

1968

Gaydon Elliott Winger v. Insurance Company of North America v. L. A. Bowen, D/B/A L. A. Bowen Insurance, Inc. : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

GAYDON ELLIOTT

—vs.—

INSURANCE COMPANY OF
NORTH AMERICA

—vs.—

L. A. BOWEN
INSURANCE COMPANY

BRIEF

Fourth

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IN THE SUPREME COURT OF THE STATE OF UTAH

GAYDON ELLIOTT WINGER,
Plaintiff,

—vs.—

INSURANCE COMPANY OF
NORTH AMERICA,
*Defendant, Third Party
Plaintiff and Appellant,*

—vs.—

L. A. BOWEN, dba L. A. BOWEN
INSURANCE, INC.
*Third Party Defendant
and Respondent.*

Case No.
11323

BRIEF OF RESPONDENT

STATEMENT OF CASE

Plaintiff initiated a declaratory judgment action against defendant seeking a determination that defendant, Insurance Company of North America, provided professional liability insurance to plaintiff on August 9, 1966, at approximately 6:00 o'clock P.M, pursuant to a professional liability insurance policy originally issued to him in 1960, which was renewed continuously each year thereafter and attempted to be renewed at the time the accident occurred.

Defendant filed a Third Party Complaint against L. A. Bowen, Third Party Defendant, seeking judgment against him decreeing that Third Party Defendant is liable to reimburse and pay Third Party Plaintiff all costs and expenses of every kind and nature which it incurred in investigating and defending the action and for any amount paid pursuant to a judgment or settlement or compromise.

DISPOSITION IN THE LOWER COURT

The case was tried to the Honorable Joseph E. Nelson sitting without a jury, and he awarded plaintiff judgment in its favor and against defendant declaring that the professional liability insurance policy issued by defendant to plaintiff was in force and effect at time and date of the loss. The court also granted Third Party Defendant judgment in its favor and against Third Party Plaintiff no cause of action on the Third Party Complaint.

RELIEF SOUGHT

Respondent seeks to have the action of the lower court affirmed in entering judgment of no cause of action upon the Third Party Complaint and in denying appellants Motion for New Trial.

STATEMENT OF FACTS

In discussing the facts of this case, Dr. Gaydon E. Winger will be referred to as Winger; Insurance Company of North America will be referred to as INA and L. A. Bowen will be referred to as Bowen.

Bowen has operated an insurance agency in Orem, Utah, under various names, all of which included his own name from 1962 to the present time. (TR 113-115). Prior to his acquisition of the business he now operates, it was owned by others and was called the Cordner Agency. (TR 139) From 1962 continuously until December 16, 1965, Bowen was a licensed agent for INA and as such had authority to submit applications for insurance, bind coverage, collect premiums, countersign policies and the usual authority conferred upon an agent by an insurance company. (TR 115, 116)

Sometime in 1960, Winger obtained a professional liability insurance policy from INA through the Cordner Agency. He was advised of the change of ownership of that business from Cordner to Bowen in 1962, and he also continued to renew his professional liability insurance policy with INA until August of 1966. (TR 123) At that time he again attempted to renew the policy through Bowen by completing a renewal request form and mailing it with his check to Bowen's office. The policy expired at 12:01 A.M., August 9, 1966 (Ex 7) and the evidence tends to show and the trial court believed that the renewal notice with the check for the premium was mailed by Winger's wife on August 8, 1966, but was not received by Bowen until sometime during the evening mail delivery of August 10, 1966. (TR 125, 151-152) At approximately 7:00 o'clock P.M. on August 9, 1966, Winger injured a patient while working on her teeth in his office. (TR 43)

On August 10, 1966, upon receipt of the renewal request from Winger, Bowen sent a memo to Rulon Myers, a licensed agent for INA asking him to renew the Winger policy and to bill him (Ex. 26) and on August 12, 1966, Mr. Myers sent a memo (Ex. 39) to the INA office in Salt Lake City, directed to Mr. Merlin Perkins, asking that the Winger policy be renewed, stating that the policy was formerly with the Bowen Agency. Mr. Perkins returned the memo to Mr. Myers with the following notation written on it:

Rulon — We are unable to renew or write this for you — unless we have the supporting business and a letter of record on your behalf.

