LIABILITY

Evidence of Liability Insurance Improperly Prejudiced Jury's Verdict in Defamation Lawsuit

Ventura v. Kyle, 2016 WL 3228373
(8th Cir. June 13, 2016)

Background

Late Navy Seal Chris Kyle, the most lethal sniper in the history of the Special Forces, became a household name with the 2014 release of *American Sniper* directed by Clint Eastwood and staring Bradley Cooper. Kyle's autobiography, on which the screenplay is based, is not without its controversies. In 2011, the autobiography sparked a high profile defamation and unjust enrichment lawsuit brought by Jesse Ventura, the former Governor of Minnesota.

The alleged altercation underlying Ventura's lawsuit occurred at a bar where Kyle and some friends gathered in October of 2006 after the funeral of a fellow Navy Seal. Kyle's autobiography contains a subchapter entitled "Punching out Scruff Face" which describes an incident where Kyle got into a physical altercation with a celebrity who was "running his mouth about the war and everything and anything he could connect to it." Although the autobiography does not mention Ventura by name, Kyle identified "Scruff Face" as Ventura in promotional interviews.

Ventura sued Kyle in federal court for defamation, misappropriation, and unjust enrichment contending that Kyle fabricated the alleged altercation.

District Court Verdict

The trial featured testimony from two witnesses from HarperCollins, the publisher of Kyle's autobiography. Sharyn Rosenblum, the primary publicist for the autobiography, testified that she did not know who "Scruff Face" was when she originally read the manuscript. She also testified that the subchapter describing the bar incident had "'a very insignificant part' and did not impact the book's success." Peter Hubbard, the autobiography's editor, testified that the "Scruff Face" story had "a 'negligible' effect on the success of the book" and "was not relevant to his decision to enter into a contract with Kyle" for his autobiography.

In an effort to impeach the HarperCollins witnesses, Ventura's counsel questioned "them about Kyle's and HarperCollins's insurance coverage to show that 'HarperCollins had a direct financial interest in the outcome of the litigation' and the witnesses were biased in favor of Kyle." (Rule 411 of the Federal Rules of Evidence prohibits the admission of evidence regarding liability insurance for the purpose of proving liability, but permits the admission of such evidence to show witness bias.) The court permitted the plaintiff to ask the HarperCollins witnesses if they were aware that HarperCollins's insurer was paying for the defense costs incurred by Kyle's estate and whether they were aware that HarperCollins had a direct financial interest in the outcome of the litigation because it was providing the

insurance. Both witnesses responded no.

During closing arguments, Ventura's counsel questioned whether the HarperCollins witnesses were truly unaware that HarperCollins's insurance policy was paying for Kyle's defense. Specifically, Ventura's counsel opined, "[i]t's hard to believe that they didn't know about the insurance policy because it's right in Kyle's publishing contract. Paragraph 6.B.3. of Exhibit 82, *Chris Kyle is an additional insured for defamation* under the publisher's insurance policy."

Kyle's counsel moved for a mistrial due to the references to insurance, but the court denied the motion. After five days of deliberation, the jury awarded Ventura $500,000 for his defamation claim and recommended damages of approximately $1.35 million for the unjust enrichment claim. The district court adopted the jury's recommendations as to the unjust enrichment claim and the accompanying damages award.

Kyle's counsel moved for judgment as a matter of law or, alternatively, for a new trial, contending that Ventura failed to meet his burden of proof on several elements of the defamation claim and that the unjust-enrichment judgment violated Minnesota law and the First Amendment. Finally, he sought a new trial on the grounds that the jury's "awards were tainted by the admission of prejudicial testimony and argument regarding [Kyle's] insurance."

Appeal

Kyle's estate appealed the district court verdict. On appeal, the Court of Appeals for the Eighth Circuit held that Kyle was entitled to a new trial on the defamation claim because Ventura's counsel asked questions that put prejudicial information before the jury and invoked questions of insurance in its closing arguments.

