1971

State Farm Mutual Insurance Company v. Richard Kay and Myrtle L. Kay : Appellant's Brief

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Page

CASES CITED

TABLE OF CONTENTS (Continued)

TEXTS CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE FARM MUTUAL INSURANCE COMPANY,
Plaintiff and Appellant,
vs.
RICHARD KAY and MYRTLE L. KAY,
Defendants and Respondents.

Case No. 12300

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Richard Kay, age 35, and a resident of his mother's household, filed suit against his mother, Myrtle Kay, for damages for injuries received in a one car accident while riding with his mother. State Farm Mutual, the insurer for Myrtle Kay, filed an answer on behalf of Myrtle Kay, took Richard Kay's deposition and filed a declaratory action asking the court to declare the policy of Myrtle Kay inapplicable to afford coverage because of an exclusion in the policy pertaining to resident relatives in the same household. Defendants claimed the insurer waived the exclusion by entering a defense for Myrtle Kay without

taking a reservation of rights and that Myrtle Kay had been prejudiced thereby.

DISPOSITION IN THE LOWER COURT

The declaratory action was originally assigned to Judge Maurice Harding. Each of the three parties made a motion for summary judgment. Judge Harding denied all motions on the basis there was an issue of fact as to whether there had been any actual prejudice. Counsel for defendants suggested to Judge Harding that he disqualify himself in the case, which he did, and the matter was referred to Judge Allen B. Sorensen. Richard Kay renewed his motion for summary judgment to Judge Sorensen who heard the matter on the 25th of September, 1970, and took it under advisement pending a pre-trial conference, but on October 8, 1970, without any further conference made a minute entry granting a summary judgment to both defendants, ruling as a matter of law that the defendant Myrtle Kay had been prejudiced and that the plaintiff was estopped to assert non-coverage.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have the summary judgment of the trial court reversed and a judgment entered in favor of the appellant holding:

> That because of the exclusion in the policy the appellant is not required to continue the defense of the action by Richard Kay against his mother Myrtle Kay nor to pay any judgment that he may obtain against her.

STATEMENT OF FACTS

Richard Kay was 35 years of age at the time of the accident involved in this lawsuit, single and never married. He has aways lived with his parents except for three years of service in the U. S. Army. He is an employee of Geneva Steel and had worked for them up to the time of the accident for approximately 10-11 years at $500.00 per month. He turned his checks over to his mother, and she distributed the money the way she thought she should. She bought his clothes but kept any change coming back, gave him money for bus fare to go to work, but no entertainment and had no savings account for him (Dep. R. Kay, 21, 27, 28, 29, 40). He had no automobile, having lost his driver's license a few years before the present accident because of an automobile accident wherein he had no insurance coverage (Dep. 7, 22).

On August 4, 1968, a Sunday, Richard was riding with his mother in her 1965 Ford Galaxie when they were involved in a one-car accident while returning from visiting his grandparents at Nephi, Utah. His mother was going to drop Richard off at Geneva Steel so he could go to work (Dep. 14, 15).

She either fell asleep or had a blackout, both of which she denied, had happened to her before (Dep. M. Kay, 18). This occurred as they were coming out of Spanish Fork on the freeway (Dep. M. Kay, 17).

Both Richard Kay and Myrtle Kay were severely injured when the car ran off the highway and onto the the adjacent dirt embankment.

At the time of the accident Myrtle Kay had a liability insurance policy with State Farm Mutual Insurance Company with major medical coverage having limits of $5,000.00 for each occupant. (R. 6 *specimen copy).* The company paid $5,000.00 to Mrs. Kay for her own medical bills, and $5,000.00 for Richard's medical bills (Dep. M. Kay, 21).

On or about the 15th day of July, 1969, Richard Kay filed a suit against his mother and on the 17th of July she was served with a summons and complaint. The complaint alleges that Richard Kay was a paying passenger in a vehicle driven by Myrtle Kay and that she drove the same in a negligent manner causing the accident and plaintiff's injuries and asks for damages in the sum of $121,000.00. The complaint does not state the relationship between plaintiff and defendant nor does it state Richard's address at all.