Perk.

Sometime between August 13 and a couple of days before the 19th of August, Winger reported the accident to Bowen, and he in turn reported it directly to the Salt Lake office of INA and dealt directly with that office and its representatives in relation to the claim (TR 133-135)

In December of 1965, Mr. Bill Webber, manager of the Salt Lake office of INA and Mr. Merlin Perkins, who was then in the production department of the company, came to Bowen's office in Orem, and as a result thereof Bowen's agency with the company was terminated. At that time Mr. Perkins advised Bowen how sorry he was about what had occurred and he then advised Bowen that he, Bowen, could not acquire any new business for the company, but he could keep the existing business he had and that renewals of policies

should be handled through Mr. Rulon Myers in Provo. (TR 171). On cross examination of Bowen he admitted that he knew he did not have authority to bind coverage after the termination of his agency. There is no evidence that Bowen ever bound or attempted to bind coverage after the termination of his agency, and he emphatically denied having either bound or attempted to bind coverage in the Winger matter. (TR 167-169)

Upon the termination of the agency relationship between INA and Bowen no notice was ever given to anyone by either Bowen or INA of such termination (TR 290)

Pursuant to the conversation with Merlin Perkins, Bowen did have several business transactions with INA through Rulon Myers wherein existing policies were renewed or were to be renewed.

In December, 1965 an existing policy on Orem City was renewed by Bowen through Rulon Myers with the knowledge of the company. (TR 171-173, Ex. 28-29). In August of 1966 two transactions occurred relating to the renewal of policies. Bowen sought renewal of two existing policies with INA on one A. V. Washburn. The company knew these came from Bowen and that they were renewals of existing policies. In the Washburn matter the policies were not renewed because Mr. Washburn did not desire it because the premium was too high; however, the company was willing to renew. (TR 173-176) The other transaction in August, 1966 related to the Winger policy. Again, the company knew this was

a renewal of an existing policy and that it came from Bowen's agency. (Ex. 39)

The other transaction relating to the renewal of an existing policy occurred in November or December of 1966, wherein Bowen did not deal through Rulon Myers but dealt directly with the Salt Lake office of INA. (Ex. 32) That transaction involved the renewal of a policy of one LeRoy Thorne, which policy was renewed by the company. (TR 177-181, Ex. 32-35)

From all the evidence before it, including the testimony of the witnesses and the exhibits, the Court found that the Winger policy was renewed on August 9, 1966 and that by reason of the conduct of both Bowen and INA on Bowen's renewals of policies and INA's acceptance of said renewals and retaining the benefits therefrom without objecting to Bowen's efforts in its behalf, that Bowen was an agent of INA in relation to the renewal of the Winger policy. The Trial Court also found that in each case of the renewal of an insurance policy by insureds of INA through Bowen, the company knew that the business was renewal business, that it was coming from Bowen. The company knew the insured had no knowledge of the termination of the agency relationship between the company and Bowen; in each case the company renewed the policy or would have renewed and obtained and retained the premiums on the renewals. (R 71)

INA filed objections to the courts Findings of Fact and Conclusions of Law which objections were overruled and the company's Motion for a New Trial was denied.

ARGUMENT

POINT I

THE JUDGMENT AND PROCEEDINGS IN LOWER COURT ARE PRESUMED BY THE REVIEWING COURT ON APPEAL TO BE CORRECTED.

The cases are legion supporting the general proposition of law stated in Point I, and especially as it applies to the instant case. No cases have been found by respondent stating a contrary position.