Specifically, the Court noted the following: "[a]lthough relatively brief, Ventura's counsel's closing remarks about insurance 'were not minor aberrations made in passing.' Given Ventura's repeated efforts to introduce evidence of HarperCollins's and Kyle's insurance at trial, it is difficult to see how Ventura's counsel's comments were anything other than 'a deliberate strategic choice' to try to influence and enhance damages by referencing an impersonal deep-pocket insurer."

Courts have recognized the high risk of prejudice where evidence of liability insurance is presented to the jury. As the Eighth Circuit explained in *Halladay v. Verschoor*, 381 F.2d 100, 112 (8th Cir. 1967), "it [i]s 'utterly repugnant to a fair trial or . . . a just verdict' for the jury to hear that 'the damages sued for . . . will be taken care of by an insurance . . . company.'" It is almost unanimously acknowledged that 'the receipt of such evidence constitutes prejudicial error sufficient to require reversal.'" *Id*. Although Rule 411 allows for the admission of such evidence for limited purposes, such as showing witness bias, the probative effect of admission must always be weighed against the

potential that the evidence may unfairly prejudice the jury.

Acknowledging the inherent potential for prejudice accompanying evidence of liability insurance, the Court of Appeals concluded that the jury instructions, which contained only "the general reminder that counsel's arguments are not evidence[,]" were insufficient to cure prejudice caused by the remarks by counsel. Although the jury award of $500,000 on the defamation claim was "not beyond the bounds of rationality," the court could not definitively state that this figure was unaffected by the prejudicial nature of counsel's remarks. This conclusion was supported by the close nature of the case. The case was essentially a battle of credibility between respective fact witnesses and the jury needed five days of deliberation to reach its 8-2 verdict. The potential prejudice could not be ignored where the case ultimately could have gone either way. The jury's knowledge that any award may be covered by an unseen insurance company too easily could have tipped the scale.

In light of the above, the Court of Appeals concluded that Ventura's counsel's closing remarks, combined with their improper cross-examination of the two witnesses from HarperCollins on Kyle's insurance coverage, prevented Kyle from receiving a fair trial. The Court of Appeals set aside the verdict of the district court and remanded the defamation claim for a new trial.

Rhode Island Supreme Court Holds Materials Relied upon by Expert Witness Not Subject to Discovery

Cashman Equip. Corp. v. Cardi Corp.,
2016 WL 3129659
(R.I. June 3, 2016)

The Rhode Island Supreme Court recently held that the materials relied upon by an expert witness in formulating its opinions are not discoverable under Rule 26 of the Rhode Island Superior Court Rules of Civil Procedure.

The plaintiff filed a petition for a writ of certiorari after the Providence Superior Court denied its motion to compel the production of "all materials and documents, less attorney work product, including all computer models and drafts of materials and documents, developed and considered by [the defendant's] testifying expert . . . in the process of formulating his written expert opinion."

The plaintiff argued that the materials considered by a testifying expert in formulating its opinion are "fully discoverable" under Rule 26(b)(4)(A) of the Superior Court Rules of Civil Procedure with the exception of "core attorney work product." The plaintiff contended that not only would such materials be useful in cross-examining the expert witness, but that they would be necessary for the purpose of determining how the expert arrived at the final model or report relied upon in the formulation of its opinion.

The defendant responded by arguing "that the plain language of Rule 26(b)(4)(A) limits discovery with

respect to testifying experts to interrogatories and depositions and does not provide for discovery 'by document subpoena' or discovery 'of matters 'considered by' but not relied upon in forming an expert's opinion.'" The defendant argued that expanding the scope of this rule would require the promulgation of a formal amendment process and the approval of the majority of the Superior Court Justices.