The defense of the lawsuit was submitted to State Farm Mutual Automobile Insurance Company, and on August 1, 1969, an answer was filed on behalf of the insured, Myrtle Kay, by counsel, furnished by the insurance company. With the filing of the answer a notice of the taking of Richard Kay's deposition was served upon his counsel and was scheduled for August 29, 1969 (R. 25). No contact was made with Richard Kay by the insurance Company for the purpose of obtaining his statement pertaining to the accident prior to the deposition (R. 74).

In Richard Kay's deposition it was determined that he was single, unmarried and a resident of the household of the insured Myrtle Kay and had been for many years.

The insurance policy issued to Myrtle Kay contained the following provisions:

INSURING AGREEMENT 1.

> (a) The company agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury sustained by other persons, and to defend with attorneys selected and compensated by the company any suit against the insured alleging such bodily injury and seeking damages which are payable hereunder, even if any of the allegations of the suit are groundless, false or fraudulent, but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

Under the exclusions provision of said policy pertaining to insuring agreement 1 in subparagraph (i) there is the following:

> This insurance does not apply under: (i) Coverage A to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured;

On October 23, 1969, the declaratory action was filed against both Richard Kay and Myrtle Kay asking the court to declare the policy inapplicable because of the above policy exclusion.

Richard Kay and Myrtle Kay each filed a motion for a summary judgment claiming that the insurance company waived any policy defense it had by entering into the defense of the case on behalf of Myrtle Kay. The plaintiff, State Farm Mutual Insurance Company, also asked for a summary judgment based on the policy defense.

State Farm Mutual's motion for a summary judgment was based on two points: (1) That no liability could exist under the terms of the policy because of the exclusion of coverage where the insured defendant, Myrtle Kay, and her son, the plaintiff in the original action both resided in the same household, and (2) That inasmuch as there could be no coverage because of this exclusion, there is no duty to defend and the insurance company should, therefore, be excused from the same.

Defendants contend that the insurance company having entered into the defense of the case without having taken a reservation of rights has waived and is estopped from asserting any defenses to coverage it may have had against Myrtle L. Kay prior to assuming said defense.

The motions for summary judgment were originally heard by Judge Harding who ruled that all motions for summary judgment should be denied, on the basis of the rules set forth in 38 A.L.R. 2d at page 1150. The court held further that the question of whether or not the insured was prejudiced by the assumption of the defense was an issue of fact which he would hear (R. 60).

Subsequently, at the suggestion of Myrtle Kay and Richard Kay's counsel, Judge Harding disqualified himself and the matter was referred to Judge Sorensen. Richard Kay and Myrtle Kay subsequently renewed their motions for summary judgment, and the plaintiff State Farm Mutual Insurance Company then took the deposition of Myrtle Kay. On September 25, 1970, Judge Sorensen called the matter up for hearing, at which time Judge Harding's ruling was brought to the attention of the court. Judge Sorensen announced that he was not inclined to pass upon Judge Harding's ruling but would set the matter for pre-trial (R. 78). Counsel for plaintiff indicated that there were certain items that could be stipulated to with respect to certain facts, and that when those were in, the parties through their counsel would stipulate that the matter could be heard by the court. However, prior to the stipulations being completed and filed the court entered a summary judgment for the defendants Richard Kay and Myrtle Kay. The stipulations were subsequently signed and filed and are part of the present record (R. 74, 75)

It is from this summary judgment that the plaintiff appeals.

ARGUMENT

POINT I

THE PLAINTIFF INSURANCE COMPANY HAD A DUTY TO ENTER AN INITIAL DEFENSE TO THE COMPLAINT OF RICHARD KAY AGAINST MYRTLE KAY UNTIL THE COMPANY DETERMINED THE FACTS WHICH BROUGHT THE ACCIDENT WITHIN THE POLICY EXCLUSION.