Not only is there a presumption of validity on appeal of the judgment and proceeding in the lower court, but the burden is on the appellant affirmatively to demonstrate error, and in the absence of such the judgment must be affirmed by the reviewing court. *Leithead vs. Adair*, 10 U. 2d 282, 351 P. 2d 956; *Coombs vs. Perry*, 2 U. 2d 381, 275 P. 2d. Again, on appeal the judgment of the trial court is presumptively correct and every reasonable intendment must be indulged in by the appellate court in favor of it. *Burton vs. Zions Co-operative Mercantile Institution*, 122 U. 360, 249 P. 2d 514; *Nagle vs. Club Fontainblue*, 17 U. 2d 125, 405 P. 2d 346; *Petty vs. Gindy Manufacturing Corporation*, 17 U. 2d 32, 404 P. 2d 30.

This proposition of law is correct and is binding upon the appellate court whether the proceedings in the lower court are before a judge only or a judge and jury.

Other cases supporting this proposition are *Charlton vs. Hackett*, 11 U. 2d 389, 360 P. 2d 176; *Universal Invest-*

ment Company vs. Carpets, Inc. 16 U. 2d 336, 400 P. 2d 564; *Taylor vs. Johnson*, 15 U. 2d 342, 398 P. 2d 382; *Wendelboe vs. Jacobson*, 10 U. 2d 344, 353 P. 2d 178; *Hadley vs. Wood*, 9 U. 2d 366, 345 P. 2d 197; *Daisy Distributors, Inc., vs. Local Union 976, Joint Council 67, Western Conference of Teamsters*, 8 U. 2d 124, 329 P. 2d 414.

POINT II

THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THIRD PARTY DEFENDANT AND AGAINST THIRD PARTY PLAINTIFF.

It is the position of third party defendant, L. A. Bowen, that because of the conduct of Insurance Company of North America in (a) failing to notify anyone of the termination of the agency relationship between the company and Mr. Bowen, (b) advising Mr. Bowen to continue to handle existing business he had with them such as renewing policies for insureds through a licensed agent of the company, (c) having knowledge of each transaction wherein a policy was renewed or attempted to be renewed and that such business came from Mr. Bowen, (d) failing to protest to Mr. Bowen his action in obtaining the renewal of existing policies with the company and failing to prohibit him from such action by any means available to it, (e) actually renewing and issuing policies for delivery to Mr. Bowen and subsequent delivery to the insured, (f) getting the benefits of such transactions by receiving the premiums paid by the insured to Mr. Bowen upon the renewal and issuance

of the policy, and (g) retaining the benefits of such transactions by keeping the insurance premiums received from the policies renewed through Mr. Bowen, and (h) holding Mr. Bowen out as its agent to all those who had become insureds of the company through Mr. Bowen's agency while he was a licensed agent of the company, that Bowen was an agent of INA at the time of the loss in question.

It is the duty of an insurance company to notify insured persons who have dealt with their agent as the representative of the company of the termination of his authority, and if it fails to do so, it is bound by his acts if such a person continues to deal with him as a representative of the company, in ignorance of the termination of the agency. *Southern L. Ins. Co. vs. McCaen*, 96 U. S. 84, 24 L. Ed. 653; *Western Millers Mut. Ins. Co. vs. Williams*, (CA 5 Tex.) 231 F. 2d 425; *Southern States F. Ins. Co. vs. Vann*, 69 Fla. 549, 68 So. 647; *Aetna Ins. Co. vs. Stambaugh-Thompson Co.*, 76 Ohio St. 138, 81 N.E. 173; *Strunk vs. Firemans Ins. Co.*, 160 Pa. 345, 28 A. 779; *Wilson vs. Commercial Union Assur. Co.*, 51 S.C. 540, 39 S.E. 245; *Tuckers vs. American Aviation & Gen. Ins. Co.*, 193 Tenn. 160, 278 S.W. 2d 677; 29 Am. Jur., Insurance, Sec. 144.