In affirming the Superior Court's denial, the Supreme Court looked to the fundamental principles of statutory interpretation that clear and unambiguous language must be given its plain and ordinary meaning. Rule 26(b)(4)(A) makes clear mention of expert discovery through interrogatories and depositions, but does not provide for the disclosure of documents. In light of the clear, unambiguous language of the rule, the Supreme Court held that a litigant is not entitled to the discovery of materials developed and considered by a testifying expert in the process of formulating its written expert opinion.

The Rhode Island Supreme Court affirmed the denial of the plaintiff's motion to compel and quashed the writ for certiorari.

Questions Concerning a Liability Insurer's Duty to Prosecute a Counterclaim of an Insured Certified to the SJC

Mount Vernon Fire Ins. Co. v. VisionAid, Inc.,
2016 WL 3202961
(1st Cir. June 9, 2016)

The Court of Appeals for the First Circuit recently certified three questions to the Massachusetts Supreme Judicial Court ("SJC") regarding the duty of a liability insurer to provide and pay for counsel to prosecute an insured's counterclaim. As noted by the Court of Appeals, "[t]his dispute between an insurance company and its insured has potentially wide-reaching implications for how liability insurers must conduct themselves in the Commonwealth of Massachusetts."

Background

The insured, Vision Aid, Inc. ("VisionAid"), is a defendant in a state court lawsuit filed by its former Vice President of Operations, Gary Sullivan. Sullivan originally filed a complaint based on illegal age discrimination with the Massachusetts Commission against Discrimination ("MCAD"). Sullivan alleged that "VisionAid's termination of him was based on his age and, therefore, illegal." VisionAid reported the complaint to Mount Vernon Fire Insurance Company ("Mt. Vernon"), its liability insurer, and the insurer appointed counsel to defend the MCAD complaint. Defense counsel argued that "VisionAid fired Sullivan because of legitimate non-discriminatory reasons, namely his sub-par performance and misappropriation of company funds."

Unable to resolve the MCAD complaint, and obtain a mutual release of all claims, Sullivan dismissed the complaint and filed an age discrimination complaint against

VisionAid in Massachusetts state court. Mt. Vernon agreed to continue to defend VisionAid subject to a reservation of rights. In response to the reservation of rights, VisionAid opted to choose its own counsel to defend it. Mt. Vernon responded by withdrawing its reservation of rights and indicated that appointed defense counsel would remain VisionAid's defense counsel. Mt. Vernon also informed VisionAid that although "it was aware that VisionAid wished to pursue a counterclaim [for misappropriation of company funds] against Sullivan, Mt. Vernon's position was that the Policy was strictly a defense-liability policy and that it was not required . . . to pay for the prosecution of counterclaims or affirmative actions." Mt. Vernon informed VisionAid that it needed to hire its own attorney to pursue a counterclaim against Sullivan. Mt. Vernon also filed a declaratory judgment action in the United States District Court for the District of Massachusetts and sought a declaration "whether it was required to pay for the prosecution of VisionAid's proposed state-court misappropriation claim." VisionAid answered and filed a counterclaim seeking the following declaration: (1) that Mt. Vernon's duty to defend included the duty to prosecute the misappropriation counterclaim and (2) that the parties' interests were no longer aligned and, therefore, VisionAid was entitled to independent counsel on the entire state-court action at Mt. Vernon's expense.

On cross-motions for summary judgment, the court ruled for Mt. Vernon and found that under the plain language of the policy, Mt. Vernon was not required to prosecute an affirmative counterclaim. VisionAid appealed.

Appeal

On appeal, VisionAid contends that the term "Defense Costs" contained in the subject policy is ambiguous and "under Massachusetts law an ambiguous insurance agreement is to be interpreted in the light more favorable to the insured." VisionAid argues that the policy's grant of coverage for defense costs, the exact parameters of which are not set out in the policy, included coverage for all work a defense attorney would typically do in connection with the covered claim, including the prosecution of a counterclaim which would defeat liability or diminish damages.

