Wyoming Law Journal

Volume 1 | Number 2 Article 7

December 2019

Liability Insurance as Affecting Immunity from Suit

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The general rule in reality is not as harsh as it might sound upon first having it called to mind. All that is necessary is for the client to be placed in such a position as would enable him to form an entirely free and unfettered judgment, independent of any sort of influence.[8] The court will not apply the general rule on questions that arise prior to the establishment of a fiduciary relationship between the attorney and his client. As long as the attorney deals with a prospective client at arms length or assumes a hostile attitude prior to the relationship's arising, the rule will not be applied.[9] Once the fiduciary relationship is established there is still nothing wrong with an attorney having property conveyed to himself by a client but it does place the burden of proof of the transaction's fairness upon his shoulders should the conveyance ever be questioned.[10]

The instant case clearly shows the intent of the courts to protect the fiduciary relationship that exists between any attorney and his client.[11] Canon 11 of the Cannons of Professional Ethics expresses this same purpose, "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client."[12]

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8. Kidd v. Williams, (1901) 132 Ala. 140, 31 So. 458, 56 L. R. A. 879.
9. Tillman v. Gazaway, (1927) 128 Okl. 183, 261 Pac. 935; See Elmore v. Johnson, (1892) 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366.
10. Phipps v. Willis, (1908) 53 Or. 190, 96 Pac. 866; 5 Am. Jur. 289, Sec. 50.
11. Holdridge v. Southwest Cotton Co., (1929) 35 Ariz. 496, 281 Pac. 202; Powell v. Griffin, (1929) 178 Ark. 788, 13 S. W. (2d) 18; Ross v. Payson, (1896) 160 Ill. 349, 43 N. E. 399; Board of Comr's of Okfulskee County v. Hazelwood, (1920) 79 Okl. 185, 192 Pac. 217, 11 A. L. R. 709.
12. Cheatham, Cases and Materials on the Legal Profession, p. 121, 522.

LIABILITY INSURANCE AS AFFECTING IMMUNITY FROM SUIT

The plaintiff brought suit for personal injuries and damages to his automobile resulting from the negligence of an employee of the defendant State Highway Commission in the operation of a highway truck. The lower court sustained a demurrer to the petition on the ground that the court did not have jurisdiction of the person of the defendant or the subject of the action. *Held:* Affirmed. *Price v. State Highway Commission* (Wyo. 1946) 167 P. (2d) 309.[1]

The State Highway Commission of Wyoming, by the statute[2] creating it, "shall have the power to sue in the name of the 'State Highway Commission of Wyoming', and may be sued by such name in the courts of this state and in no other jurisdiction upon any contract executed by it." Against it, as against other

1. The action was dismissed as to the driver of the truck and his superior, the Superintendent, who were joined as defendants. Other grounds on which the demurrer was based were:
   (1) That there was a misjoinder of the parties defendant.
   (2) That the petition does not state facts sufficient to constitute a cause of action against the defendant State Highway Commission.
2. Wyo. Com. Stat. 1945, Sec. 48-101.

agencies of the state, an action for damages for tort cannot be maintained except as the legislature may by law direct.[3]

The plaintiff contended that the act of the defendant State Highway Commission in procuring liability insurance on its vehicles was a wavier of the state's immunity to suit. This contention has been given little weight in other courts. Generally it has been ruled that in absence of statute, a governmental agency is without authority to purchase insurance to cover a non-existent liability.[4] Several courts have stated by way of dicta that the unauthorized purchase of liability insurance does not waive the immunity of the agency.[5] The courts of West Virginia and Kentucky have held that even where the insurance is authorized by statute it still does not act as a waiver of the immunity to suit.[6] This rule has been qualified in Kentucky by a statute which in addition to authorizing the purchase of the insurance provides that the insurer shall bind himself to pay any final judgment rendered against the insured for loss or damage to property of any school child or death or injury of any school child or other person. The interpretation of this statute has been to allow suit and judgment against the insured agency to determine the extent of liability of the insurer.[7] The same result has been reached in Tennessee without a statute.[8] Wyoming has such a statute, requiring insurance on school buses, which provides that liability on the part of the school district is not created except in the amount of the policy procured under the statute.[9]

Waiver of the immunity to suit may be prohibited by the constitution of the state.[10] Where this is true, the legislature has no power to pass a law providing for waiver of the immunity or giving express consent to be sued.[11] In states that are not thus restricted, consent by the state can be granted by legislative action.[12] Where the interests of the state are sufficient it may intervene in a case as a defendant. Such appearance in court is a voluntary submission to the court's jurisdiction and a judgment may be entered against it.[13] Where the state as plain-