The purpose of this rule of law is, of course, for the benefit of third persons who rely on the apparent agency for the same purpose relating to insurance coverage, often to their detriment. However, coupled with that aspect of the rule is the fact that the company either in one transaction or in a course of dealing holds the

individual out to the public, and possibly to the apparent agent himself, as an agent of the company.

As far as insurance agents are concerned, their particular authority, such as authority to enter into insurance contracts, receive premiums, bind coverage, waive provisions of the policy, eg., is considered in conjunction with the particular matter to which that authority relates. An insurance company, the same as any other principal, is liable for the acts done or contracts made by one of its agents within the scope of the agent's actual or apparent authority. *Volker vs. Connecticut Fire Ins. Co.*, 22 N.J. Super., 314, 91 A. 2d 883; *Security Ins. Co. vs. Cameron*, 85 Okla. 171, 205 P. 151; *Deming Invest. Co. vs. Shawnee F. Ins. Co.*, 16 Okla. 1, 83 P. 918 (rule recognized); *Payne vs. New York L. Ins. Co.*, 173 Wash. 322, 23 P. 2d 6. An insurance company is also liable for the acts of the agent that were unauthorized when performed, if such acts are subsequently ratified by it. 29 Am. Jur., Insurance, Sec. 145.

Implied authority of an insurance agent may arise independently of any express grant of authority, as from some manifestation of the insurer that the particular authority in question shall exist in the agent, or it may arise as a necessary or reasonable implication in order to effectuate other authority expressly conferred. *Viele vs. Hermanea Ins. Co.*, 22 N.J. Super 314, 91 A. 2d 883; *Security Ins. Co. vs. Cameron*, Supra; *Deming Investment Co. vs. Shawnee F. Ins. Co.*, Supra; *W. B. Goode & Co. vs. Georgia Home Ins. Co.*, 92 Va. 392, 23 S.E. 744.

A custom or usage may also confer actual powers upon an insurance agent which has not expressly been given to him. *Long vs. North British & Mercantile Ins. Co.*, 137 Pa. 335, 20 A. 1014; *Lebanon Mut. Ins. Co. vs. Hoover*, 113 Pa. 591, 8 A. 163; *Nehring vs. Bast*, 258 Minn. 193, 103 N.W. 2d 368.

As the principles of law as discussed so far apply to this case, it is the contention of third party defendant that Mr. Bowen was given express authority after the termination of his agency with the company to handle the renewals of any existing policies he had placed with the company prior to the termination of his agency. It is also contended that the express authority was conferred upon Mr. Bowen to solicit renewals of existing policies as a licensed agent of the company by reason of the attitude and action of the company that such authority existed by reason of the company (a) having advised Mr. Bowen to conduct himself as he did, (b) having knowledge of his conduct, (c) failing to protest Mr. Bowen's actions or taking action to nullify them, (d) issuing renewal policies for Mr. Bowen on business that existed with his agency prior to the termination of his agency, (e) obtaining benefits from Mr. Bowen's actions in obtaining the renewals of the policies in the form of insurance premiums paid for the policy renewals, and (f) retaining the benefits by keeping the premiums paid instead of returning the premiums and cancelling the policies issued.

Again, it is contended by third party defendant that he had actual authority to solicit the renewal of existing

policies with Insurance Company of North America because of the custom and usage of the company in acquiescing in his action in obtaining the renewals.

The conduct of the company in acquiescing and ratifying Mr. Bowen's actions in soliciting renewals of policies with the company after the termination of his agency with it lends great weight and credence to Mr. Bowen's testimony that he was advised by Mr. Merlin Perkins that he was authorized to continue to handle renewals of existing business with the company of which the policy of plaintiff was one. This is so even though the letter of the company to Mr. Bowen, dated December 16, 1965, (Exhibit 124) purports to limit his authority. It was after this particular letter was received that the company acquiesced in and ratified Mr. Bowen's actions.

