The URB Insider

1938 — 75th Anniversary — 2013

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URB Celebrates 75 Years As A Rate Service Organization

In 2013, Underwriters Rating Board celebrates 75 years as a Rate Service Organization. This milestone was celebrated with a 75th Anniversary Open House on October 24, 2013, held at the URB office in Schenectady.

The afternoon event was attended by over 100 representatives of URB's member companies, board members, colleagues, friends and business partners.

URB provides manuals, policy forms, education, statistical services, statistical reports and rating software to its member companies.

URB aims to be recognized as a pro-active, market driven supplier of a broad array of individualized services to insurers. The long term personal and professional relationship between URB and its member companies is its greatest asset.

Thank you to all those who attended the 75th Anniversary Open House Celebration. We are glad so many people were able to join us. Thank you for being such a big part of our 75 years! Here's to the next 75…◆

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K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.

2013 NY Slip Op 04270 [21 NY3d 384]

Argued April 25, 2013; Decided June 11, 2013

NY Court Of Appeals Case

Editor's Note: The following is the opinion of the New York Court of Appeals in the captioned case.

K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co., 91 AD3d 401, affirmed.

Smith, J

We hold that, when a liability insurer has breached its duty to defend its insured, the insurer may not later rely on policy exclusions to escape its duty to indemnify the insured for a judgment against him.

I

Plaintiffs are two limited liability companies that made loans totaling $2.83 million to a third such company, Goldan, LLC. The loans were to be secured by mortgages. Goldan failed to repay the loans, and plaintiffs discovered that their mortgages had not been recorded. A bankruptcy petition was later filed against Goldan.

Plaintiffs brought a lawsuit against Goldan and its two principals, Mark Goldman and Jeffrey Daniels, asserting a number of claims. One claim was asserted by each plaintiff against Daniels, a lawyer, for legal malpractice. Plaintiffs alleged that Daniels acted as their attorney with respect to their loans to Goldan, and that his failure to record the mortgages was "a departure from good and accepted legal practice."

Daniels notified his malpractice carrier, American Guarantee and Liability Insurance Company, of the malpractice claims against him, and forwarded a copy of the complaint. American Guarantee refused to provide "either defense or indemnity coverage," for the reason, among others, that the allegations against Daniels "are not based on the rendering or failing to render legal services for others." After this disclaimer, plaintiffs made a settlement demand on Daniels for $450,000—significantly less than the $2 million limit of American Guarantee's policy. Daniels transmitted the demand to American Guarantee, which rejected it for the reasons it had previously given for denying coverage.{**21 NY3d at 388}

Daniels defaulted in plaintiffs' action against him, and plaintiffs obtained a default judgment in excess of the policy limit. The judgment was entered only as to plaintiffs' legal malpractice claims; their other claims against Daniels were discontinued. After judgment was entered, Daniels assigned to plaintiffs all his rights against American Guarantee and plaintiffs, as Daniels's assignees, brought the present action against American Guarantee for breach of contract and bad faith failure to settle the underlying lawsuit. On their contract claims, plaintiffs seek to recover the $2 million policy limit, and on their bad faith claims they seek to recover the full amount of their default judgment.

American Guarantee moved for summary judgment dismissing the complaint, relying on two policy exclusions, the so-called "insured's status" and "business enterprise" exclusions. The policy issued by American Guarantee says, in relevant part:

"This policy shall not apply to any Claim based upon or arising out of, in whole or in part . . .

"D. the Insured's capacity or status as:

"1. an officer, director, partner, trustee, shareholder, manager or employee of a business enterprise . . .

"E. the alleged acts or omissions by any Insured, with or without compensation, for any business enterprise, whether for profit or not-for-profit, in which any Insured has a Controlling Interest."

According to American Guarantee, the claim against Daniels arose out of his "capacity or status" as a member and owner (and thus presumably at least a "manager") of Goldan, and out of his "acts or omissions" on Goldan's behalf.

Plaintiffs cross-moved for summary judgment in their favor. Supreme Court granted plaintiffs' motion as to the breach of contract claims, holding that American Guarantee breached its duty to defend Daniels, and was therefore bound, up to the $2 million limit of its policy, to pay the resulting judgment against him. The court dismissed the bad faith claims (2010 NY Slip Op 33801[U] [2010]).

The Appellate Division affirmed, with two justices dissenting in part (*K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*, 91 AD3d 401 [1st Dept 2012]).