VisionAid further argues "that under Massachusetts's . . . 'complete defense' rule, [Mt.] Vernon's duty to defend includes prosecuting the counterclaim." Under the complete defense rule, "'an insurer must defend the entire lawsuit if it has a duty to defend any of the underlying counts in the complaint.'"

On the matter of independent counsel, VisionAid argues that the parties' interests no longer align because the counterclaim "is impeding it from reaching an accord with Sullivan since he is unwilling to settle without a mutual release." As a result, VisionAid contends that it should be

allowed to select its own attorney at Mt. Vernon's expense.

In response, Mt. Vernon argues that the policy clearly and unambiguously only provides defense coverage for claims brought against an insured. Mt. Vernon also argues that the term "Defense Costs" is not ambiguous "and is specifically limited to expenses resulting from defense of a claim as defined by the Policy."

Mt. Vernon further argues that the "complete defense" rule may obligate an insurer to provide a defense of an uncovered claim against an insured, but the rule does not encompass a duty to prosecute a counterclaim by an insured. Mt. Vernon "avers that the only time an insurer may be required to prosecute a counterclaim on behalf of an insured is 'when that counterclaim will be asserted for the purpose of defeating or offsetting liability as to the claims that trigger coverage under the policy.'" Mt. Vernon argues that the misappropriation counterclaim is unrelated to the VisionAid's defense against Sullivan's claims.

Lastly, Mt. Vernon argues that "there is no conflict of interest between appointed defense counsel and VisionAid such that it should be called on to pay for VisionAid's personal counsel."

Certified Questions

The Court of Appeals determined that Massachusetts courts have not addressed whether an insurer's duty to defend includes the duty to prosecute an affirmative claim by an insured, and if so, the scope of the duty.

The Court of Appeals notes that "[t]he outcome of this case could affect scores of insurance contracts in Massachusetts, insurance is an area of traditional state regulation, and the policy arguments here do not clearly favor one side or the other." Because of the wide ranging implications, the Court of Appeals opined that certification was the most prudent course of action. The Court of Appeals certified the following three questions:

"(1) Whether, and under what circumstances, an insurer (through its appointed panel counsel) may owe a duty to its insured – whether under the insurance contract or the Massachusetts 'in for one, in for all' rule – to prosecute an insured's counterclaim for damages, where the insurance contract provides that the insurer has a 'duty to defend any Claim,' i.e., 'any proceeding initiated against [the insured]'?"

"(2) Whether, and under what circumstances, an insurer (through its appointed panel counsel) may owe a duty to its insured to fund the prosecution of an insured's counterclaim for damages, where the insurance contract requires the insurer to cover 'Defense Costs,' or the 'reasonable and necessary legal fees and expenses incurred by [the insurer], or by any attorney designated - by [the insurer] to defend [the insured], resulting from the investigation,

adjustment, defense, and appeal of a Claim'?"

"(3) Assuming the existence of a duty to prosecute an insured's counterclaim(s), in the event it is determined that an insurer has an interest in devaluing or otherwise impairing such counterclaim, does a conflict of interest arise that entitles the insured to control and/or appoint independent counsel to control the entire proceeding, including both the defense of any covered claims and the prosecution of the counterclaim?"

The SJC has not issued an opinion on these certified questions. Because an opinion favoring VisionAid's position may broaden an insurer's duty to defend, we will monitor this matter.

SUBROGATION

Insurer's Claim for Gross Negligence Not Barred by "Waiver of Subrogation"

Cont'l Cas. Co. v. Equity Indus. Maple Heights, LLC, 2016 WL 2927847 (N.D. Ohio May 19, 2016)

A federal judge recently concluded, relying on Ohio law, that a "waiver of subrogation" clause in a commercial lease did not bar a tenant's insurer from bringing a subrogation action against the property owner asserting claims based on gross negligence and wanton and careless conduct.