In relation to ratification of acts of an agent, an insurance company, like any other principal, may ratify acts or contracts which were performed or made by its agent, or by a person who purported to act as its agent, without authority to bind the company, so as to become bound thereby. 29 *Am. Jur.* Insurance, Sec. 153.

Such ratification is equivalent to precedent or original authority, and unless the intervening rights of third parties would thus be defeated, relates back to supply such original authority. *Southern L. Ins. Co. vs McCaen*, supra; *Terry vs. Provident Fund Soc.*, 13 Ind. App. 1, 41 N.E. 18; *Kansas Farmers' F. Ins. Co. vs. Saindon*, 52 Kan. 486, 35 P. 15; *Riverside Development Co. vs. Hartford F. Ins. Co.*, 105 Miss. 184, 62 So. 169 (recog-

nizing general rule); *McDonald vs. Metropolitan L. Ins. Co.*, 68 N.H. 4, 38 A. 500; *Eastman vs. Provident Mut. Relief Asso.*, 65 N.H. 176, 18 A. 745; *Excelsior F. Ins. Co. vs. Royal Ins. Co.*, 55 N.Y. 343, 14 Am. Ref. 271.

If an unauthorized person solicits insurance, and the insurer accepts the application, it thereby ratifies the unauthorized act and places such person on the same foundation and invests him with the same authority as its commissioned agents insofar as the insured is concerned. See 29 Am. Jur., Insurance, *op. cit.*

An insurer may ratify the receipt of an application by an unauthorized person purporting to act for it, by issuing an insurance policy or certificate based upon the application. See *Eastman vs. Provident Mut. Relief Asso.* 65 N.H. 176, 18 A. 745.

Ratification of such an act or contract may also be effected by silence, failure to repudiate or acquiescence in it, or by the receipt and retention of the benefits issuing therefrom. In *Southern L. Ins. Co. vs. McCean*, 96 U.S. 84, 24 L.Ed. 653, the silence of the company after receiving from an agent, whose authority had been terminated, a statement that the premium on a policy had been paid by him was held to be equivalent to the adoption of the act of the agent. See *Mutual Ben. L. Ins. Co. vs. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Masonic Life Asso vs. Robinson*, 149 Ky. 80, 147 S.W. 882; *Horwitz vs. Equitable Mut. Ins. Co.*, 40 Mo. 557, 93 Am. Dec. 321; *Eastman vs. Provident Mut. Relief Asso.*, *supra.*; *Gish*

vs. *Insurance Company of North America*, 16 Okla. 59, 87 P. 769.

It is the overwhelming general rule of law that an insurance company cannot accept the benefits of an unauthorized transaction and reject its burden; however, it is also true that in order for the ratification to be binding on the insurer, the act or contract must be one which could have been authorized in the first instance. See *Great Southern L. Ins. Co. vs. Dolan*, (Tex. Comm. App.) 262 S.W. 475; 2 Am. Jur. 174, Agency, Sec. 217.

The insurance company must have knowledge of the material facts of the transaction or transactions before the ratification can be binding upon it.

In 3 Am. Jur. 2d, Agency Sec. 175 it is stated as follows:

It is an established principal of the law of agency that where a person acts for another who accepts or retains the benefits or proceeds of his efforts with knowledge of the material facts surrounding the transaction, such other must be deemed to have ratified the methods employed, as he may not, even though innocent, receive or retain the benefits of, and at the same time disclaim responsibility for, the measures by which they were acquired. This general principal applies, for example, to an unauthorized contract affected, an unauthorized loan procured on behalf of the principal or purported principal. If the agent procures a contract by fraudulent or corrupt practices, although the principal has not been privy in any way to such conduct of his agent, yet by claiming the benefits of the contract,

he must take it tainted as it may be with such practices.

There are annotations of this principle at 30 A.L.R. 2d 824; 34 A.L.R. 2d 524; 49 A.L.R. 2d 1277; 48 A.L.R. 926.

