissented and wrote that Section 337 requires that the possessor of land know or have reason to know of the presence of a trespasser in dangerous proximity to an artificial condition which involves risk

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of death. The dissent indicated that the knowledge requirement had not been satisfied in this case.

Justice Heiple also dissented. He wrote that the facts of the case indicate that the jury finding of 50 percent fault on the part of the Chicago Transit Authority was grossly erroneous, that a 10 percent degree of negligence would be in the range of reasonableness. The Justice also wrote that the jury verdict in fixing plaintiff damages at $3,000,000 was excessive. He indicated that damages should be in the range of $750,000 and then reduced by 90 percent, thus resulting in a net verdict of $75,000.

The lead opinion in discussing the facts of the case noted that the plaintiff's expert witness testified that the segment of track involved in this case was "the only one in the United States or Canada where an electrically charged grade level third rail is unguarded, uncovered or unfenced."

The Kansas Supreme Court Strikes Down Collateral Source Statute

Thompson v. K.F.B. Insurance Company 850 P. 2d 773 (Kansas 1993)

A Kansas law which provided that evidence of collateral source benefits is admissible was held unconstitutional. Sections 60-3802 through 60-3805 K.S.A. essentially provided that in an action for personal injury or death in which the claimant demands judgment for damages in excess of $150,000, evidence of collateral source benefits received or evidence of collateral source benefits which are reasonably expected to be received in the future were admissible into evidence. Additionally, evidence of the cost of the collateral source benefits admitted into evidence was also admissible. The statute provided that, when determining damages in an action for personal injury or death, the trier of fact was to determine the net collateral source benefits received and the net collateral source benefits reasonably expected to be received in the future. If the case was jury trial, the jury was to be instructed to make such determination by itemization of the verdict. The statute then provided that the amount of the judgment was to be reduced by the amount of net collateral source benefits, with certain limitations.

The Kansas Supreme Court wrote that the common law collateral source rule prevented a jury "from hearing evidence of payments made to an injured person by a source independent of the tort feasor as a result of the occurrence upon which the personal injury action is based." The court paraphrased the rule as providing that plaintiff's damages otherwise recoverable from the wrongdoer will not be diminished by benefits received by the plaintiff from sources wholly independent of and collateral to the wrongdoer.

The supreme court wrote that the Kansas legislature had "three times in recent memory" enacted statutes which were intended to override or limit the common law rule. A 1976 statute provides that, in personal injury actions involving services rendered by health care providers, evidence of reimbursement (excluding payments from insurance paid for by the plaintiff or his employer) would be admissible for consideration by the trier of fact. The provision was declared unconstitutional in *Wentling v. Medical Anesthesia*

Services, 701 P 2nd 939 (1985), as being violative of the equal protection provisions of the federal and Kansas constitutions.

In 1986, the Kansas legislature passed K.S.A. 60-3403, which provided that in medical malpractice actions evidence of the amount of reimbursement paid or to be paid for the benefit of a claimant under a medical, disability or other coverage (except life insurance coverage), or workers' compensation, military service benefit plan, employment wage continuation plan, social welfare benefit plan or other program provided by law was admissible. In *Farley v. Engelken,* 740 P. 2nd 1058 (Kansas 1987), the court found the statute unconstitutional.

The legislature enacted the statute in question in the instant case in 1988. The Kansas Supreme Court applied the rational basis test, which provides that a statutory classification does not violate the equal protection guarantees of the constitution if the classification is rationally related to a legitimate legislative purpose. The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation so that persons similarly situated are treated alike. The statute failed to meet this standard.