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K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.

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The majority held that the exclusions American Guarantee relied on were inapplicable to the malpractice claim on which the default judgment against{**21 NY3d at 389} Daniels was based (*id.* at 403-405). The dissent concluded that issues of fact existed as to whether the exclusions applied (*id.* at 405-411 [Andrias, J., dissenting]).

American Guarantee appeals to us as of right pursuant to CPLR 5601 (a), on the basis of the two-justice dissent in its favor. Plaintiffs cross-appeal pursuant to leave granted by this Court. We now affirm on both the appeal and the cross appeal.

II

We affirm the summary judgment in plaintiffs' favor on the breach of contract claims without reaching the question that divided the Appellate Division: the applicability of the insured's status exclusion and the business enterprise exclusion to American Guarantee's duty to indemnify Daniels for a judgment based on legal malpractice. We hold that, by breaching its duty to defend Daniels, American Guarantee lost its right to rely on these exclusions in litigation over its indemnity obligation.

It is quite clear that American Guarantee breached its duty to defend—indeed, it does not seem to contend otherwise now. We summarized the law applicable to this issue in *Automobile Ins. Co. of Hartford v Cook* (7 NY3d 131, 137 [2006]):

> "It is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage. If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be.
>
> "The duty remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered . . . . Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course." (Citations, internal quotation marks, elision and bracketing omitted.)

Here, the complaint in the underlying lawsuit against Daniels unmistakably pleads a claim for legal malpractice. American Guarantee no doubt had reason to be skeptical of the claim; it is{**21 NY3d at 390} unusual, in a loan transaction, for lenders to retain a principal of the borrower to act as their lawyer, as plaintiffs here claimed they did. But that means only that the claim against Daniels may have been "groundless, false or baseless . . . meritless or not covered"—it does not allow American Guarantee to escape its duty to defend. It would be different if the claim were collusive, but American Guarantee has neither claimed that plaintiffs and Daniels were colluding against it nor alleged any facts to support such a claim.

It is also well established that, when an insurer has breached its duty to defend and is called upon to indemnify its insured for a judgment entered against it, the insurer may not assert in its defense grounds that would have defeated the underlying claim against the insured (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 356 [2004]). As the court said in *Mendoza v Schlossman* (87 AD2d 606, 607 [2d Dept 1982]):

> "A default judgment on the issue of liability in a legal malpractice action disposes of the issue of the lawyer's negligence and the validity of the underlying claim."

The rule as we have just stated it does not dispose of the present case, because American Guarantee is not relying on defenses that would have shielded Daniels from malpractice liability; it is relying on exclusions in its insurance contract with Daniels. In *Lang*, however, we stated the rule more broadly:

> "[A]n insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment . . .

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> Under those circumstances, having chosen not to participate in the underlying lawsuit, *the insurance carrier may litigate only the validity of its disclaimer* and cannot challenge the liability or damages determination underlying the judgment." (Emphasis added.)

While *Lang* did not involve a situation like the one we have here, we now make clear that *Lang*, at least as it applies to such situations, means what it says: an insurance company that has{**21 NY3d at 391} disclaimed its duty to defend "may litigate only the validity of its disclaimer." If the disclaimer is found bad, the insurance company must indemnify its insured for the resulting judgment, even if policy exclusions would otherwise have negated the duty to indemnify. This rule will give insurers an incentive to defend the cases they are bound by law to defend, and thus to give insureds the full benefit of their bargain. It would be unfair to insureds, and would promote unnecessary and wasteful litigation, if an insurer, having wrongfully abandoned its insured's defense, could then require the insured to litigate the effect of policy exclusions on the duty to indemnify.

Perhaps there are exceptions to the rule that we stated in *Lang* and now reaffirm. Thus, we do not necessarily reject (though we do not necessarily endorse) the decision of the Appellate Division in *Hough v USAA Cas. Ins. Co.* (93 AD3d 405 [1st Dept 2012]). There, the court held that an insurer's "disclaimer of its duty to defend its insured in the underlying action does not bar it from asserting that its insured injured plaintiff intentionally." (*Id.* at 405.) The *Hough* decision could arguably be justified on the ground that insurance for one's own intentional wrongdoing is contrary to public policy (*see Messersmith v American Fid. Co.*, 232 NY 161, 165 [1921]). But no public policy argument is available to American Guarantee here, and there is no reason to make this case an exception to the general rule. American Guarantee, having chosen to breach its duty to defend, cannot rely on policy exclusions to escape its duty to indemnify.