3. Wyo. Const. Art 1, Sec. 8.
4. See collection of opinions of state Attorneys General in Borchard, Recent Statutory Developments in Municipal Tort Liability (1936) 2 Legal Notes on Local Government 89, 94, cited in James, Wartime Tort Liability (1946) 55 Yale L. J. 365, 373.
5. See Adams v. City of New Haven, (1945) 131 Conn. 552, 41 A. (2d) 111; Lambert v. City of New Haven, (1943) 129 Conn. 647, 30 A. (2d) 923; Kesman v. School District of Fallowfield Tp., (1942) 345 Pa. 457, 29 A. (2d) 17.
6. Bradfield v. Board of Education of Pleasants County, (S. C. of App. W. Va. 1945) 36 S. E. (2d) 512; Utz v. Board of Education of Brooke County, (1944) 126 W. Va. 823, 30 S. E. (2d) 342; Brooks v. Clark County, (1944) 297 Ky. 549, 180 S. W. (2d) 300; Wallace v. Laurel County Board of Education, (1941) 287 Ky. 454, 153 S. W. (2d) 915.
7. Taylor v. Knox County Board of Education, (1942) 292 Ky 767, 167 S. W. (2d) 700.
8. Taylor v. Cobble, (Ct. of App. of Tenn. 1945) 187 S. W. (2d) 648; Rogers v. Butler, (1936) 170 Tenn. 125, 92 S. W. (2d) 414; Marion County v. Cantrell, (1933) 166 Tenn. 358, 61 S. W. (2d) 477.
9. Wyo. Comp. Stat. 1945, Sec. 67-647, Amended S. L. 1946 Chapter 103.
10. Curry v. Woodstock Slag Corp., (1942) 242 Ala. 379, 6 So. (2d) 479; Glass v. Prudential Ins., Co. of America, (1945) 246 Ala. 579, 22 So. (2d) 13; Alabama Girls Industrial School v. Adler, (1905) 144 Ala. 555, 42 So. 116.
11. State Docks Commission v. Barnes, (1932) 225 Ala. 403, 143 So. 581.
12. Utah Construction Co. v. State Highway Commission, (1933) 45 Wyo. 403, 19 P. (2d) 951.
13. Clark v. Barnard, (1883) 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780.

tiff brings the action, the defendant may in defense assert as a set-off any claim which arises out of the transaction sued upon.[14] The officer or board representing the state in such an action must be duly authorized by the legislature to bring suit or intervene.[15] The attorney general is no exception to this rule.[16] Most courts hold that statutes waiving the state's immunity must be srictly consrued since they are in derogation of the sovereignty of the state.[17]

An analogy to the plaintiff's contention is found in *O'Conner v. Boulder Colorado Sanitarium Ass'n.*[18] There it was held that a charitable hospital ordinarily exempt from tort liability to the extent of its trust funds and property, would be liable to a paying patient for the torts of its employees where such chariable hospital was protected by liability insurance and the trust funds and property would not be affected by a judgment. In the field of charities the contention that the possession of liability insurance acts as a waiver of the immunity to suit is not favored. The majority of courts hold that where a charitable organization is not otherwise liable for the torts of its agents, it is not rendered liable by the procurement of liability insurance.[19] At least one court, in*McLeod v. St. Thomas Hospital,*[20] held that charitable institutions do not have immunity from suit but that funds of the institution are simply protected from executions on tort liability. The fact that such an instituion carries liabiliy insurance does not create or impose additional liability on the institution. Whether or not the presence of insurance creates liability in another situation is considered in *Silverstein v. Kastner*[21] where it was held that a mother could not recover from her minor son for injuries received in an auto accident. The fact that the son was covered by a liability insurance policy did not alter the situation.

The contention of the plaintiff was readily answered in the present case by a showing that there was no statutory consent and that the State Highway Commission could not give its consent to what the law does not permit.

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14. State v. Holgate, (1909) 107 Minn. 71, 119 N. W. 792; State v. Schurz, (1919) 143 Minn. 218, 173 N. W. 408; Wyo. Comp. Stat. 1945, Sec. 18-507.
15. Heman Construction Co. v. Capper, (1919) 105 Kan. 291, 182 Pac. 386; Farish v. State Banking Board, (1915) 235 U. S. 498, 35 Sup. Ct. 185, 59 L. Ed. 330.
16. Parry v. Colorado Board of Corrections, (1933) 93 Colo. 589, 28 P. (2d) 251; McNeel v. State, (1931) 120 Neb. 674, 234 N. W. 786.
17. State v. Superior Court, (1936) 14 Cal. App. (2d) 718, 58 P. (2d) 1322; Federal Land Bank of Spokane v. Schermerhorn, (1937) 155 Or. 533, 64 P. (2d) 1337; Sweeney v. Dierstein, (1935) 170 Okla. 566, 41 P. (2d) 673.
18. 105 Colo. 259, 96 P. (2d) 835, (1939).
19. Piper v. Epstein, (1945) 326 Ill. App. 400, 62 N. E. (2d) 139; Vanderbilt University v. Henderson, (1939) 23 Tenn. App. 135, 127 S. W. (2d) 284; Williams' Adm'x v. Church home for Females, (1928) 223 Ky. 355, 3 S. W. (2d) 753; McKay v. Morgan Memorial Co-op. Industries and Stores, (1930) 272 Mass. 121, 172 N. E. 68; Enman v. Trustees of Boston University, (1930) 270 Mass. 299, 170 N. E. 43; Susman v. Young Men's Christian Ass'n. of Seattle, (1918) 101 Wash. 487, 172 Pac. 554.
20. 170 Tenn. 423, 95 S. W. (2d) 917, (1936).
21. 342 Pa. 207, 20 A. (2d) 205, (1941).