The plaintiff's complaint in the initial action alleges that the plaintiff Richard Kay was a paying passenger in a vehicle being driven by Myrtle Kay and that the defendant Myrtle Kay drove the vehicle in a negligent and careless manner causing the same to leave the traveled portion of the highway and collide with the dirt embankment on Interstate 15 approximately one-fourth mile north of Spanish Fork, Utah; then alleges severe disabling injuries, medical bills and loss of earnings and asks for damages in the sum of $121,000.00. The complaint does not state the relationship between the plaintiff and the defendant, nor does it state where they lived, except that it states that the defendant Myrtle Kay is a resident of Utah County. The complaint, in fact, does not show the plaintiff's address on it at all.

The complaint states a prima facie cause of action by the plaintiff against the defendant, and one which would come within the provisions of the policy of the insured Myrtle Kay so as to entitle her on the face of the complaint to a defense thereto.

The majority rule and great weight of authority states that the obligation to defend is determined by the allegations of the complaint, and if the allegations of the complaint in the action show that the claim asserted is the type of claim covered by the policy, then the insurance company has a duty to defend. As an example of the cases stating the majority rule see *Sears Roebuck v. Travelers Insurance Co.,* 261 Fed. 2d 774, in which the court states:

> If the cause of action stated in plaintiff's pleadings is within the coverage provided by the policy, it is

the insurer's duty to defend even though there may be no evidence whatever to support the allegations of the pleadings.

In the case of *Theodore v. Zurich General Accident and Liability Co.,* (Alaska, 1961), 364 P.2d 51, where the injured party alleged facts that indicated coverage under the liability policy, the insurer then had a duty to proceed in defense of the suit at least to the point of establishing, if it could, that the liability upon which the plaintiff was relying was not, in fact, covered by the policy, and not merely that it might not be. In the case of *Pendleberry v. Western Casualty and Surety Co.,* (1965, Ida.), 406 P.2d 129 the court held an insurer is obligated to defend even though the complaint fails to state a claim covered by the policy where the facts of the case, if established, present a potential liability of the insured. In the case of *Missionaries of the Company of Mary, Inc. v. Aetna Casualty and Surety Co.,* (1967, Conn.), 230 A.2d 21, the court held the duty to defend does not depend on facts disclosed by the insurer's independent investigation where the third party's complaint appears to be within the coverage.

In Ohio it is long settled that the obligation to defend exists regardless of the insurance company's ultimate liability to the insured. When a petition is filed against the insured in which there is pleaded an action covered by the policy, the obligation to defend arises. In *Socony-Vacuum Oil Co. v. Continental Casualty Co.* (Ohio, 1945), 59 N. E. 2d 199, it has been held that such allegations of the pleadings constitute the sole test of the insurer's duty. See also 151 N. E. 2d 730.

The case of *Commercial Ins. Co. of Newark, N. J. v. Pressly,* (1966, Cal. App.) 53 Cal. Rep. 220 is a case directly in point with our case as far as procedure is concerned.

In this case the insurer issued its comprehensive personal liability policy to Baker, excluding injury caused intentionally by or at the direction of the insured. Pressly brought an action against Baker alleging (a) That Baker wilfully and maliciously assaulted and injured Pressly, including the severance of a part of Pressly's left ear and (b) That he negligently struck, beat and bruised Pressly, causing the described injuries.

Depositions of Pressly and Baker were taken.

The insurer then filed an action for a declaratory judgment against Pressly and Baker and on the basis of the depositions taken in the damage action the insurer moved for summary judgment.

The trial court granted the motion, declaring that the injuries sustained by Pressly were intentionally caused by Baker and the insurer had no duty to defend Baker or to pay any judgment which might be recovered against Baker.

The appellate court affirmed, holding that the duty to defend is governed in the first instance by the allegations of the complaint in the damage action and here the insurer was initially obligated to defend Baker since one of the causes of action pleaded in the complaint alleged negligence, but that, when it becomes certain that the

claim cannot eventuate in a judgment which the insurer is obligated to pay, the duty to defend ceases, and, since that is the situation here, the trial court acted without error in granting the motion for summary judgment, as it did.