In *Kansas Farmer's Fire Ins. Co. vs. Saerdon*, (Kan.) 35 P. 15 (1893), a person claiming to be a solicitor or agent of the plaintiff in error, the fire insurance company, on having in his possession blank applications of the company, received and forwarded to the company an application endorsed by him as the solicitor of the company. The company accepted the application from the unauthorized solicitor and paid him for his services as solicitor and returned and delivered to him for the insured the policy applied for. It received the premium on the policy through the solicitor less his charge for his commission. The Kansas Supreme Court held that in an action on the policy in question, the insurance company having enjoyed the benefits of the acts of the alleged solicitor, could not deny that he was its agent for the purpose of soliciting and delivering the policy.

Third party defendant has been unable to find any case with facts exactly as those involved in the instant case. However, from the authorities cited and the general principles of law for which they stand, it appears that based upon the facts of this case, the law as it applies to similar transactions and generally to this area, and equity and good conscience, the only conclusion that can be reached is that Mr. Bowen had authority to solicit and handle renewal business with defendant. The agency terminated on December of 1965. After that time Mr.

Bowen handled renewal business with Insurance Company of North America:

(1) The renewal of the Orem City policies which were in fact received through the agency of Rulon Myers, but with knowledge on the part of Insurance Company of North America that said business was being initiated and handled by Mr. Bowen. A policy was issued for which the company received a premium.

(2) The application for renewal of two policies on a Mr. A. V. Washburn, in August, 1966. These were handled through the Myers agency but with knowledge on the part of the insurance company that Mr. Bowen had initiated and was handling the business. In this case the company was willing to renew the two policies but did not do so only because Mr. Bowen and Mr. Washburn decided against it.

(3) The application for renewal of the professional liability policy of plaintiff in this action, Dr. Gaydon E. Winger, on August, 1966. This was also handled through the Myers agency but with knowledge on the part of the company as to where the business came from. See Defendant's Ex. 39. It is interesting to note on that exhibit that after being aware of the fact that this was renewal business of Mr. Bowen, the company did not refuse to renew the policy. The statement made by the company was that the policy could not be renewed "*unless (emphasis mine) we have the supporting business and a letter of record on your behalf. Perk.*"

CONCLUSION

In conclusion it should again be pointed out that Insurance Company of North America failed to notify anyone of the termination of Mr. Bowen's agency and in doing so continued to hold him out as its agent to policy holders that Mr. Bowen had acquired for the company. For one year thereafter the company then knew that Mr. Bowen was handling renewal business for it and made no objection to these transactions. In no case was Mr. Bowen advised to discontinue his activities with regard to renewal business nor in any case was the insured advised that Mr. Bowen's agency with the company had terminated. In two cases insurance policies were actually renewed and the company received and retained the premium which Mr. Bowen had collected. In no case did the company cancel the renewed policy and return the premium to the insured and advise it that Mr. Bowen was no longer its agent. In one case with full knowledge of the transaction the company would have renewed two policies but Mr. Bowen and the insured decided otherwise, and in the Winger matter with full knowledge of the facts the company would have renewed the Winger policy if it could have also written the supporting coverage for him.

At the trial, Mr. Bowen claimed that representatives of the company authorized him to handle renewal business with the company. Defendant denies this; however, the company's actions involving Mr. Bowen and renewal business lends great credence and weight to Mr. Bowen's testimony in this regard.

Defendant, Insurance Company of North America, continuously held Mr. Bowen out as its agent after the termination of his agency relationship with it. The company thereafter, with full knowledge of all material facts in each instance, ratified the acts of Mr. Bowen on the renewal business. It is the position of third party defendant that in each transaction involved after the termination of his agency with the company he had authority to do what he did with regard to solicitation of renewals of policy. Especially is this true in the instant case.

The judgment of the lower court should be affirmed.

Respectfully submitted,

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