

APPELLATE CASE NOTES

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WESTERN DISTRICT UPHOLDS VERDICT FOR PERSONAL INJURIES BASED ON NEGLIGENT MISREPRESENTATION BY INSURANCE COMPANY

*GALEN RICHEY V. CATHERINE PHILIPP AND
AMERICAN FAMILY MUTUAL INSURANCE COMPANY*
S.W.3d _____, 2008 WL 564797

Galen Richey was rendered a complete paraplegic after he fell from his sister's roof while attempting to remove a large fallen tree limb. He sued his sister's insurance provider, American Family Mutual Insurance, and Catherine Philipp, the insurance agent, alleging defendants either made negligent misstatements, i.e., that no coverage existed, or failed to submit the homeowner's claim for tree removal in a timely manner.¹ On March 4, 2008, the Western District affirmed the jury's verdict which exceeded 12 million dollars.

RELEVANT FACTS

In July of 2000, a large tree limb broke off a tree and landed on the roof of Richey's sister, Brenda Bricker, who reported the tree fall to her insurance agent, Catherine Philipp. According to Bricker, Philipp advised that her policy did not cover tree removal. After this alleged denial, Richey came to Bricker's home and attempted to remove the tree limb himself. While removing some debris from the roof the limb unexpectedly rolled, knocking Richey off the roof.

Richey filed suit against American Family and its agent for injuries sustained as a result of the fall, asserting claims for negligence and negligent misrepresentation. Richey argued that his injuries would not have occurred if the insurance agent hadn't misrepresented the coverage available. A Jackson County jury agreed in 2006, awarding Richey over \$13 million, reduced by his five percent comparative fault.²

LEGAL ANALYSIS

Defendants appealed, claiming 1) that Missouri does not recognize a cause of action for bodily injuries sustained as a result of negligent misrepresentation; 2) that any negligence by the insurance company was not the proximate

cause of plaintiff's injuries; and 3) that it owed no legal duty to a non-policyholder.

I.

Relying on *Overcast v. Billings Mutual Insurance Co.*, 11 S.W.3d 62 (Mo. banc 2000), defendants contended that the only remedy for wrongful denial of insurance coverage is a contract action, and not personal injury damages. *Overcast* was a breach of insurance contract and defamation claim based on the insurer's refusal to cover plaintiff's fire damage claim. The Missouri Supreme Court held that "[w]hen an insurance company wrongfully refuses payment of a claim to its insured, the company has simply breached its contract," and that "[n]o tort claim has supplanted or supplemented the basic contract claim and remedy where an insurance company wrongfully refuses to pay a loss incurred by its own insured." *Overcast*, 11 S.W.3d at 67.

Upon close analysis of the *Overcast* opinion, the *Richey* Court pointed out that a tort claim can be brought against the insurer based on a bad faith refusal to pay or based upon conduct that is distinct from the conduct that merely constituted a breach of contract. In fact, in *Overcast* the Supreme Court allowed the insured's defamation claim to proceed, holding that it was not dependent on the contract claim.

Here, however, Richey was not the insured and was not seeking to recover a loss under a contract of insurance. The *Richey* Court held that the plaintiff was not limited to damages for breach of a contract to which he was not a party. The Court also held that Missouri recognizes negligent misrepresentation as an actionable tort, and has recognized the right of a third party to sue an insurance company for negligent misrepresentation. The submissibility of a misrepresentation claim depends not on the contract but upon the establishment of all the elements of the misrepresentation.³

II.

Defendants also claimed that even if Missouri allowed a cause of action for personal injuries stemming from an insurance company's negligent misrepresentation, any misrepresentation was not the proximate cause of Richey's injuries. Here again, the Western District disagreed.

Importantly, the insurance agent who allegedly misrepresented the coverage made key admissions in her deposition and at trial - so much so that the Court found causation to be essentially "undisputed." She admitted that once people know that tree removal won't be covered by insurance they will do what's necessary to remove the tree. She admitted that individuals with no training or expertise will ascend roofs and remove heavy trees with chainsaws, and that this is an undesired and dangerous action by policyholders, their family and friends. Further, she admitted that she knew an incorrect denial could lead to an injury, "and that tree removal coverage is designed to prevent exactly what occurred [to Richey]."

These broad admissions led the Court to conclude: "Generally, the issue of foreseeability and causation is a contested issue, but in this case it was not. We need not decide whether or not Richey's injuries were reasonably foreseeable because Philipp testified that she knew that there was an appreciable chance some injury would result from her conduct." Such admittedly foreseeable actions are, as a matter of law, not a superseding, intervening cause. The test of proximate cause is determined by looking back, after the occurrence, and examining whether the injury appears to be a reasonable and probable consequence of the defendant's conduct. Here, the Court found that defendants' proximate cause argument ignored the multiple admissions of its agent that the injury was foreseeable.

III.

Finally, defendants asserted that the evidence was insufficient to establish they owed Richey a duty. In addressing this claim, the Court started from the premise that whether a duty exists depends upon whether a risk was foreseeable. Foreseeability for purposes of establishing a duty depends on whether a defendant should have foreseen a risk in a given set of circumstances.

By this standard, the insurance company's agent left very little on which to hang a "no duty" defense. In fact, there seemed to be very few key facts she did not admit. This, again, led the Court to remark that "its holding is limited strictly to the circumstances of this case. This is an unusual case because proximate cause and duty were essentially uncontested," i.e., they were admitted by Philipp.⁴

CONCLUSION

Galen Richey's claim for damages was a claim against an insurance company and an independent agent, for negligence and misrepresentation. It was a common law tort claim, not a first party claim by an insured for policy benefits. Although not every breach of contract gives rise to a tort claim, the Western District's opinion holds that under certain facts, where there is a misrepresentation, an action may be brought by a person who is exposed to harm even if the misrepresentation was made to others.

Moreover, the *Richey* Court's discussion of proximate cause is instructive. Although the Court's holding is limited to the specific facts and circumstances presented, the Court's proximate cause analysis and the importance that foreseeability plays in that analysis, is a good review of Missouri law on causation. ■

ENDNOTES:

1. Implicit in the Court's opinion, though not stated, is that the homeowner had coverage for tree removal.
2. The jury assessed ninety-five percent fault to Philipp and American Family and five percent fault to Richey and found that Richey's damages totaled \$13,350,000. The Circuit Court entered its judgment for Richey in the amount of \$12,682,500 which accounts for the five percent reduction in the damage award due to the percentage of fault assessed against Richey.
3. The Court went on to hold that the trial court used a proper not-in-MAI instruction because no applicable MAI existed at the time of the trial, and properly defined negligence by defendants as "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances, by a person in defendants' business." In 2007, MAI 31 26 was adopted and set forth the jury instruction for negligent misrepresentation resulting in a pecuniary loss.
4. The Court pointed out that to the extent defendants were concerned that the holding regarding proximate cause and duty would "bring a sea change to Missouri law," its holding was limited to the circumstances of this case where proximate cause and duty were admitted by Philipp.

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