In our case it appears that State Farm Mutual had a duty to defend the injury action on the basis of the pleadings set forth in the plaintiff's complaint. As in the *Pressly* case, *supra,* an answer was filed to plaintiff's complaint on behalf of State Farm Mutual's insured, and the deposition of the plaintiff, Richard Kay, from whom no statement had previously been obtained (R. 74), was taken. Upon tying down by deposition the fact that the plaintiff and defendant were living in the same household and that they were mother and son, a declaratory action was immediately filed.

POINT II

THE PROVISION IN THE INSURANCE POLICY EXCLUDING COVERAGE FOR BODILY INJURY TO THE INSURED OR ANY MEMBER OF THE FAMILY OF THE INSURED RESIDING IN THE SAME HOUSEHOLD AS THE INSURED IS VALID AND ENFORCEABLE.

The exclusion providing that there is no coverage for bodily injury to the insured or any member of the family of the insured residing in the same household as the insured has been passed upon by many courts and has been held valid and enforceable and not contrary to public policy. Examples of cases so holding are the follow-

ing: In the case of *Southern Guaranty Co. v. Gipson,* (1963, Ala.), 156 So. 2d 630, the insurer issued its automobile liability policy to George Gipson who owned a dwelling house in which he lived with his minor son and his minor grandchild whom he had adopted, and also his daughter, her husband, and their nine minor children, including the granddaughter adopted by George Gipson. The daughter and her husband occupied the premises rent free and had unrestricted access to the entire house. They occupied separate bedrooms but all used the living room in common, as well as the kitchen. George Gipson owned some of the furniture, and the daughter and her husband owned other items of furniture. The whole group used the furniture and the television, as well as some coal heaters used to heat the house. The laundry and cooking for the entire group was done by the daughter who used vegetables from the garden and groceries purchased by both her father and her husband. No effort was made to separate the groceries for cooking, and they were served on the table in the kitchen to the entire group. Some of the coal was purchased by George Gipson, and some by the husband of the daughter. The telephone was paid for by George Gipson, and the electricity by the son-in-law. While the minor son of George Gipson was driving the automobile, the minor grandchild was injured. The injured grandchild and her father brought an action against George Gipson and his son, who was the driver of the automobile.

The insurer brought this suit for a declaratory judgment against George Gipson and others and appealed from an adverse judgment.

The Supreme Court reversed and remanded with instructions to enter a decree absolving the insurer from any responsibility to defend the suits or to pay any judgment as might be rendered in them holding (1) That the injured grandchild was a member of the family of the insured residing in the same household as the insured within the policy exclusion which excluded coverage for bodily injury to the insured or any member of the family of the insured residing in the same household as the insured, and (2) That there was no merit in the contention that the insurer was bound by an agreement made by the local agent of the insurer after the accident, that the insurer would defend the suits since (a) liability not covered by a policy will not be engrafted on the policy by the mere act of the insurer in assuming control of the litigation and conducting the defense when the beneficiary is sued upon such liability, and (b) that the mere promise of the agent did not serve to vacate the exclusion.

In the case of *Hankins v. State Farm Mutual Auto Insurance Co.,* (1964, Mo.), 379 S.W. 2d 829 State Farm Mutual issued its automobile liability policy to Elizabeth Hankins who resided with her mother in an apartment in Kansas City, Missouri. They occupied the same bedroom and slept in the same bed. The policy excluded injury to any member of the family of the insured residing in the same household as the insured. Hankins' mother was a passenger in an automobile operated by Hankins which was involved in an accident resulting in injury to the mother. The mother filed suit against the daughter Hankins who forwarded service copies of the summons and petition to the insurer. The insurer defended the ac-

tion and advised Hankins that its continued defense of the action should not be construed by her as a waiver of any policy defense the insurer then or thereafter might have. The Supreme Court held that there was no coverage under the policy because of the exclusion for injury to a member of the family of the insured residing in the same household as the insured.