III

The courts below properly dismissed plaintiffs' claims based on American Guarantee's alleged bad faith failure to settle the malpractice claim against Daniels for a sum lower than the policy limit.

An insurer's rejection of a settlement offer for less than the full amount of its policy does not by itself establish the insurer's bad faith, even when the insured later suffers a judgment greater than the policy limit.

> "[A] bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement{**21 NY3d at 392} offer within the policy limits were not accepted." (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453-454 [1993].)

Plaintiffs have alleged no facts showing that "bad faith" in this sense was present here. Indeed, nothing in this record suggests that American Guarantee knew or should have known that the malpractice claim against Daniels was worth significantly more than $450,000—let alone more than the $2 million policy limit. As we have mentioned, it may well have been reasonable for American Guarantee to believe that the malpractice claim lacked any merit.

Plaintiffs' claim in this case is not really for a bad faith failure to settle, but for an alleged bad faith failure to defend. Plaintiffs allege that American Guarantee repudiated its duty to defend without any basis for doing so. We need not decide, however, whether such an allegation could ever support a claim for damages in excess of policy limits. Such a claim would require the insured to show, at a minimum, that the judgment against him would not have been entered if the insurer had defended the case. Plaintiffs have not alleged that that is true here, and they would face an awkward task in making that case: it would require them to prove that the judgment against Daniels that they obtained by default could not have been obtained if Daniels had been defended. They have not alleged this, and therefore their bad faith claims cannot stand.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur; Judge Abdus-Salaam taking no part.

Order affirmed, without costs.◆

NY Cases

Carey v Schwab

2013 NY Slip Op 05370 [108 AD3d 976]
July 18, 2013

Editor's Note: The following is the opinion of the Supreme Court, Appellate Division, Third Department in the captioned case.

Stein, J. Appeal from an order of the Supreme Court (Ferradino, J.), entered March 20, 2012 in Saratoga County, which, upon reargument, adhered to its prior order denying defendant's motion for summary judgment dismissing the complaint.

On May 24, 2008, defendant, along with Diana Weaver and Jan Wilson, rode three horses to a local tavern. Two of the horses, Whiskey and Sally, were paint horses that belonged to defendant and the third horse, Cowboy, belonged to Wilson. While defendant, Wilson and Weaver were at the tavern, Whiskey and Cowboy got loose from their restraints and took off down the road, with Wilson chasing after them on foot. Plaintiff Robert Carey (hereinafter plaintiff) was inside his nearby home, when he observed the two horses running down the road and Wilson following them. Plaintiff tried to assist Wilson in corralling the horses by following them in his car, and he ultimately pulled his vehicle in front of the horses. When the horses stopped, Wilson was able to take Whiskey's reins, but the horses got away and, once again, took off down the road. Wilson and plaintiff continued to follow the horses and, when they stopped in a pasture, Wilson again grabbed Whiskey's reins. She then asked plaintiff to hold Whiskey while she attempted to retrieve Cowboy. As plaintiff held Whiskey's reins, the horse "got spooked" and "head swatted" plaintiff, who was knocked unconscious and fell to the ground; Whiskey then dragged plaintiff, who was still holding the reins, stepped on plaintiff and ran over him.

As a result of the injuries that plaintiff allegedly sustained in this incident, he and his wife, derivatively, commenced this personal injury action. After joinder of issue and discovery, defendant moved for summary judgment dismissing the complaint, claiming that he did not have prior notice that Whiskey had any vicious propensities or a history of dangerous behavior.[FN1] Supreme Court (R. Sise, J.) denied defendant's motion and defendant thereafter moved to reargue. Supreme Court (Ferradino, J.) granted the motion to reargue, but adhered to the prior order denying defendant's motion for summary judgment. Defendant now appeals.