Comprehensive General Liability—The Policy Pollution Exclusion

Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation

The Florida Supreme Court withdrew its decision rendered September 3, 1992 (which was discussed in the December 1992 issue of the *Journal of Risk and Insurance*), and substituted in its place a new opinion. In the later decision, the Supreme Court held that as a matter of law the pollution exclusion clause contained in the comprehensive general liability insurance policy involved in the case precluded coverage to its insured for liability for the environmental contamination that occurred in Dimmitt. The comprehensive general liability policy in question provided an exclusion from coverage for bodily injury or property damage arising out of the discharge, dispersal, release, or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, gases, or waste materials into or upon land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release, or escape is sudden or accidental.

Dimmitt Chevrolet, Inc. and Larry Dimmitt Cadillac, Inc. operated two car dealerships. From 1974 to 1979, they sold used crankcase oil generated by their businesses to Peak Oil Company. From 1974 to 1979, Peak recycled the oil at its Hillsborough County plant for sale as used oil. The EPA, in 1983, determined that Peak's oil operations had resulted in extensive soil and groundwater pollution, much of which resulted from Peak's placement of waste oil sludge in unlined storage ponds from which chemicals leached into the soil and groundwater. In 1987, the Dimmitts were notified by the EPA that they were potentially responsible parties for the cost of investigating and cleaning up the pollution. The pollution was gradual and had occurred over a period of several years.

Southeastern Fidelity Insurance provided comprehensive general liability coverage, which contained the above exclusionary language, to the Dimmitts from 1972 through 1980. Southeastern filed a declaratory judgment action as to its lack of duty to defend or indemnify Dimmitt under the CGL policy. Summary judgment was entered in favor of Southeastern by the trial court on the basis that the pollution exclusion was not ambiguous and that the word "sudden" should be given a temporal meaning.

The Florida Supreme Court in its earlier, now withdrawn, decision had disagreed with the trial court's interpretation of the term "sudden and accidental" contained in the pollution exclusion and held that the term was ambiguous because it was subject to more than one interpretation. In its now withdrawn opinion, that Court had determined that the term was capable of being defined as unexpected and unintended. It further determined, from its review of the drafting history of the clause, that the clause was included in policies *only* to preclude coverage for intentional pollution damage.

The Supreme Court has receded from that decision in its newly rendered decision which totally replaces its earlier decision. In its now controlling decision, the Florida Supreme Court holds that, as a matter of law, the pollution exclusion clause contained in that comprehensive general liability insurance policy precluded coverage to its insured for liability for the environmental contamination that occurred in the *Dimmitt* case. Importantly, the Supreme Court held that the ordinary and common usage of the term "sudden" includes a temporal aspect with a sense of immediacy or abruptness. Quoting the Ohio Court in *Hybud Equipment Corp. v. Sphere Drake Ins. Co.*, 597 N.E. 2d 1096, 1102 (Ohio 1992), the Supreme Court held that "sudden" has a temporal dimension when used in conjunction with the term accidental and means happening quickly, abruptly, or without prior notice, that "[a]s expressed in the pollution exclusion clause, the word sudden means abrupt and unexpected." The Court refused to construe the term sudden also to mean unintended and unexpected because to do so would render the words sudden *and* accidental entirely redundant.

Thus, the Supreme Court construed the policy to mean that basic coverage arises from the occurrence of unintended damages, but such damages as arise from discharge of various pollutants are excluded from basic coverage, except that damages arising from the discharge of these pollutants will fall within the coverage of the policy where such discharge is sudden and accidental. Applying the policy language in this case, the Supreme Court held that the pollution damage is not within the scope of Southeastern's policy. The Court stated that the pollution in this case took place over a period of many years and most of it gradually and that, with regard to the spills and leaks at the site as well as occasional runoff of contaminated rain water, these are common place events which occurred in the course of daily business and cannot, as a matter of law, be classified as "sudden and accidental."

This opinion is subject to a motion for rehearing.

The *Journal of Risk and Insurance* welcomes reviews of legal cases relating to risk and insurance or suggestions for cases suitable for review. Send information to Contributing Editor, Patrick F. Maroney, The Florida State University, Tallahassee, FL 32306-1042.

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