Other cases, to cite a few from other states holding to the same effect, are as follows: *National Bank of Ashland v. State Farm Mutual,* (1960, Ky.), 334 S. W. 2d 261; *Varnadoe v. State Farm Mutual,* (1965, Ga.), 145 S. E. 2d 104; *Keane v. State Farm Mutual Insurance Co.,* (1966, Ga.), 152 S. E. 2d 577; *Gabel v. Birds,* (Mo., 1967), 422 S.W.2d 341; *Tichner v. Union Insurance Co.,* (1968, Mo.), 425 S.W.2d 483; *National Farmers Union Property and Casualty Co. v. Maes,* (1965, Wisc.), 132 N.W.2d 517; *American Liability Insurance Co. v. DeWitte,* 64 U.S.D.C. (So. Car.), 236 Fed. Supp. 636.

POINT III

THE DOCTRINE OF IMPLIED WAIVER OR ESTOPPEL IS NOT VALID TO BRING WITHIN THE COVERAGE OF THE INSURANCE POLICY A RISK THAT IS NOT COVERED BY ITS TERMS OR THAT IS EXPRESSLY EXCLUDED THEREFROM.

Richard Kay and Myrtle Kay, his mother, contended that the insurance company by entering into the defense of the action on behalf of the insured has waived any defense which it otherwise had and is also estopped to assert the defense of the exclusion by virtue of having undertaken the defense of the insured.

In this connection the cases distinguish between forfeiture provisions in a policy and exclusions. Forfeiture provisions in a policy cover matters such as giving notice of the occurrence of an accident, the insured cooperating with the insurance company, forwarding to the company demands, notices, etc.

With respect to these provisions the insurance company may be found guilty of waiving its rights or estopped on equitable principles from asserting them because of the position that the insured takes as a result of the insurance company's conduct.

> It has been repeatedly held that the doctrines of waiver and estoppel cannot be used to extend the coverage of an insurance policy or create a primary liability, but may only affect rights reserved therein. While an insurer may be estopped by its conduct or its knowledge or by statute from insisting on a forfeiture of a policy, under no conditions can the coverage or restrictions on coverage be extended by waiver or estoppel. Appleman, Vol. 16A, §9090 at page 341. See also on page 344 of the same volume the following: The doctrine of implied waiver or estoppel is not available to bring within the coverage of an insurance policy risks that are not covered by its terms or that are expressly excluded therefrom.

Thus in the case of *Home Insurance Company of New York v. Campbell Motor Co.*, 227 Ala. 499, 150 So. 486, the court held one cannot extend the coverage unless the subject matter is within the terms of the contract. In this case the court said:

> What appellant seems to seek here is to make a new contract so as to cover bodily injury or death resulting to a passenger in the insured vehicle when by its terms it is excluded expressly from the contract. The doctrine of estoppel does not operate to that effect. After a loss accrues an insurance company may, by its conduct, waive a forfeiture or by some act before such loss may induce the insured to do or not to do some act which is contrary to the stipulations of the policy, and thereby be estopped from setting up such violation as a forfeiture; but such conduct, though in conflict with terms of the contract of insurance, and with the knowledge of the insured and relied upon by him, will not have the effect to broaden such contract so as to cover additional objects of insurance or causes of loss. The passenger exclusion endorsement which was a part of the insurance contract instantly considered relieved the appellee from liability and assuming control of the defense of the insured could not by estoppel enlarge the coverage or obligate the appellee to continue representation in the suit. See also 130 So. 2d 920.

In the case of *State Farm Mutual Insurance Co. v. Cooper,* 233 Fed.2d 500, 4th Cir. Lena Cooper brought a suit against State Farm Mutual Insurance Company to recover the amount of the judgment in the sum of $5,000.00 which she had recovered against Jessie C. Cooper, her husband, for injuries suffered by her as a result of an accident to his automobile which occurred while she was riding with him as a guest. The company denied all liability and refused to defend the suit because the policy under the head of exclusions expressly provided that it should not cover any obligation of the insured to pay damages to any member of his family residing in the

same household with him because of bodily injury caused by the accident and arising out of the use of the automobile. The plaintiff contended that the insurance company was estopped to base its defense on the exclusion in the contract because of a representation as to the nature of the policy by the agent of the company who solicited the insurance. The agent was reported to have told the insured that under the law of South Carolina he had to have insurance and, therefore, he took the policy. The court stated on page 503 that:

> Conditions going to the coverage or scope of a policy of insurance, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action. Citing cases. See also *Southern Guaranty Co. v. Gipson,* (1963, Ala.), 156 So. 2d 630, *supra.*

In §1135, 29A, American Jurisprudence Insurance, at page 289, it is stated:

> The rule is well established that the doctrines of implied waiver and of estoppel based upon the conduct or action of the insurer are not available to bring within the coverage of a policy risks not covered by its terms or risks expressly excluded therefrom, and the application of the doctrines in this respect is, therefore, to be distinguished from the waiver of or estoppel to assert grounds of forfeiture. Thus, while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage, or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel. While it is true that if the insurer, with knowledge of facts which would bar an existing primary liability, recognizes such primary liability by treating the policy

as in force, he will not thereafter be allowed to plead such facts to avoid his primary liability. The doctrine of waiver cannot be invoked to create a primary liability and bring within the coverage of the policy risks not included or contemplated by its terms.

POINT IV

THERE WAS IN FACT NO WAIVER OR ESTOPPEL AND NO ACTUAL PREJUDICE TO THE INSURED MYRTLE KAY BY THE ASSUMPTION OF THE DEFENSE OF MYRTLE KAY'S CASE BY STATE FARM MUTUAL INSURANCE COMPANY.

In 38 A.L.R. 2d at page 1150 it is stated:

> The general rule is this: A liability insurer by assuming the defense of an action against the insured, is thereafter estopped to claim that the *loss resulting to the insured from an adverse judgment in such action* is not within the coverage of the policy, or to assert against the insured some other defense existing at the time of the accident. (Underlining ours.) As with all broad principles this rule is subject to qualification. Thus it is established that the rule assumes that the control of the defense by the insurer is prejudicial to the insured, and if it ap*pears that there was in fact no prejudice, the rule is inapplicable.*

We point out to the court that the initial action did not proceed to judgment. As soon as the deposition of Richard Kay was taken and it was confirmed that he was, in fact, a resident of the household of his mother, a declaratory action was filed. The suit was filed on July 16, 1969, service was made on July 17, 1969, an answer was

filed on August 1, 1969, at which time Richard Kay's deposition was noticed up for August 29, 1969. Upon receipt of the deposition and review thereof for State Farm Mutual a declaratory action was filed on October 22, 1969.

The insurer took prompt action to deny coverage as soon as proper proof was obtained by counsel disclosing that the relationship of the parties to the action brought them within the exclusion of the policy.

It is not difficult to see prejudice in most cases where an insurer conducts the defense of the insured's case to the point of judgment, but where the insurer proceeds with the defense, as it is required to do under its policy, only until it determines or develops evidence that takes the case out of the coverage of the policy and takes action then to deny coverage actual prejudice must be shown and there is no presumption. Thus in the Oregon case of *Journal Publishing Co. v. General Insurance Co.,* 210 F.2d 202, (Oregon, 1954) it was held that although the automobile liability insurer had undertaken defense and had filed a verified answer to a personal injury action against the insured and had thereafter denied liability and had withdrawn from the case on the ground that the claimant was an employee of the insured and therefore not covered by the policy; in view of the fact the case never reached trial, the insured was not prejudiced by such action of the insurer and the insurer was not estopped from denying its obligation to defend the action.

In the case of *Commercial Insurance Co. of Newark, New Jersey v. Pressly, supra,* the insurer in a declaratory action was allowed to withdraw from the defense after

filing an answer in the original action and taking depositions which confirmed that the actions of the insured causing the injuries were not covered by the policy.

In 38 A.L.R. 2d at page 1157 §5 it is stated:

> It seems well established that if a liability insurer's defense of an action against the insured is to work an estoppel barring the insurer from subsequently raising the defense of non-coverage, or some other defense existing at the time of the accident, it must be shown that prejudice resulted from the insurer's conduct in defending the action against the insured. Citing many cases under the headings of: United States; Illinois; Kentucky; Mississippi; Missouri; New Hampshire; New York; Oregon; Pennsylvania South Dakota; Tennessee; Vermont and Wisconsin.