The defendant, the owner of a large commercial warehouse in the city of Maple Heights, Ohio, leased the facility to the tenant pursuant to a lease agreement. During the lease period, a large fire broke out at the warehouse and caused extensive damage. In its subrogation action, the tenant's insurer alleged that the warehouse fire suppression system failed to operate properly due to a disabled compressed air system and an inadequate water supply.

After paying its insured $55 million for the property damage caused by fire, the tenant's insurer brought a subrogation action against the property owner alleging breach of contract, negligence, gross negligence and "wanton and careless conduct." The defendant moved to dismiss the claims relying on a provision of the lease that mutually released and discharged the property owner and the tenant "from all claims and liabilities arising from, or caused by, any casualty or hazard, covered, in whole or in part by any insurance . . ., and also waived "any right of subrogation which might otherwise exist in, or accrue to any person on account thereof."

In response, the tenant's insurer argued that Ohio law does not recognize subrogation waivers with respect to gross negligence. Agreeing with the insurer, the court stated that although under Ohio law an exculpatory clause that limits liability

due to negligence may be valid and unenforceable, "such a clause is ineffective where the party seeking protection failed to exercise any care whatsoever, where there was willful or wanton misconduct, or where the clause is against important public policy concerns, unconscionable, or vague and ambiguous."

The court denied the motion to dismiss.

Waiver of Subrogation Contained in Condominium Bylaws Inapplicable to Subrogation Action against Tenant

Pacific Indemnity Co. v. Deming,
2016 WL 3607028
(1st Cir. July 5, 2016)

The United States Court of Appeals for the First Circuit recently held that a clause contained in condominium bylaws requiring unit owners to obtain insurance containing a waiver of subrogation did not foreclose a unit owner's insurer from pursuing a subrogation action against a tenant.

Pacific Indemnity Company ("Pacific") sought to recover damages from Deming, a tenant, as a result of damages he caused to a condominium unit it insured. Pacific contended that the defendant-tenant, Deming, negligently caused water damage to the unit it insured.

On cross-motions for summary judgment, the district court concluded that a waiver of subrogation contained in the by-laws for the condominium waived Pacific's right of subrogation against the defendant-tenant. The United States Court of Appeals for the First Circuit disagreed, reversed the grant of summary judgment, and remanded the case.

The bylaws in question contained a clause requiring each unit owner to obtain insurance insuring personal property owned by the unit owner, insuring the unit owner for personal liability, and providing loss assessment coverage. The same clause required "all such policies . . . [to] contain waivers of subrogation . . .." The defendant-tenant argued that "'[b]y agreeing to the requirements of the condominium association, Pacific's insured purchased an insurance policy that permitted waiving the right of subrogation.'"

At summary judgment, Pacific argued that "'[b]ecause defendant . . . cannot establish that there is any contractual impediment to plaintiff's pursuit of this subrogation claim against him, plaintiff is entitled to judgment against defendant.'" Pacific also argued that its policy language permitted an insured to "'waive any rights of recovery from another person or organization for a covered loss in writing before the loss occurs . . ..'" Pacific further argued that the policy language "'merely authorized plaintiff's insureds/subrogors to enter into separate agreements which waive subrogation against particular 'persons' or 'organizations.'" Pacific argued that the defendant-tenant was unable to point to any "'document indicating that he is such a 'person' who received a pre-loss waiver.'"

The Court of Appeals noted that the waiver of subrogation at issue does not "specify the scope of the subrogation rights to be waived." Unlike the district court, the Court of Appeals declined to resolve the scope of the waiver of subrogation. Instead, it concluded that the unit owner did not purchase insurance containing the waiver of subrogation required by the by-laws. The Court of Appeals concluded that the Pacific policy only gives "the insured the option to waive rights of recovery" and cannot be read as a waiver of subrogation." Specifically, the policy reads as follows: "the insured ''may waive any rights of recovery from another person or organization for a covered loss in writing before the loss occurs.'"

The Court of Appeals concluded that Pacific could pursue its subrogation action against the tenant.

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