We affirm. As a general rule, an owner of a domestic animal will only be held strictly liable for the harm caused by such animal if he or she " 'knows or should have known of that animal's vicious propensities' " (*Bard v Jahnke*, 6 NY3d 592, 596 [2006], quoting *Collier v Zambito*, 1 NY3d 444, 446 [2004]; *see Hastings v Sauve*, 21 NY3d 122, 125 [2013]; *Bloomer v Shauger*, 21 NY3d 917, 918 [2013]).[FN2] Therefore, on his motion for summary judgment, defendant bore the initial burden of establishing that he had no prior knowledge that Whiskey had any vicious propensity. (*see Hamlin v Sullivan*, 93 AD3d 1013, 1013 [2012]). It is now well established that a vicious propensity is "the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (*Collier v Zambito*, 1 NY3d at 446 [internal quotation marks and citations omitted]; *see Bloomer v Shauger*, 21 NY3d at 918), and includes behavior that would not necessarily be considered dangerous or ferocious if those behaviors reflect a " 'proclivity to act in a way that puts others at risk of harm' " (*Bloomer v Shauger*, 94 AD3d 1273, 1275 [2012], *affd* 21 NY3d 917 [2013], quoting *Collier v Zambito*, 1 NY3d at 447). However, normal or typical equine behavior is insufficient to establish a vicious propensity (*see Bloomer v Shauger*, 94 AD3d at 1275; *Bloom v Van Lenten*, 106 AD3d 1319, 1320 [2013]; *Hamlin v Sullivan*, 93 AD3d at 1014).

Here, in support of his motion, defendant offered, among other things, his affidavit and the deposition testimony of himself, Weaver and Wilson concerning Whiskey's behavioral history in general, as well as the incident at issue in this case. Defendant alleged that he owned two paint horses at the time of the incident and described Whiskey as calm, docile, well-trained and sociable.[FN3]

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Carey v Schwab

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In addition, he claimed that he had never received complaints about Whiskey's behavior in the past and had no knowledge of Whiskey ever moving or jerking his head violently or quickly, knocking anyone to the ground or stomping on anyone. Weaver and Wilson, both of whom were familiar with Whiskey, corroborated defendant's testimony regarding the horse's generally calm demeanor and the lack of a history of aggressive behavior.

In opposition to the motion, plaintiffs relied, in large measure, on the deposition testimony of Thomas Merrills—a neighbor of plaintiff and a friend of defendant—who also witnessed the incident and tried to help Wilson retrieve the horses. Merrills explained that he visited defendant's barn many times and was familiar with defendant's horses. Merrills stated that he knew that defendant rode his paint horse often and had observed that the paint horse "would usually give [defendant] a hard time getting on and off" and was often "circling [defendant], dancing around." Further, Merrills testified that he had seen the paint horse rear up and stand on two legs while defendant tried to mount him and that the horse was "flighty" and "was always throwing his head in the air," which Merrills—who had substantial experience with horses[FN4] — believed to be aggressive behavior that is not ascribed to horses in general (*compare Bloomer v Shauger*, 21 NY3d at 918). However, Merrills was not able to identify Whiskey as the paint horse that he had previously observed acting aggressively. The crux of defendant's argument is that Merrills' inability to make such identification renders his testimony insufficient to create an issue of fact regarding whether defendant had prior knowledge of Whiskey's vicious propensity.

We disagree. While, indeed, plaintiffs will ultimately bear the burden of establishing at trial that defendant had notice of a vicious propensity attributable to Whiskey, it is defendant's burden, as the movant on this summary judgment motion, to demonstrate as a matter of law the absence of such notice, i.e., that Merrills' previous observations were of a different horse. The record, including defendant's own testimony, clearly establishes that Whiskey was the paint horse that defendant usually rode and that defendant had ridden Whiskey to the tavern on other occasions. This supported an inference that Whiskey was the horse that Merrills previously observed acting aggressively and created a credibility issue for a jury to resolve (*see Reil v Chittenden*, 96 AD3d 1273, 1274 [2012]). Viewing, in a light most favorable to plaintiffs, Merrills' testimony regarding his observations of defendant's paint horse, together with the evidence that Whiskey was the paint horse that defendant usually rode, and giving plaintiffs the benefit of all reasonable inferences that can be drawn therefrom, we find that there are genuine issues of fact which preclude summary judgment (*see Reil v Chittenden*, 96 AD3d at 1274; *Gannon v Conti*, 86 AD3d 704, 706 [2011]; *Seybolt v Wheeler*, 42 AD3d 643, 645 [2007]). Therefore, Supreme Court properly adhered to the prior order denying defendant's motion for summary judgment.[FN5]

Rose, J.P., Spain and Garry, JJ., concur. Ordered that the order is affirmed, with costs.