In the case of *Upper Columbia River Towing Co. v. Maryland Casualty Co.* (C.A. 9 Ore., 1963), 313 Fed.2d 702 it was held that a comprehensive liability insurer did not waive its right to deny coverage under the policy by initially assuming defense of actions against the insured, where as soon as the insurer determined that there was no coverage for accidents in question it denied coverage, and there was no evidence that the insurer's conduct prejudiced the insured. Counsel for the insurer in this case took depositions and secured independent medical examinations of the plaintiffs before refusing to further defend the actions.

In 38 A.L.R. 2d page 1170 subparagraph (d) it is stated:

> It seems that the most important factor to be considered in determining the timeliness of an insurer's notice of non-waiver of defenses against the insured is the knowledge of the insurer as to such defenses. Delay in the absence of knowledge will not result in estoppel of the insurer if the insurer acts promptly upon obtaining knowledge.

Support for this view is found in the following cases: Citing cases from: California, Indiana, Massachusetts, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, and Vermont.

In *Restighini v. Hanagan, et al.,* (Mass.), (1939), 18 N. E.2d 1007, one of the cases cited in the above annotation, the automobile liability insurer undertook defense of actions for injuries, removed the cases to the superior court, filed claims for jury trials, propounded and answered interrogatories, defended cases before the auditors, attended hearing upon auditor's draft report and withdrew from the cases without the operator of the automobile signing a non-waiver agreement. It was held that this conduct did not estop the insurer from denying liability on the ground that the cases were not covered by the policy and where it did not appear that the plaintiff was misled.

In the case now before this court the insured has not, in fact, been prejudiced by the defense entered on her behalf. Prior to this accident the insured worked as a secretary and purchasing agent for the U. S. Government for about 23 years (Dep. M. Kay, 6).

Richard Kay worked at Geneva Steel Company earning about $500.00 per month (Dep. R. Kay, 9). He turned all his checks over to his mother and she gave him back what she thought she should, like bus fare and stuff like that (Dep. R. Kay, 11). He had no bank account in his name (Dep. R. Kay, 12), and was not allowed to draw on the account his mother had (Dep. M. Kay, 10). Richard didn't have much social life and went with his mother, or mother and father when his father was alive. What they did he did, and he didn't have too much demand for money. Mrs. Kay did most of the handling of the clothes for Richard (Dep. M. Kay 12). She took him to the attorney's office to discuss the filing of a lawsuit (Dep. M. Kay, 22, 23). Richard still lives with her and there is no enmity between them as a result of the lawsuit (Dep. M. Kay, 19), and she has no difficulty generally getting Richard to follow her suggestions (Dep. M. Kay, 24).

Estoppel is the equitable doctrine that a party should not be permitted to repudiate an act done or position assumed where that course would work an injustice to another who, having ample reason to do so has relied thereon. An estoppel may arise even where there is no intent to mislead, as long as one's conduct is sufficient to induce reasonable reliance on the part of the other. The party estopped must have acted with the knowledge of the facts. However, the final element which must always be present in an estoppel is a change of position by the relying party with prejudice for injuries suffered as a proximate cause of such reliance.

There has been no change of position by Mrs. Kay with prejudice for injuries suffered by her as a proximate cause of any reliance and the insurer was not aware of the actual facts with respect to the son's residency with his mother until after his deposition was taken.

CONCLUSION

The insurer had a duty under the policy to undertake the defense of the action on behalf of the insured as the complaint stated a cause of action covered by the policy. Prompt action was taken by the insurer to take the deposition of Richard Kay, and as soon as it was determined that he resided with his mother under circumstances bringing the accident within the exclusion provision of the policy a declaratory action was filed and a denial of coverage made thereby. The insured was not prejudiced by such action and the insurer should not be estopped from denying liability. The summary judgment entered by Judge Sorensen should be reversed and judgment entered in favor of State Farm Mutual Insurance Company.

Respectfully submitted,

STRONG & HANNI
By L. L. Summerhays

604 Boston Bldg.
Salt Lake City, Utah