Footnotes

Footnote 1: Because the complaint set forth a claim for common-law negligence, plaintiffs cross-moved to amend the complaint to add a claim for strict liability. At that time, both parties acknowledged that a negligence claim did not lie based upon the circumstances presented. Supreme Court denied the cross motion as "unnecessary" because it found that the factual allegations contained in the complaint adequately stated a cause of action based on strict liability. Plaintiffs' cross motion is not a subject of this appeal.

Footnote 2: Although plaintiffs contended at oral argument that the Court of Appeals' recent decision in *Hastings v Sauve* (*supra*)—decided on May 2, 2013, just weeks before oral argument—permits a common-law negligence claim in this case, we need not reach that issue in light of our decision herein.

Footnote 3: It is undisputed that Whiskey was the horse involved in the incident herein.

Footnote 4: Merrills grew up around horses and worked as a trainer for 11 years.

Footnote 5: In the original order, Supreme Court (R. Sise, J.) made a factual error by finding that there was no evidence in the record that defendant owned another paint horse, as defendant clearly owned two paint horses (Whiskey and Sally). This factual error was the basis for Supreme Court (Ferradino, J.) granting defendant's application for leave to reargue. Nonetheless, the court correctly concluded that summary judgment was inappropriate based upon Merrills' testimony and the question of whether Whiskey was the paint horse that Merrills had previously observed. ◆

Conley & Tibbitts Props., LLC v Leatherstocking Coop. Ins. Co.

2013 NY Slip Op 06206 [109 AD3d 1198]

Released on September 27, 2013

Editor's Note: The following is the opinion of the Supreme Court, Appellate Division, Fourth Department in the captioned case.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered July 11, 2012. The order denied the motion of plaintiff for summary judgment, granted the cross motion of defendant for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this breach of contract action arising from a dispute over insurance coverage, plaintiff appeals from an order that denied its motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the amended complaint. We affirm. Plaintiff obtained insurance from defendant to cover a rental property (hereafter, building) that it owns in Oneida County. Although the policy covered losses caused by, inter alia, fire, it contained an exclusion for losses or increased costs resulting directly or indirectly from "enforcement of any code, ordinance or law regulating the . . . repair . . . of a building," irrespective of "any other cause or event that contributes concurrently or in any sequence to the loss."

While the policy was in effect, a fire damaged the building. Plaster had been disturbed while the fire was being extinguished, and a state code required under such circumstances that an asbestos survey be completed before any further action could be taken with respect to the building. The survey indicated that asbestos was present, and plaintiff obtained an estimate for the cost of removing the asbestos. Although defendant reimbursed plaintiff for all other parts of its claim, it denied coverage for the cost of asbestos removal. Plaintiff thereafter commenced this action seeking "the full amount of the building damages and remediation of asbestos."

"Where[, as here,] the provisions of an insurance contract are clear and unambiguous, they must be enforced as written' " (*Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 66). Affording the unambiguous terms in the instant insurance contract their plain and ordinary meaning (*see White v Continental Cas. Co.*, 9 NY3d 264, 267), we conclude that defendant established its entitlement to judgment as a matter of law by establishing that the policy does not provide coverage for the increased costs sought by plaintiff (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Pursuant to the terms of the contract exclusion, no coverage exists for increased costs caused by the enforcement of the state code at issue here, "irrespective of any other concurrent or subsequent contributing cause or event" (*Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1380 [2010]). Present—Scuder, P.J., Centra, Sconiers, and Valentino, JJ. ◆

Case Notes Around The Country

- Pennsylvania—The Superior Court in Pennsylvania recently ruled insurance companies can be named and identified as defendants in underinsured motorist cases. The reasoning was that other defendants are not prejudiced in this circumstance because underinsured motorist coverage does not provide indemnity to the tortfeasor. The plaintiff claimed the omission of his insurance carrier's name, confused the jury due to the presence of multiple defense attorneys. ◆
- New Jersey—Recently, the New Jersey Supreme Court has rejected a challenge to the breath test used in drunken driving cases. The decision of the court upholds the use of Alcotest, which replaced the Breathalyzer. Lawyers for people charged with DWI who challenged the test claimed the state didn't comply with a 2008 Supreme Court ruling to revise software on the machines and to have a searchable database of test results. ◆
- Massachusetts—The Supreme Judicial Court in Massachusetts recently upheld a $20.6 million jury award won by the family of a woman who died after hitting her head on a concrete pool deck when an inflatable slide partially collapsed. The 2011 verdict found that the slide sold by Toys R Us did not comply with federal safety standards. The ruling held that there was enough evidence to support the jury verdict. ◆

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